S&C
Spark & Cannon
1300 982 050

FAIR WORK AUSTRALIA

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1035045-1

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]]

Sydney

9.55 A.M., FRIDAY, 9 NOVEMBER 2012

Continued from 08/11/2012

PN1835

THE SENIOR DEPUTY PRESIDENT: Where are we up to?

PN1836

MS ADLER: If it would assist your Honour I believe we're on page 27 of the schedule.

PN1837

THE SENIOR DEPUTY PRESIDENT: Thank you, and it's clause 24.4A?

PN1838

MS ADLER: That's it.

PN1839

THE SENIOR DEPUTY PRESIDENT: Very well.

PN1840

MS ADLER: This is another variation which has changed between our two lots of submissions, so I will take your Honour to (indistinct) which I believe was numbered 1, the table, to page 5 of the table.

PN1841

THE SENIOR DEPUTY PRESIDENT: Yes.

PN1842

MS ADLER: If we go to clause 24.3 of the award which discusses an entitlement to living away from home allowances, where an employee qualified for that entitlement they will receive either monetary compensation under clause 24.3A(i) or reasonable board and lodging and three meals per day under clause 24.3A(ii) or under clause 24.3(iii) where an employee lives in a camp all board and accommodation will be provided free of charge. If we look to clause 24.4 as it stands in the award currently where 10 or more employees are engaged the employer will provide a cook. If there are less than 10 employees the employer must reimburse the employees for food reasonably purchased by them for their own use or must reimburse the reasonable cost of meals consumed in the nearest recognised centre.

PN1843

In the variation we seek in the September submissions so in the right hand column in the table is aimed at reducing confusion between the interaction of clause 24.3 and 24.4 and how they apply. There is confusion in the industry as to whether when clause 24.3A(ii) applies, so that's in relation to the provision of reasonable board and lodging and the provision of three adequate meals per day that where the employee is also living in a (indistinct) situation under clause 24.4 and where there is less than 10 people the employer must reimburse the employee for those meals as well. So there is potential that the two provisions can apply concurrently and we seek to have that clarified. So the amended variation seeks to clarify that there exists two distinct types of living away from home arrangements. The first is when the employee is provided with a monetary allowance or is provided board and lodging and three meals per day.

PN1844

The second is a camping scenario in which for camps of more than 10 a cook must be engaged or if less than 10 reimbursement of food related expenses. In

cases of camps of over 30 people a camp attendant must be provided and there are other provisions within that section in relation to camping requirements. Most significantly the variation as under clause 24.4D, but if clause 24.3 applies which is the general entitlements for living away from home, then clause 24.4 will not apply. So that one will apply to the exclusion of the other and this will prevent the double dipping that I am referring to. That's all I have, your Honour.

PN1845

THE SENIOR DEPUTY PRESIDENT: Very well. Anyone from the employer side? No. Mr Maxwell.

PN1846

MR MAXWELL: Thank you, your Honour. Your Honour, in our outline of submissions in reply between 5 October 2012 we do deal with the proposed variation by the HIA. Whilst we had some sympathy for the initial variation put forward by the HIA we do have a major concern with their amended variation that they seek. In paragraph 30.1 of our outline of submission there is a reference to clause 24.3C, that should be a reference to clause 24.3B.

PN1847

THE SENIOR DEPUTY PRESIDENT: Sorry. Where is that, Mr Maxwell?

PN1848

MR MAXWELL: This is on page 52 of our outline of submission in reply.

PN1849

THE SENIOR DEPUTY PRESIDENT: The clause reference should be what?

PN1850

MR MAXWELL: Should be 24.3B and not 24.3C.

PN1851

THE SENIOR DEPUTY PRESIDENT: B for Barry.

PN1852

MR MAXWELL: Yes. If I could take you to clause - or just mention what 24.3B says. 24.3B states, "The accommodation provided will be of a reasonable standard having regard to the location in which work is performed including the provision of reasonable ablution/laundry/recreational and kitchen facilities as well as reasonable external lighting, mail facilities, radio or telephone contact and fire protection." Your Honour, that provision is directly related to employees living in camp. For those that are aware of the history of the construction award you will remember the MBCIA 1990 had a fairly detailed and lengthy provision that dealt with the standards to apply in camps that (indistinct) went so far as mentioning the length of tables and so forth that people should be provided with. That was changed through the process of award simplification to reflect what is now contained in clause 24.3B to refer to a reasonable standard.

PN1853

If the provision about employees living in camp is taken out of 24.3A then you would have to replicate 24.3B in any new clause and we say that that would add an unnecessary complication to the award. That the original proposal put forward by the HIA in the original submission which was to vary 24.4A to include a provision that this sub-clause would not apply where the employee is provided

with three meals per day in accordance with clause 24.3A(ii) is a much simpler way of dealing with the problem that the HIA alleges exists. Your Honour, we would also state that there is no evidence of any problem or confusion. I would be surprised how many HIA members actually provide (indistinct) systems to employees and the range of camp for their projects, but as we say there is no evidence provided of any confusion, but if the Tribunal is of a mind to vary the award we would suggest that the variation originally proposed by the HIA to just vary clause 24.4A would deal with the problem they have identified, rather than adding further complications to the award.

PN1854

THE SENIOR DEPUTY PRESIDENT: Any further? Yes, Mr (indistinct)?

PN1855

UNIDENTIFIED SPEAKER: Only that we would support (indistinct).

PN1856

THE SENIOR DEPUTY PRESIDENT: Yes, thank you. Yes, very well. Ms Adler.

PN1857

MS ADLER: Your Honour, we see the concern raised by the CFMEU and would perhaps suggest that rather than excluding the entire operation of clause 24.3 where 24.4 applies, perhaps the variation could state that clause 24.4 will apply to the exclusion of clause 24.3A and B. Just A.

PN1858

THE SENIOR DEPUTY PRESIDENT: Does the provision as you have amended it provide for an option that arises in 24.4, it doesn't?

PN1859

MS ADLER: Yes, so we have literally split or proposed to split the provision so it's clear that there is an entitlement to living away from home allowances in situations of either a monetary comepnsation or where you provide reasonable board and lodging and three adequate meals a day or in a camping situation in which all the existing clauses within the award remain as is. It is mostly a re-ordering of the provisions. However, the most significant change is part D of our variation which states how the exclusion would operate.

PN1860

THE SENIOR DEPUTY PRESIDENT: But as it currently reads the entitlement the employer has to either pay the living allowance or provide reasonable board and lodgings in a well kept establishment, whatever that means, and doesn't provide the option of a camp arrangement in the base entitlement.

PN1861

MS ADLER: Under 24.3A(iii) provides that where employees are required to live in a camp that the employer provide all board and accommodation free of charge. So we proposed that that provision in our proposed variation is removed and that all provisions and entitlements relating to camping requirements are kept within the same section or under the same clause of the award.

PN1862

THE SENIOR DEPUTY PRESIDENT: Yes, but as currently structured the provision requires either the payment of the allowance or reasonable board and lodging in a well kept establishment, it doesn't provide for camping at all.

PN1863

MS ADLER: I believe under clause 24.3A(iii).

PN1864

THE SENIOR DEPUTY PRESIDENT: 24.3 - - -

PN1865

MS ADLER: A(iii).

PN1866

THE SENIOR DEPUTY PRESIDENT: Sorry?

PN1867

UNIDENTIFIED SPEAKER: That's the existing clause.

PN1868

MS ADLER: The existing clause. Sorry, I beg your pardon are you speaking about (indistinct) variations?

PN1869

THE SENIOR DEPUTY PRESIDENT: The existing clause provides that as one of the three options, your clause doesn't seem to provide for camping at all.

PN1870

MS ADLER: Because it provides it under clause 24.4 of the proposed variation.

PN1871

THE SENIOR DEPUTY PRESIDENT: But the employer is still obliged to either pay the living allowance or put someone up in a hotel.

PN1872

MS ADLER: Yes, and that is preserved under clause 24.3 of the proposed variation so in the - - -

PN1873

THE SENIOR DEPUTY PRESIDENT: That means there is no option of a camp available under 24.3.

PN1874

MS ADLER: Sorry the wording under the proposed variation of clause 24.4 says, "Where an employee qualifies under clause 24.1," which is the same wording used for the general entitlement, "the employer will where 10 or more employees are engaged provide a cook. If there's less than 10 employees they will be reimbursed for food or the cost of meals and if camps of over 30 people the employer must employ (indistinct)." So we submit that that entitlement in the existing 24.4A(iii) is reflected in our proposed variation clause 24.4.

PN1875

THE SENIOR DEPUTY PRESIDENT: But wouldn’t there need to be the third option in 24.3 and 24.4 indicate where an employee qualifies under 24.1 and is accommodated in a camp?

PN1876

MR CALVER: If I may assist, your Honour, yes, so that 24.3A(iii) could be where an employee is required to live in a camp provide the benefits set out at clause 24.4 and that would be the cross-reference that would deal with eh matter that you are raising if I apprehend your concern.

PN1877

THE SENIOR DEPUTY PRESIDENT: Yes, my concern was it doesn't allow the employer to utilise the camp option at all.

PN1878

MR CALVER: No, and that would be not something which we would support. So if we change 24.3A(iii) to where employees are required to live in a camp, provide the benefits set out at clause 24.4 I think that that would accommodate Ms Adler's concern and yours. I rise to be helpful only.

PN1879

MS ADLER: Yes.

PN1880

THE SENIOR DEPUTY PRESIDENT: So that is going back to the original 24.3 structure with those - - -

PN1881

MS ADLER: With the three options.

PN1882

THE SENIOR DEPUTY PRESIDENT: - - - additional words referencing 24.4.

PN1883

MS ADLER: Yes.

PN1884

THE SENIOR DEPUTY PRESIDENT: What you have in your amended amendment C would be a separate point as it is in the current 24.3 because it relates to all three of the options. I suppose the allowance option is in the hands of the employee as to where they're living.

PN1885

MS ADLER: Yes, your Honour, the key to the variation is to prevent the double dipping between potentially the employer being required to provide the reasonable lodging and the three meals a day, as well as under clause 24.4A of the current provisions to reimburse for reasonable costs related with food expenses. Hence the inclusion of that exclusion clause under the proposed variation 24.4D.

PN1886

THE SENIOR DEPUTY PRESIDENT: Yes, the purpose is to avoid any possible reading of the award which would allow double dipping.

PN1887

MS ADLER: That's right.

PN1888

MR MAXWELL: Your Honour, we have identified a further problem and this is our concern that there was a small issue that was sought to be dealt with and now we are perhaps creating further problems by seeking (indistinct). Under

clause 24.6 it deals with camp meal charges. We suggest that there may be situations where people work on remote sites where the accommodation may be provided off site, but for the purposes of - because of the distance between the accommodation and the work site and the location of the camp it may be that the employees take their meals at the camp and under the proposed variation 24.6 would not apply to those provided with the benefit under 24.3. So or if you have a situation where the employee is paid a living away from home allowance and meals are taken in the camp, again 24.6 would not apply to those people. So we are cautious or we have a concern that varying the clause on the fly could have unintended consequences and that is why we prefer the simplicity of just varying 24.4A which is original ideas (indistinct).

PN1889

THE SENIOR DEPUTY PRESIDENT: To the effect where an employee qualifies at all under 24.1 and is required to live in a camp pursuant to 24.3(iii) then those provisions apply.

PN1890

MR MAXWELL: Yes.

PN1891

MS ADLER: Perhaps I was just going to perhaps provide a - the mutually agreeable position may be that as opposed to inserting that exclusion clause under our proposed amended variation that at clause 24.3A(iii) replacing the words, if we say, "Where employees are required to live in a camp, provide all board and accommodation in accordance with clauses 24.4 and 24.5."

PN1892

THE SENIOR DEPUTY PRESIDENT: But that doesn't mention the free aspect does it, free of charge and in accordance with - - -

PN1893

MS ADLER: With 24.4 and 24.5.

PN1894

THE SENIOR DEPUTY PRESIDENT: Yes, very well. Thank you. That's probably enough on that one. Just bear with me. The next one was an expense, what's the next non-expense or reference issue?

PN1895

MS ADLER: I believe it's the variation on page 28 which is another one proposed by HIA.

PN1896

THE SENIOR DEPUTY PRESIDENT: Does anyone have an earlier matter not of the allowance or reference target? No, very well.

PN1897

MR MAXWELL: Sorry, your Honour, we don't but I believe there is an MBA matter at the bottom which is related I think to the (indistinct) to the HIAs variation which is at the bottom of page 27.

PN1898

THE SENIOR DEPUTY PRESIDENT: Yes, very well, we will have both Ms Adler and Mr Calver address us on those variations or proposed variations. Who wants to lead?

PN1899

MR CALVER: We rely on our written submission in that regard, your Honour.

PN1900

THE SENIOR DEPUTY PRESIDENT: Very well, and Ms Adler?

PN1901

MS ADLER: Yes, your Honour. The variation we seek that's outlined in that table at clause 28 provides for an overhaul of the existing fares and travel patents arrangements within the award. Currently clause 25 provides a range of entitlements in relation to fares and travel, specifically under clause 25.2, "An employee is entitled to a daily fares allowance each day worked when an employee is employed on a construction site located within a 50 kilometre radius of the GPL and the capital city or a state or territory or within a 50 kilometre radius of a principal post office in a regional city or town in a state or territory." Further to this under clause 25.3 through to 25.7 the award provides a number of further entitlements to compensate for travel in relation to the radial areas that have been established under clause 25.2.

PN1902

The calculation of the daily fares allowance for travel within metropolitan radial areas and travel outside the radial area is a source of much confusion for employers. While the CFMEU has pointed out in their submissions that the use of radial areas are not new to the industry the current provisions do differ from those that were included in pre-modern awards. A criticism that we feel the CFMEU fails to recognise that the pre-modern awards were state based. Now we have federal awards where you can't get that specific geographical location that we used to have under those pre-modern awards. As such there is little guidance within the on-site award as to how they apply. In our March submissions at paragraphs 115 to 119 we attempted to highlight by way of example the difficulties associated with the application of clause 25. I won't go through that example now, it's in our written submissions.

PN1903

The CFMEU are critical of this example stating that it is a New South Wales-centric example but we use it to demonstrate the complexity involved and the confusion that exists in the industry and not to do anything further than that. The main concern is that the application of clause 25.2 may result in overlapping radial areas which creates uncertainty as to the appropriate calculation of other provisions within clause 25 as they are influenced by the reduction of the initial radial area under clause 25.2. The variation we seek proposes to measure a radial area from the location where the employee is originally engaged on work as nominated by the employer. Such determination provides a level of certainty for both the employer and employee and enables a clear application for the provision of clause 25. That is the first variation we seek in relation to clause 25.

PN1904

Moving on to clause 25.5 which outlines an allowance for travelling outside those radial areas. It states, "Where an employee is required to travel daily from inside one radial area to work on a construction site outside that area, an employee will be entitled to the daily fares allowance; payment for the time reasonably spend in travelling from the designated radial boundary to the job and return to the radial boundary, and any expense necessarily and reasonably incurred in such travel will be 45 cents per kilometre where the employee uses their own vehicle." Clause 25.5B provides, "Time outside ordinary working hours reasonably spent in such travel will be calculated at ordinary hourly on-site rates." Our members have expressed confusion as to the application of the 45 cent per kilometre rate for travel outside of a radial area and the calculation of time spent travelling outside ordinary working hours.

PN1905

While it is clear from clause 25.5A(ii) of the award that time spent in travel is payable for the time spent travelling from the radial boundary to the job and back to the radial boundary, such demarcation is not clear in clause 25.5A(iii) or clause 25.5B. We submit that the current wording of these provisions differ from the wording that was evident in the National Building Construction Industry Award under clause 38.4.1B which states, "In respect of travel from the designated boundary to the job and return to that boundary the time outside ordinary working hours reasonably spent in such travel calculated at ordinary on-site rates to the next quarter of an hour with a minimum payment of one and a half hours per day for each return journey, any expenses necessarily and reasonably incurred in such travel shall be 47 cents per kilometre where the employee uses their own vehicle."

PN1906

So it's clear under that provision that those entitlements apply in respect of travel from the designated boundary to the job and return to that boundary. It is unclear why during the award modernisation process the Tribunal diverged from the above methodology and wording. We submit that there are a number of pre-modern awards that include provisions that contain similar wording to the national award I just referred to and I will hand up a table I put together that just summarises and extracts the relevant provisions from the other pre-modern awards.

EXHIBIT #HIA5 SUMMARY OF RELEVANT PROVISIONS FROM OTHER MODERN AWARDS

PN1907

MS ADLER: So we submit the clause that's ended up in the on-site award is an anomaly and as such it requires clarification along the lines of the provisions that are in a number of pre-modern awards.

PN1908

THE SENIOR DEPUTY PRESIDENT: The provision contained in Mr Calver's table reflects your application you have made of course before 1 July, so the relevant figures at now 1678 and 4516.

PN1909

MS ADLER: That's right, yes. The final variation we have on foot, your Honour, in relation to this provision is in relation to clause 25.8 which provides

that the daily fares allowance will not be payable on any day in which the employer provides or offers to provide transport free of charge from the employee's home to the place of work and return. Clause 25.8 further provides that the daily fares allowance will be payable on any day for which the employer provides a vehicle free of charge. The employee for the purposes relating to their contract of employment and the employee is required by the employer to drive this vehicle from the employee's home to their place of work and return.

PN1910

We submit that clause 25.8 of the award should be varied, so that where the employer provides a vehicle to the employee, the employer is not required to also pay the daily fares allowance. We submit that in the construction industry a motor vehicle is an essential part of the job, however we would submit that this is a significant cost outlay for an employee particularly and of benefit to both the employer and employee would be the ability for the employer to provide a company vehicle without essentially being penalised for doing so by having to also pay the daily fares allowance. The current variation before you seeks to clarify that the provision of a company vehicle is the provision of transport as outlined within clause 25.8A and therefore a company vehicle is provided the employee would not be entitled to the payment of the daily fares allowance.

PN1911

In the CFMEUs reply submissions they refer to the decision of MBA of Victoria and Australian Building Construction Employees and Builders Labourers Federation 1981 FCA 49. In referring to that decision they claim it provides authority for the notion that an employee is paid the fares and travel allowance instead of their hourly rate, possibly overtime rates, for time spent in travel from the employee's home to the work site when the employee is provided a vehicle from the employer free of charge. So in that case, your Honour, the CFMEU is claiming that the decision gives authority for the proposition that the daily fares allowance which we see how is compensation and is an easier way to compensate the employee for travel where otherwise they would receive an hourly rate for when the employer provides a vehicle for travel from their home to the work site.

PN1912

We submit that if anything the case is authority for the notion that the provision of a company vehicle is the provision of transport under the current on-site award clause 25.8A and the case held that the provision of a vehicle by the employer to an employee free of charge was the provision of transport under clause 16.6 of the Builders Labourers Award referred to in that case. It is of some concern that at the outset of the CFMEUs reply submissions they recognised a similar wording between clause 16.6 as referred to in that case and clause 25.8A of the Building Award that by the end of the discussion the interpretation of clause 16.6 seemed somehow to apply to clause 25.8B as opposed to clause 25.8A as was referred to earlier on in the submission.

PN1913

In addition we submit there is nothing in this authority that presents a correlation between the provision of the daily fares allowance which is outlined at paragraph 21 of this decision as it is paid for compensation for travel and patents and costs peculiar to the industry and there is nothing to correlate that with payment for time spent in travel to and from work in circumstances where the employer

provides the transportation, we would submit that these are two separate propositions. Further to this it is our position that there is a lack of flexibility in the current clause 25.8 and that employers should be able to offer the option of providing a company vehicle for an employee's benefit without additional costs burden. In sum the variations we seek to clause 25 include clarifying the radial area which applies to an employee, to clarify the boundaries to which an allowance is payable for travel beyond a defined radial area and we seek to clarify that when an employer provides a company vehicle the employee is not entitled to the daily fares allowance. That is all I have, your Honour.

PN1914

THE SENIOR DEPUTY PRESIDENT: Yes, anyone else on the employer's side? No. I'm sorry, Mr Calver.

PN1915

MR CALVER: Your Honour, I think in fairness to the Tribunal and to my friend and the HIA I should point out that in proceedings before Fair Work Australia in Re Building and Construction General On-Site Award 2010 2009 AIRC FB 989, a full bench upon which you sat, your Honour, the Master Builders submitted that clause 25.8 should be amended and that amendment sought to clarify what Ms Adler has said. Essentially the point is that if an employee were to be eligible for fares and travel patents allowance the vehicle provided must be solely for purposes related to the employee's employment. The wording in 25.8B does not stand starkly for that proposition now as it should. The Master Builders application to vary was rejected by that full bench on the basis that the variation sought was inconsistent with the terms of clause 38.6 of the MBCIA upon which clause 25.8 is based.

PN1916

We renew our call as per our written submission in March in regard to paragraphs - pardon me, your Honour - paragraphs 3.29 and 3.30. The only arguable costs for an employee in the circumstances that the clause covers would be for fuel where the vehicle was provided and that notion is one where we think that clause 25.8B should be varied to indicate that the fares and patents allowance will not be payable when the employee receives a vehicle free of charge inclusive of free fuel. That would make the allowance relevant to a stated purpose that is restricting it to compensation for travel only where an actual expense arises for the employee. That is something which is commonsense and something which we endorse as appropriate to the section 134 modern award objectives and one which falls squarely into making this provision understandable and a proper safety net provision. Hence we have renewed our application despite that full bench decision which I felt duty bound to bring to your attention. If it please the Tribunal.

PN1917

THE SENIOR DEPUTY PRESIDENT: Yes. Mr Maxwell.

PN1918

MR MAXWELL: Thank you, your Honour. Your Honour, we oppose the variations of the HIA to change the whole clause. We have some sympathy to the HIA proposal regarding the travel outside radial areas but we oppose the changes in regard to the patents and fares and travel where provided with a vehicle.

Perhaps to deal with those issues it would be worthwhile just handing up a copy of the clause from the MBCIA which is the one that is referred to in the decision.

PN1919

THE SENIOR DEPUTY PRESIDENT: Thank you.

PN1920

MR MAXWELL: Your Honour, it might perhaps be worth also at the same time to hand up - - -

PN1921

THE SENIOR DEPUTY PRESIDENT: Not quite the same time, my Associate (indistinct).

PN1922

MR MAXWELL: I'm sorry, your Honour, it's just a copy of the decision Mr Calver referred to.

PN1923

THE SENIOR DEPUTY PRESIDENT: Thank you.

PN1924

MR MAXWELL: Your Honour, if I can perhaps deal with the - your Honour, in our outline of submissions reply on 20 October 2012 we deal with the issue of the (indistinct) travel patents allowance in section 14. We submit that the HIAs proposal to (indistinct) changes to this clause, that they claim that the wording of the clause creates much confusion for employers and employees. Apart from the hypothetical example given in their submission there is no evidence of actual confusion on the ground. But they seek to make substantial changes to the clause which would in effect allow an employer carte blanche scope to change the radial area to determine an employee's entitlement on each job. If I can take you to the proposed clause.

PN1925

THE SENIOR DEPUTY PRESIDENT: Yes.

PN1926

MR MAXWELL: Sorry, your Honour, the proposed clause I think is found on page 24 and 25 of the HIA submission of 21 September 2012. Your Honour, if you look at the - your Honour, it's perhaps a bit unclear exactly how that clause is to be read but I note the consideration of the radial areas is found in paragraph (iii) on page 25 which deals with the defined radius. You will see the defined radius is determined by the employer by reference to one of the following options. So the employer has all the options to define the radial area. So first of all they could use the employer's normal base establishment or workshop. Secondly they could use the GPO or principal post office of the capital city or major regional centre for all employers whose base, establishment or workshop is within the defined radius from the said post office. Or (c) they could use the local post office closest to the employer's establishment or workshop beyond the defined radius, the post office - I'll skip (d) and (e) in the case of an employer that does not have a fixed base, establishment or workshop the post office closest to the town or city nominated by the employer as a place where the employee normally carries out work.

PN1927

The nominated town or city may be changed upon the employer providing two weeks' notice of the change to the employee. So under the proposed clause the employee would have no certainty as to what their entitlement is under the award. Their entitlement would be subject to the fluctuating decisions of the employer and I suppose to give you an example under their proposal (e) if the employer doesn't have a fixed base establishment the employee could be working in Picton and the employer can say, well your (indistinct) is 50 k's of working in Picton and if the employer then has a job in North Sydney the employer could say, well your radial area is now 50 k's of North Sydney. So we say the intent of this clause is to substantially change the entitlements available to employees and we say there is no evidence to justify why that entitlement should be changed and that as the matter is dealt with in the part 10A process that the variation should be opposed.

PN1928

We also point in paragraph 14.4 of our submission, but it should be noted that the clause adopted by the AIRC when the award was made is one that was initially proposed by the MBA, so perhaps if the HIA has got any concerns they should discuss the matter further with Mr Calver as the architect of the clause. However, it was ultimately determined by the full bench which we set out in our decision. Your Honour, if I can then deal with the suggested changes to clause 25.8 which both the HIA and MBA have both proposed changes to. Essentially the effects of the changes will be to remove the requirement for an employer to pay the fares and travel allowance where the employer provides the employee with a vehicle free of charge. We oppose the variations, neither the HIA or MBA provided any evidence to justify the changes. Nor have they demonstrated (indistinct) change in circumstances. Mr Calver did refer to the full bench decision in 2009 AIRC FB 989 which was the decision that I have handed up and the relevant paragraph I think is - just bear with me - - -

PN1929

THE SENIOR DEPUTY PRESIDENT: Somewhere between 33 and 37 presumably.

PN1930

MR MAXWELL: Yes, between paragraphs 33 and 37 of - the full bench dealt with the matter there. Your Honour, I've handed up a copy of the clause from the National Building and Construction Industry Award because there are some particular provisions that are not carried over to the modern award which to some extent would have unintended consequences that I think perhaps the employer organisations have not taken full notice of which was the issue that we tried to alert them to in our outline of submission. In particular if I can take you to clause 38.6 of the MBCIA 2000 clause. So under 38.6.1 it provides that subject to the clauses mentioned the allowance proscribed in this clause, "Except the additional payments shall not be payable on any day which the employer provides or offers to provide transport free of charge to an employee's home (indistinct) work and return." So one is a provision of transport.

PN1931

38.6.2, "The allowance proscribed in this clause will be payable on any day for which the employer provides a vehicle free of charge to the employee and the employee is required by the employer to drive such vehicle from the employee's

home to the place of work and return." So under that clause if the allowance is paid, if they're provided with the vehicle free of charge and they are required to drive the vehicle from their home to the place of work. In 38.6.3, "Time spent by an employee travelling from the employee's home to the place of work and return outside ordinary hours shall not be regarded as time worked for any purpose of this award and no travelling time payment shall be made except for the example provided in the clauses there mentioned." 38.6.4 provided that, "38.6.2 and 38.6.3 hereof shall have no application in the case of an employee directed by the employer to pick up and/or return other employees to their homes. Such an employee shall be paid as though time taken was worked but no allowance should be paid."

PN1932

Your Honour, we would point out that clauses 38.6.3 and 38.6.4 are not contained within the modern award. Based on the authority of the Master Builders Association of Victoria v. Australian Building Construction Employees and Builders Labourer Federation cases which we refer to in clause 14.7 of our written submission, and in particular in that decision in paragraph 27 where the court found that, "Accordingly clause 17 and clause 19 shall be interpreted as follows, that where an employee is required pursuant to his contract of employment to drive the vehicle provided by his employer and free of charge to the employee from his home to his place of work and return on any one day, the time spent so driving that vehicle is working time within the meaning of clauses 17 and 19."

PN1933

Your Honour, we submit that the reason why 38.6.3 and 38.6.4 are inserted into the MBCIA 2000 was to address that particular issue that was raised in that federal court matter. It would appear based on the authority of that decision that because 38.6.3 and 38.6.4 are not included in the modern award that currently any employer who provides a vehicle free of charge to the employee and currently pays the fares and travel allowance could be liable to a claim for the payment of travelling time and the time spent travelling from their home to the place of work and return each day. That would be a significant liability that employers would have not factored into.

PN1934

The union is not seeking - well, not at this stage seeking the intent that we would prosecute anyone on that basis, however we suggest that if the employers press their variation to remove the payment of the fares and travel allowance then we would see an insertion of an additional provision in the clause to say that where such employees are not paid the fares and travel allowance then the time spent in travelling from their homes to their place of work and return is considered to be working time based on the authority of the federal court decision that we have referred to. We have raised that because we believe the employer organisations may wish to rethink their application and perhaps withdraw it because of the potential contingent liability that their members may face based on the current wording of the award and also that they should perhaps consider the extra cost.

PN1935

For example, if an employee working, someone living out of let's say Penrith and working in the CBD of Sydney is given a vehicle free of charge by their employer and is required pursuant to their contract of employment to drive the vehicle to

and from work each day, well then given the difficulties of moving around Sydney in the rush hour periods, an employer could be looking at an additional three hours payment at overtime rates on a single day. Now, I think on a simple calculation people would easily determine that paying the fares and travel allowance each day is a lot less than paying an employee three hours overtime each day. So on that basis we oppose the application but we would support the re-insertion of clauses 38.6.3 and 38.6.4 that were contained in the MBCIA into the modern award which would then remove any possibility of any liability on the employers.

PN1936

THE SENIOR DEPUTY PRESIDENT: Yes. Mr Maxwell, you commenced your submissions if my notes are correct, whilst we have some sympathy for HIAs position in respect of travel outside radial areas, I couldn't detect any degree of sympathy in the submissions that followed. Was that meant to mean you had some sympathy for the fact that the current provisions are not easy to understand but you opposed the effect of the variation proposed?

PN1937

MR MAXWELL: Your Honour, to the extent that the HIA only seek to reinsert provisions that were contained in the pre-modern awards in regard to travel outside radial areas, we are supportive of that to the extent that it would address any concerns that the HIA have and that was my understanding of the submission of the HIA that in regard to the travel outside the radial areas, they were just seeking what they (indistinct) the clarity of the provisions contained in the MBCIA.

PN1938

THE SENIOR DEPUTY PRESIDENT: The provisions are frankly not all that clear. Is there any prospect of the CFMEU sympathy showing itself in some attempt with the other unions and employers to perhaps formulate a simpler provision which doesn't alter the effect of the clause but makes it somewhat easier to grapple with?

PN1939

MR MAXWELL: In clause of 25.5, your Honour, we are more than willing to participate in an attempt to arrive at a consent provision to a variation to that clause to address the employers' concerns.

PN1940

THE SENIOR DEPUTY PRESIDENT: Very well, thank you for that. Anything further?

PN1941

MR MAXWELL: Nothing.

PN1942

THE SENIOR DEPUTY PRESIDENT: Mr Nobel or Mr Calver?

PN1943

MR NOBEL: No, I was just going to say after what Mr Maxwell said it's a little food for thought and the suggestion I think has a lot of merit.

PN1944

THE SENIOR DEPUTY PRESIDENT: Thank you. Mr Calver.

PN1945

MR CALVER: Mr Maxwell completely misses the point of this exercise by going on a historical excursus that he has undertaken. It's quite plain from clause 25.1 of the award that, "Other than in the case," and I'm quoting, "of an employee directed by an employer to pick up and/or return other employees to their homes, time spent by an employee travelling from the employee's home to the job and return outside ordinary hours will not be regarded as time worked. No travelling time payment is required except as provided for in," and then the clauses are adumbrated. We think that the historical exercise would not enable other than that decision that he's quoted from to be distinguished. Your Honour, what we're doing is we're looking at what we have ended up with as part of the 10A process saying whether or not there is an anomaly as against the objectives in section 134 determining whether the provision meets those objectives and looking at whether or not the provision is working effectively.

PN1946

I reinforce that is the case and so the first thing we do is look at the way that the clauses are currently structured. So if I might be tedious for a second and just go back to basics. An employee who reports the duty per clause 25.10 on a construction site per clause 25.2 whether inside or outside a radial area as defined in 25.2 to 25.5 must be paid the fares and travel patents allowance. It is payable regardless of whether an employee drives, rides, walks, catches public transport or takes any other method to work. It is also payable on rostered days off in accordance with clause 25.10. The fares and travel patents allowance, however, is not payable to an employee who is provided with or offered free transport to and from an employee's home to a work site. That is pursuant to 25.8A. The anomaly arises because of a fully maintained vehicle provided by the employer to travel between home and work for a purpose related to their contract of employment the fares and travel patent allowance will still be payable under 25.8B.

PN1947

This is odd to say the least, because it allows employees to receive a travel allowance even when they enjoy the benefit of a company maintained vehicle. Now that the 10A process is bedded down and the requirement for a cogent reason other than a change of circumstances - as well as a change of circumstances gives the Tribunal capacity to make the changes which we sought to which I referred and now in the current exercise we say that this sits oddly in a regime where the logic that flows is that the fares ands travel patent allowance is provided regardless of how the employee gets to and from work and even when they're resting on a rostered day off, except where it is done at no cost to themselves because they are provided with free transport and we say it should not apply where they receive a fully maintained vehicle.

PN1948

The application previously was rejected on the basis that the provision was based on clause 38.6 of the MBCIA which was in that regard the pre-modern industry standard. However, we have moved on from that point, we have moved on from the historical shackles that the MBCIA brought with it. Although the allowance only remains payable when the vehicle is used for the purpose related to the

contract of employment that is unlikely to require more than travel to and from the construction site. So on the basis of our written submission we hold to the view that that would make the provision far more suited to a fair reasonable safety net and one which sits in with the structure that we've ended up with and that the words that I open my remarks with deal with the issue that Mr Maxwell has raised and that the way in which to correct an anomaly would be to alter clause 25.8B in the manner that we have suggested in our application, your Honour.

PN1949

THE SENIOR DEPUTY PRESIDENT: Anything further from you, Ms Adler?

PN1950

MS ADLER: Just two discrete points, your Honour. In relation to the radial areas under clause 25.2, Mr Maxwell has submitted that our proposed variation would give an employer carte blanche to determine radial areas and change them at will. Under the current provision in clause 25.2 it is our experience that an employer will determine those radial areas and make the choice that exists already in clause 25.2 not the employee, and not to say that employers do do this, but there is nothing in clause 25.2 at present that prevents the changing of those radial areas. So in essence all we seek to do by the proposed variation is to propose more certainty as to those defined radial areas and not to reduce the entitlement the employee already is receiving under the current provision. That's the first discrete point.

PN1951

The second point, your Honour, is on the exchange he had with Mr Maxwell on clause 25.5. While we still pursue the variation we have on foot at present, we wouldn’t be opposed to attempting to come to some consent position and perhaps the issue could be reconvicted when the allowances matter is re-listed for hearing. That's all I have, your Honour, thank you.

PN1952

THE SENIOR DEPUTY PRESIDENT: Thank you Ms Adler.

PN1953

MR MAXWELL: Sorry, your Honour, I don't wish to raise - just in terms of this issue, and I know Mr Calver doesn't like me going back in history, but I think that the whole basis of this fares and travel clause isn't just to pay for fares. It is also travel - - -

PN1954

THE SENIOR DEPUTY PRESIDENT: Mr Kentish has pointed that out with exhibit CEPU8 in the electrical matter.

PN1955

MR MAXWELL: As you're aware the whole basis of this clause is to compensate people not just for their expense but also the time taken and that was the synthesis of the allowance.

PN1956

THE SENIOR DEPUTY PRESIDENT: In the matter Mr Kentish drew my attention to, presumably the precursor electrical award it seemed to have been a compromise to avoid having an employer have to work out travel to the site for each individual employee on a daily basis.

PN1957

MR MAXWELL: That's correct, your Honour, and I would just raise the possibility that if this clause is varied in any substantial way it could be open that whole issue.

PN1958

THE SENIOR DEPUTY PRESIDENT: Yes. Very well. Moving right along, what is the next issue that arises?

PN1959

MR CALVER: Your Honour, there is a typographical error that if you wouldn't mind including in your decision the correction, that's in clause 28.1, there's a mis-reference there - - -

PN1960

THE SENIOR DEPUTY PRESIDENT: Sorry, 28 - - -

PN1961

MR CALVER: .1, your Honour.

PN1962

THE SENIOR DEPUTY PRESIDENT: Reference should - I see - be to clause 5.1. Is there any disagreement with that proposition? This is the standard national training wage provision.

PN1963

MR MAXWELL: Your Honour, I think Mr Calver is referring to the proposed variation to clause 28. In our submission whilst we agree there is incorrect reference there, it should be clause 5.1 of schedule C, but we are also mindful that a full bench has been convened to deal with apprentices and trainees and noting that the MBA has made an application to vary both this clause in greater detail that that mess is perhaps best left to the full bench dealing with those matters, sir.

PN1964

THE SENIOR DEPUTY PRESIDENT: Particularly so if it appears in a common clause in all modern awards, I think Mr Calver it is best brought to the attention of that full bench so they can deal with it in respect to all awards, unless the mis-reference has only appeared in this one?

PN1965

MR CALVER: It has only appeared in this one, your Honour, because it seeks to displace exhibit C and it's a clear mis-reference to wage rates set out in C5.1, not C3.1 and matters going to the full bench would add to the clarity for that full bench to know what it's referenced and the minimum wages in schedule C are set out in C5.1 not in C3.1 which in practice causes confusion because it is a mis-reference. That doesn't impinge on the substantive matter, it's a typographical error.

PN1966

THE SENIOR DEPUTY PRESIDENT: Which appears only in this award?

PN1967

MR CALVER: This clause 28 does because it seeks to displace the wages in schedule C with those set out in 28.2 and 28.3.

PN1968

THE SENIOR DEPUTY PRESIDENT: I see.

PN1969

MR CALVER: So it's not a common mis-reference, it's just a mis-reference in 28.1.

PN1970

THE SENIOR DEPUTY PRESIDENT: So that national training wage provision reference - - -

PN1971

MR CALVER: 3.1 relates to coverage.

PN1972

THE SENIOR DEPUTY PRESIDENT: So the following minimum wage rates will apply.

PN1973

MR CALVER: Our members look in the back, see the wage rates, they get directed to coverage which adds to even more confusion if they even know about 28.

PN1974

THE SENIOR DEPUTY PRESIDENT: Clause 3.1 in schedule C.

PN1975

MR CALVER: Pardon me, sir, sorry?

PN1976

THE SENIOR DEPUTY PRESIDENT: It's clause 3.1 which is coverage in schedule C.

PN1977

MR CALVER: Yes, there are no wage rates.

PN1978

THE SENIOR DEPUTY PRESIDENT: I'll take that on notice, if it is restricted to this award I'll deal with it, if it goes beyond that I'll bring it to the attention of the full bench.

PN1979

MR CALVER: Thank you, sir.

PN1980

THE SENIOR DEPUTY PRESIDENT: What is the next issue? Clause 28.3 of yours Ms Adler?

PN1981

MS ADLER: I believe that's a consequential amendment in relation to allowances.

PN1982

THE SENIOR DEPUTY PRESIDENT: Very well, we'll leave that then.

PN1983

MS ADLER: Thank you.

PN1984

THE SENIOR DEPUTY PRESIDENT: Excuse me one second.

PN1985

MS PATTERSON: Your Honour, I think the next proposed amendment is a (indistinct) to clause 31.4.

PN1986

THE SENIOR DEPUTY PRESIDENT: Yes, 31.3 is not pressed, 31.4, yes.

PN1987

MS PATTERSON: ABI relies on this written material submitted in this matter in respect to the proposed variation. We note that the CFMEU opposes the variation on the basis that it is a longstanding award provision and criticises the evidence provided. The application itself and the written materials set out a number of circumstances where termination payments can be delayed and resolved in a technical breach of the award which can occur on a daily basis. As outlined in the submissions ABI is prepared to alter its proposed variation to add the words "requiring payment no later than the employees next usual pay day" to assist in the objective of providing a fair safety net and to address the potential concerns of the CFMEU in regard to the burden of employees who may require the moneys to enable them to secure new employment which was raised in the submissions in reply. ABI submits the proposed variation reflects current and relevant circumstances that can affect the time in which termination payments can be calculated and processed and proposed variation satisfies the modern award objectives.

PN1988

THE SENIOR DEPUTY PRESIDENT: Thank you. Anyone else from the employer's side?

PN1989

MR MURRAY: Yes, your Honour, Australian Industry Group supports the application and we adopt the written submissions in reply filed by us on 25 October in that respect. I also endorse the comments made by my friend from ABI in respect of the proposed amendment or change to the application to reflect the common practice of using electronic fund streams and the clause refer to eh next pay date under such a system. If the Tribunal pleases.

PN1990

THE SENIOR DEPUTY PRESIDENT: Mr Murray. Mr Maxwell.

PN1991

MR MAXWELL: Thank you, your Honour. Your Honour, we deal with this mass reading of section 16 of our outline of submissions in reply dated 25 October 2012. We say that in regard to the ABI application they seek a variation to clause 41.4 to our termination payments (indistinct) as reasonably practical. Now, the only evidence that they provide in support of their proposed variation statement to Mr Grimmel and you will note that this is found - and he deals with this issue in paragraph 12 of the witness statement. He states, "The award also requires that CTECH allow contractors to (indistinct) the award also requires that CTECH and our contractors to make termination payments within one day of termination of employment." Well, clearly that's not the case, your Honour, the award provides at 31.4 that when notice is given all moneys due to the employee must be paid at

the termination of employment. Where this is not practicable the employer will have two working days to send moneys due to the employee by registered post or where paid by EFT the moneys are transferred into the employee's account.

PN1992

We suggest that two working days is not a burden on employees given the travel allowance payments by EFT which is I suggest the majority way in which people are paid these days, and we also submit that the (indistinct) evidence from Mr Grimmel is not sufficient to vary the award. I also understand that I have got the reference with me today but I understand this matter was also raised by the ABI and it's a common provision they sought a number of moderate awards that was dealt with recently I think in a decision of Senior Deputy President Hamberger in another award where he rejected such a proposal. I will endeavour to find the case and refer it to the Tribunal, but it was one that's handed down in the last month.

PN1993

THE SENIOR DEPUTY PRESIDENT: Yes.

PN1994

MR MAXWELL: But there is nothing cumbersome or a burden on employers to pay someone within two working days of termination and there was no justification for the termination. If the Tribunal pleases.

PN1995

MS ANGUS: Similarly from an AWU perspective we oppose the application. The award provisions as I said when we pointed out we concur are longstanding and reasonable and also your Honour it's important to have regard to the particular circumstances of this industry which is based on short term project work and an often itinerant workforce and having regard to those industry circumstances on that basis it should also be opposed.

PN1996

THE SENIOR DEPUTY PRESIDENT: Thank you. Mr Kentish.

PN1997

MR KENTISH: We support the submissions of Mr Maxwell today (indistinct).

PN1998

THE SENIOR DEPUTY PRESIDENT: Thank you. We have got HIA ordinary hours of work 33.1.

PN1999

MS ADLER: Yes, your Honour. This variation as well we have altered between our March submissions and our September submissions and it's outlined at page 1 of the table.

PN2000

THE SENIOR DEPUTY PRESIDENT: Yes.

PN2001

MS ADLER: So clause 33 of the award evidently provides a system of ordinary hours of work, including establishment of ordinary working hours being 38 hours a week between seven a.m. and six p.m. Monday to Friday and incorporates the use of a rostered day off system. We submit that these provisions are unable to

accommodate the needs of the industry and the proposed variation seeks to introduce the option for the averaging of hours which was canvassed quite extensively yesterday through CCI WA's application so I don't intend to go over ground that's already been covered, other than to suggest as I have done so in our September submissions that there are some examples of working hour scenarios that cannot be accommodated by the current provisions with the award. For example employers and employees are unable to have a roster on foot of work of Monday to Thursday of 10 hours a day or a two week roster that provides Monday to Saturday working days at eight hours a day and week two being Monday to Thursday at seven hours a day.

PN2002

The current provision cannot accommodate such a scenario, therefore we submit that the clause is inflexible for the industry and that when comparing the provision within the on-site award to provisions within similar awards in manufacturing associated industries occupations award, the timber industry award and the joinery award, those three awards which are strongly aligned with the onsite award provide for ordinary hours clauses that provide for the averaging of hours and I do have extracts of the relevant provisions from those three awards, your Honour, which I seek to tender.

PN2003

THE SENIOR DEPUTY PRESIDENT: Very well. Thank you.

PN2004

MS ADLER: So simply put, your Honour, comparable awards contain provisions that provide for the averaging of hours to provide more flexibility. We would submit that similarly in the building industry such averaging of hours should be permissible and provide you with the provisions from those relevant other modern awards. That's all I have, your Honour.

PN2005

THE SENIOR DEPUTY PRESIDENT: Does anyone else wish to add to those written submissions from the employer's side? No? Mr Maxwell.

PN2006

MR MAXWELL: Thank you, your Honour, I won't be too long on this matter. Your Honour, in paragraphs 3.24 and 3.25 of our outline of submissions in reply which is found on page 17 I believe unless I've got a different version, we deal with the fact that the hours of work provisions to be included in the modern award (indistinct) before the AIRC full bench and part 10A award modernisation process, we point out that the AIG sought more (indistinct) provisions, as did the HIA, ABI, AFEI and MBA and that we oppose the employer submissions, so ultimately that matter was clearly a matter before the Tribunal. There is no evidence put before the Tribunal in regard to the working of the hours suggested by the MBA in terms of people working 10 hour days Monday to Thursday in the construction industry or the thought that (indistinct) - given that the prevalence of enterprise agreements in the construction industry there would be so examples that they could refer to, none have been provided and we submit that it is simply a desire by the HIA to allow the construction award to reflect provisions in other awards that do not apply on-site is not sufficient reason to vary a matter determined in the part 10A award modernisation process. It is not an anomaly or

technicality considered by the Transitional Provisions Act. On that basis we would oppose the variation as sought.

PN2007

THE SENIOR DEPUTY PRESIDENT: Ms Angus.

PN2008

MS ANGSU: Your Honour, the argument is they don't' like the hours provisions. There are different hours provisions in other awards and you should adopt those hours provisions instead. The application has been rejected for the reasons advanced which we endorse by the CFMEU.

PN2009

THE SENIOR DEPUTY PRESIDENT: Thank you Ms Angus. Do you rely on your written submissions do you? Very well. The compressed air issue, the one I've been waiting for with some anticipation, 33.1D.

PN2010

MR MAXWELL: Your Honour, I think the compressed air issue may be a matter that's before you on 30 November.

PN2011

THE SENIOR DEPUTY PRESIDENT: Very well.

PN2012

MR CALVER: Unless you want to delete it now, your Honour.

PN2013

THE SENIOR DEPUTY PRESIDENT: That's for joint determination, okay, we'll move on from that. My anticipation is thwarted, I'll have to wait longer. The next one was the CCI which we've dealt with. Day shifts, Mr Calver, 34.1A.

PN2014

MR CALVER: Yes, your Honour. In relation to shift work we provided comprehensive written submissions in our written submissions of March that is section 7 which begins on page 41 of the written submission and goes a considerable number of pages in relation to this matter finishing at page 49. We rely on those written submissions. The rationale for the changes is adequately set out there. One of the abiding problems in this context, your Honour, is that there is a reference in the award to a notification by the end of the day shift where there's a change in shift hours proposed as a result of factors beyond the employer's control and day shift is not defined. We seek to define day shift. But since that written submission we have read AIG's submission and we note that they would acknowledge that in particular 34.1G currently creates an ambiguity given that it appears to be a reference to a type of day shift. Pardon me, sir?

PN2015

THE SENIOR DEPUTY PRESIDENT: Sorry, which clause?

PN2016

MR CALVER: 34.1G, your Honour.

PN2017

THE SENIOR DEPUTY PRESIDENT: Yes, thank you.

PN2018

MR CALVER: It refers to a day shift which is not defined. However, I am raising the matter because in paragraph 2.19 of the HIA submission in reply they don't argue for the change that Master Buildings wants, they argue for a correction which merely puts an apostrophe and "s" after the previous day's shift. We don't think that that solves the ambiguity, to the extent of creating a definition of a day shift, however if that would cause no objection to the unions as a simpler way of dealing with that problem, it is an issue amongst members who go looking for day shift can sometimes confuse the issue. We would as a second tier adopt the AIGs proposal in 2.19 of its submission. I think in a sense your Honour given that there are pages - - -

PN2019

THE SENIOR DEPUTY PRESIDENT: I think you slipped from HIA to AIG at one point.

PN2020

MR CALVER: Did I?

PN2021

THE SENIOR DEPUTY PRESIDENT: Ms Adler was looking bewildered.

PN2022

MR CALVER: I'm getting surrounded, your Honour, it's AIG, pardon me. I withdraw HIA in that context and slip AIG in wherever I said HIA. The issue though is there is a great deal of written material before you, a great deal of detail, technical argument which I believe is best relied on in the written submissions and with that - save for that particular matter I have drawn to your attention resigning from AIGs reply submission I have nothing further at this time.

PN2023

THE SENIOR DEPUTY PRESIDENT: The AIG suggest and deal with any need to change any of the shifts, would it not, Mr Calver?

PN2024

MR CALVER: Yes.

PN2025

THE SENIOR DEPUTY PRESIDENT: I suppose the previous day shift would as well but it would all be referable to the day shift rather than the particular shift the employees come off.

PN2026

MR CALVER: Yes, and referable to the shift about which the change - from which the change emanated that requires the change. If there is no systemic change along the lines that Master Builders suggests I am urging the Tribunal to at least correct that anomaly where there is a reference to a day shift that is not defined. If it please the Tribunal.

PN2027

THE SENIOR DEPUTY PRESIDENT: Mr Murray.

PN2028

THE SENIOR DEPUTY PRESIDENT: Yes, thank you, your Honour, I think Mr Calver has largely canvassed our position on the point but from paragraphs

2.17 I think onwards of our submissions in reply, our proposal is simply to reflect what we do agree does appear to be a potential ambiguity by the quite simple method of inserting an apostrophe "s" after "day" so it's the previous day's shift. It just makes it clear then from when the notice must be given, regardless of whether it happens to fall within a definition of day shift which we agree doesn't seem to be there. It's simply to give the employees notice in advance and set out when that notice must be given. So I adopt in that regard the written submissions in reply that we filed in respect of that proposal in our submissions in reply of 25 October. From roughly 2.15 onwards and specifically the suggestion that paragraph 2.19 of those submissions, if it pleases.

PN2029

THE SENIOR DEPUTY PRESIDENT: Would the deletion of the word "day" address that problem so it would be referable to the ceasing time of the employees' previous shift?

PN2030

MR MURRAY: That might be another way of doing it, yes, your Honour, it's simply a case of making it clear by when the notice must be given, our proposal is seeking to address that point.

PN2031

THE SENIOR DEPUTY PRESIDENT: Yes, very well. Mr Maxwell.

PN2032

MR MAXWELL: Your Honour, in regard to clause 38.1G and the exchange that's just taken place we do not oppose either the AIGs insertion of an apostrophe or the suggested change made by yourself in regard to referring to the time of the employees' previous shift which suggests that both (indistinct) could address I think the concern the MBA has raised. In regard to this clause, the shift work clause, we are unclear as to the position of the MBA in regard to their proposal to insert a definition of day shift.

PN2033

THE SENIOR DEPUTY PRESIDENT: I thought that was done in order to give G some reference point?

PN2034

MR MAXWELL: Your Honour, if that (indistinct) is not pressed then we won't take it further, if it was pressed we would oppose it because it would have the effect of extending the ordinary hours of work under the award.

PN2035

MR CALVER: To clarify I did use the expression "a second tier argument", that is more fundamental arguments that we propose in our written submission upon which we still rely your Honour, but for the sake of time I haven't trawled over that ground because they are comprehensive. If the Tribunal is not minded to make the systemic changes that we want, that is having some better rationalisation of how shifts are defined. A substantial number of changes that are set out over those pages and then the actual changes articulated in our subsequent submission of 21 September. If those matters are not considered by the Tribunal to warrant change, I went to a matter that is a second tier argument in the sense that there is an error on the face of the award which we would seek to be corrected. It is a

reference to a definition which doesn't exist, which either we need to put in or correct the clause is something which we believe is an immediate and pressing matter.

PN2036

THE SENIOR DEPUTY PRESIDENT: Yes, I understand there are two issues there. On the secondary one I think I suggested deleting "day" but it would also be necessary to change "the" to "their" to relate it directly to the employee.

PN2037

MR CALVER: Yes, your Honour, and that's a terrific clarification, we appreciate it. However, it's not that I don't press the other arguments, it's just that - - -

PN2038

THE SENIOR DEPUTY PRESIDENT: The other issue (indistinct).

PN2039

MR CALVER: - - - that's the bleeding wound and the others are more related to the bone marrow.

PN2040

THE SENIOR DEPUTY PRESIDENT: I understand. Do you want to move on to the bone marrow?

PN2041

MR MAXWELL: Your Honour, in section 18 of our submission in reply between 5 October 2012 we deal with the proposed variation scores 34 shift work. In regard to the suggestion by the MBA that we seek to rely - (indistinct) work clause to refer to the finishing time and the starting time or the other way around, I can't remember which one it is at this stage, that we are prepared to sit down with the MBA to look at that provision and see if we can come to some consent arrangement. If no consent position can be reached and it's pressed by the MBA we would oppose the variation. The MBA have also sought a variation to clause 34.1E which includes a reference to morning and early morning shifts and the 24 minutes of each eight hour shift will be accrued towards a rostered day off. We deal with this in paragraph 18.4 of that outline of submission on page 57. The union doesn't propose the concept of this variation but we point out that the reference should be to morning and early afternoon shifts, that there is no early morning shift in the award and that we refer the terminology paid rostered off-shift, rather than rostered day off, because if you look at the shift work provisions in the civil and the construction. In the civil they use the term "paid rostered off-shift", so it would just provide some commonality in the wording between the two provisions within the award.

PN2042

THE SENIOR DEPUTY PRESIDENT: We can adopt the civil provision entirely.

PN2043

MR MAXWELL: No, I - - -

PN2044

THE SENIOR DEPUTY PRESIDENT: If you insist on commonality, Mr Maxwell.

PN2045

MR MAXWELL: I wouldn't suggest that, your Honour, I think it would lead to turmoil in the industry.

PN2046

THE SENIOR DEPUTY PRESIDENT: I've misinterpreted your submissions, very well. No one else wishes to add to their written submissions? All the other items in 34.1 were reference issues which takes us to remote work which we've dealt with. 36, 37 which takes us to remote work we've dealt with.

PN2047

MS ADLER: Your Honour, if it would assist I believe we're up to clause 36.2, page 37 of (indistinct).

PN2048

THE SENIOR DEPUTY PRESIDENT: 36.2, overtime penalties, yes. Go ahead, Ms Adler.

PN2049

MS ADLER: Just as a preliminary point the variation proposed that's outlined in that table, the CFMEU has raised an issue with 36.2A of our proposed variation which has omitted the wording in the brackets in the current clause 36.2 which states in the brackets, "Inclusive of time worked for accrual purposes as proscribed in clause 33 ordinary hours of work and 34 shift work." We simply seek to add 36.2B and we do not wish to vary clause 36.2A. So the proposed variation would simply be to add 36.2B which would clarify that the calculate in computing overtime each day would stand alone. So further to that point, your Honour, we submit that the proposed variation will provide clarity to the industry as to the calculation or the computation of overtime and that that should be done on a daily basis.

PN2050

We rely on the statutory declaration of Laura Cooper which is attached to our September submissions and if you follow through the annexures to that statutory declaration we provide advices from the Fair Work Ombudsman that were obtained to assist in clarifying how that overtime is calculated. Annexure A of the statutory declaration simply puts to the Ombudsman, as the CFMEU has pointed out, the industry norm or the accepted industry practice of how overtime is calculated, that being where an employee works more than eight hours a day and we have not sought to differ from that proposed industry norm nor through gleaning the advice from the Ombudsman do we seek to differ from that position, simply providing the evidence from the Ombudsman is to demonstrate that there is confusion in the industry given the changing advice we have received from the Ombudsman as outlined in the annexures to that statutory declaration.

PN2051

Further to this, just because something is industry practice or industry norm does not necessarily mean that everyone in the industry is understanding that that is the practice, especially if a business is not a member of an employer association. So the insertion of the provision seeks to make it very clear to everyone operating under the award how the overtime is to be calculated, and that's all I wish to say on that, your Honour.

PN2052

THE SENIOR DEPUTY PRESIDENT: Yes, thank you for that. Does anyone from the employer's side wish to add (indistinct)? No? Mr Maxwell.

PN2053

MR MAXWELL: Thank you, your Honour. Your Honour, I note the amendment made the variation sought by the HIA. We deal with the issue of overtime in section 19 of our outline of submission, given the change in the position of the HIA I don't intend going through those submissions. However, I am cautious to support the variation and I think we (indistinct) just take this on notice because we understand the reason that is sought the variation and our general position was that we thought it was unnecessary given the references we made to the other clauses within the award. But the wording that each days work will stand alone, we are trying to go through different scenarios for example where people work so much overtime and then are required to have a 10 hour break where there is any indication there, what are the indications for people who may work shift work and we would like to give that some more thought before we support this.

PN2054

THE SENIOR DEPUTY PRESIDENT: Very well, that's fine, we can accommodate that.

PN2055

MR MAXWELL: If the Tribunal pleases.

PN2056

THE SENIOR DEPUTY PRESIDENT: The other unions will follow that. I don't think there is any need to respond at this point, Ms Adler. Then we have a reference (indistinct) then we have (indistinct) we've dealt with, another reference to (indistinct), another reference (indistinct), reference (indistinct). Here we go, 37.6 HIA, (indistinct) issue?

PN2057

MS ADLER: Yes, your Honour. The variation we seek is in relation to - or the interaction between clauses 37 and 35 of the award. Our members have expressed confusion as to the way the provision operates in relation to breaks that apply when working on Saturdays and Sundays. Clause 35 generally provides for meal breaks and rest and crib breaks, specifically clause 35.1 provides a day worker is entitled to a meal break of at least 30 minutes between noon and one p.m. or as otherwise agreed. Clause 35.3 provides an entitlement to a rest period of 10 minutes between nine a.m. and eleven a.m. and where the employee is required to work overtime for two hours or more the employee must take without reduction of pay a crib break of 20 minutes, immediately after their normal finishing time or after each further four hours of work a crib break of 30 minutes is to be taken.

PN2058

If the employee does not take a 20 minute crib break at the cessation of ordinary hours the employee is to be regarded as having worked an extra 20 minutes. Then clause 37.6, 37.7 and 37.8 generally provide for rest periods and crib breaks while working on Saturdays and Sundays. In this instance an employee will be entitled to a paid rest period of 10 minutes between nine and 11. A 20 minute paid crib break after four hours of work which doesn't prevent the making of any

arrangements for a 30 minute meal period and if the employee is required to work an excess of a further four hours the employee must be paid a crib break of 30 minutes paid at ordinary time. In our September submissions at paragraph 3.15.3, 3.15.5 we rely on two examples to demonstrate possible interpretation between clauses 35 and 37.

PN2059

I won't labour those points, they are in our written submissions and essentially outline the overlap between the two provisions with the potential for the duplication of the provision of those breaks. So if I just take for example employee X that we referred to in the written submissions, he normally works on a Sunday between nine and six, he is asked to work until 10.30. For example then under clause 35.3A he will get his 10 minute rest break between nine and 11, and then potentially also under clause 37.6 he will also get another 10 minute break between nine and 11.

PN2060

THE SENIOR DEPUTY PRESIDENT: But isn't Sunday work overtime?

PN2061

MS ADLER: Yes, your Honour, I don't think that that displaces the original intent that the clauses operate independently of each other.

PN2062

THE SENIOR DEPUTY PRESIDENT: That's what I was going to - 35.3 (indistinct) relates to working overtime after a usual finishing time, there is no usual finishing time on a Saturday or Sunday is there?

PN2063

MS ADLER: This is perhaps the confusion we point to as to how the two provisions are to interact and we would say the intent is that clause 37 is to operate to the exclusion of clause 35 and as such we would simply seek to add a sentence to the end of clause 37.6, .7 and .8 that says, "The provision of this applies in place of the general provisions relating to breaks as set out in clause 35."

PN2064

THE SENIOR DEPUTY PRESIDENT: Yes, simply a clarification.

PN2065

MS ADLER: Yes, your Honour, that's all I have, thank you.

PN2066

THE SENIOR DEPUTY PRESIDENT: Very well, anything further from the employer's side? Mr Maxwell?

PN2067

MR MAXWELL: Your Honour, this matter is dealt with in section 20 of our submission in reply, 20 October 2012 starts on page 59. I should note that (indistinct) understand that the MBA have made an application to vary clause 37 but because that is tidy we issued the local reference rate but for (indistinct) that should be a matter for further discussion between the parties. We submit that we don't believe there is any confusion because the provisions of clause 37 stand

alone, that they deal with overtime that's worked at the weekends and clearly those rest breaks apply.

PN2068

THE SENIOR DEPUTY PRESIDENT: So there is no disagreement that 35 and 37 are independent?

PN2069

MR MAXWELL: That's correct.

PN2070

THE SENIOR DEPUTY PRESIDENT: Is there any difficulty in making that clear in the provisions?

PN2071

MR MAXWELL: Your Honour, I suppose not, but we just wanted to be mindful and check that there's no unintended consequences. If the Tribunal pleases.

PN2072

THE SENIOR DEPUTY PRESIDENT: Anything further from the union? No. 37.7, that's the same point isn't it, Ms Adler?

PN2073

MS ADLER: Yes, 37.6, .7 and .8 are all the same.

PN2074

THE SENIOR DEPUTY PRESIDENT: And 8, right, thank you.

PN2075

MS ADLER: Your Honour, if it would assist I believe the next variation is clause 39.2 on page 40 of the table.

PN2076

THE SENIOR DEPUTY PRESIDENT: 39, yes.

PN2077

MS ADLER: Sorry, clause 39.2 at page 40.

PN2078

THE SENIOR DEPUTY PRESIDENT: Page 40, yes.

PN2079

MS ADLER: On consultation with my colleague we have decided not to pursue that variation at this time.

PN2080

THE SENIOR DEPUTY PRESIDENT: Not pursued, okay. AMW, Mr Nobel, your moment has arrived. It's been a while waiting but we've got there.

PN2081

MR NOBEL: Mr Calver is going to love this because I'm going to be going back into some history.

PN2082

MR CALVER: Why are you picking on me?

PN2083

MR NOBEL: As stated in our application and our submissions in reply - - -

PN2084

THE SENIOR DEPUTY PRESIDENT: Before you start, Mr Nobel, are you going to now deal with all the matters you raise - - -

PN2085

MR NOBEL: In the application.

PN2086

THE SENIOR DEPUTY PRESIDENT: Yes, you're not going to deal with them point by point?

PN2087

MR NOBEL: I think it would be simplest just to go through them all, your Honour.

PN2088

THE SENIOR DEPUTY PRESIDENT: No one has any difficulty with that approach? No. Very well, go ahead then please Mr Nobel.

PN2089

MR NOBEL: Thank you. As has been raised, item 6 of schedule 5 to the Fair Work Transitional Provisions Act is what we're relying on, in particular part 2. I would just like to emphasise in part 2 of item 6 it says, "The review of FWA must consider whether they're modern awards; b) are operating effectively without anomalies or technical problems arising from part 10A of the award modernisation process." At part 3 of the same item, "FWA may make a determination varying any of the modern awards in any way that FWA considers appropriate." Part 4 of that, "The modern award's objective applies to FWA making a variation under this item." Sub-item 3 was noted with approval in the decision on 29 June 2012 which has been referred to quite extensively yesterday and the day before and staying with that decision if I might, I believe everybody would have copies of it, and this was referred yesterday by the Chamber of Commerce and Industry of WA in their submission that also of relevance is paragraph 103 in respect of the award modernisation request and the award modernisation decisions of the AIRC are relevant insofar as they provide historical context for the review and because the review must look at any anomalies or technical problems arising from the award modernisation process.

PN2090

In respect of the objective found at section 134 of the Act it relevantly provides as part of our application that, "FWA must ensure that modern awards together with the NES provide affidavit air and relevant minimum safety net of terms and conditions taken into account." I would say in respect of our application more important aspects we submit should be taken into account are D) the need to promote flexible modern work practices and efficient productive performance of work, E) the principle of equal remuneration for work of equal or comparable value, and G) the need to ensure a simple, easy to understand, stable and sustainable modern award system. I will be coming back to why I believe those are important aspects in relation to our application because I am going to refer to a couple of other awards and you will see from our application that are much the basis of the variation that we're seeking is based on the modern manufacturing

award and the way that that is structured and certainly in relation to the number of employees for forepersons.

PN2091

In respect of that we agree as is stated in item 6 of schedule 528 the review must be such that each modern award is reviewed in its own right, but that does not mean as the Chamber of Commerce was arguing yesterday that other awards should not be looked as per 134E above. That's in relation to the equal remuneration work of comparable value. We would say as (indistinct) currently stand in the building and construction award in relation to appendix B to the foremen and supervisors (indistinct) or persons we say that they are not achieving that objective. As outlined in the application we are arguing for the removal of the 30 employees at - what is the clause 43 - - -

PN2092

THE SENIOR DEPUTY PRESIDENT: 43.1.

PN2093

MR NOBEL: 43.1 and we are saying that essentially what happened in metals, in metal 98 there was a similar clause, it wasn't exactly the same wording, so, "Provided that part 5 shall not apply to any sole trader or partnership company or corporation where," and they have the date, "as of 15 August 1978 the total number of employees irrespective of the location employed," et cetera, et cetera, "is less than 30." We acknowledge that in the - what was MECA, it wasn't worded in the same way but I think it's quite clear from the metals clause there that it's quite obvious that it should only apply to companies et cetera who employed fewer than 30 employees on 15 August 1978. We acknowledge that when MECA was made originally as it was seen in the attached letter as part of our submissions in support, the ATSTI letter, if you have a look at - it's on page 7 of 10 of our original - I mean of our submissions dated 21 September.

PN2094

If you look at part 3, "Application," it was using very similar wording to what was then in the (indistinct) and in that letter - I mean this is the letter in which (indistinct) go in, "It is provided that this part shall now apply to any sole trades partnership, firm, company or corporation where as at - " - and then there's a blank, no date was inserted because the award hadn't been made but it was the intent that it would apply from when the award was made. But the way that MECA was written was differently. It stated that at 2.2 provided that, "This appendix shall not apply to any sole trader partnership firm," et cetera, et cetera, "as at the date of this award." The date of this award would have been 1980 - it would have been 18 April 1989.

PN2095

On our reading that date would have been the cut off point, so in the same argument in metals where it was 1978, here it would be 1989 when it came into effect. But because of the particular wording in what became MECA it wasn't picked up on, it wasn't changed and that date when MECA was actually made in 2002 the award, it just used the same language as what was in that clause which meant that the date then came forward, so it's been coming forward each time rather than staying at what the original intention of the parties was, 18 April 1989. In respect of - the pages aren't numbered sorry.

PN2096

THE SENIOR DEPUTY PRESIDENT: Yes.

PN2097

MR NOBEL: I think it might be easier to then counter what the employer groups have raised in response and I do note that a lot of what we're actually seeking don't appear to be opposed, it's just a few of the clauses. There doesn't appear to be any opposition to the re-formatting of the text, for example, in relation to the engineering construction technician, that seems to be okay. And changing the heading in B113 so it changes the word in the technical field, it doesn't seem to be opposed by anybody, it's just the part that I refer to in relation to the number of employees. Now, I have some material to hand up in relation to the connection between metals and what became MECA which I propose to actually elucidate some of the points I'm trying to make.

EXHIBIT #AMWU1 RESTRUCTURING MANUAL EXTRACT

PN2098

MR NOBEL: The CCIWA are content from paragraph 18 onwards I believe that they say our reasoning is fundamentally flawed in respect of all persons and supervisors. But I would just like to highlight that the provisions in the manufacturing award, what is MA10, concerning what were formerly referred to as former et cetera are now found using more modern language in the manufacturing award in "Definitions" at 3.1 under "Vocational Fields", the supervisor trainer coordinator field is referred to. In part 4 of the manufacturing award, 24 classifications and add on minimum wages, 24F, supervisor trainer coordinator, levels 1 and levels 2. 24G, annualised salary arrangement for supervisor trainer coordinator, levels 1 and 2. There is an all-purpose allowance at 32.1 for supervisor trainer coordinator technical.

PN2099

In schedule B of that award, at B.2.3 supervisor trainer coordinator is used and there this is where during the award simplification process, restructuring, however you want to look at it, that's when the new terms were adopted and the old way of assigning the additional wages to those former forepersons who are now supervisors, trainers and coordinators is located. So at level 1 it's 122 per cent of the minimum wage payable. At level 2 supervisor trainer coordinators 115, and the supervisor trainer coordinator technical is 107 per cent of the minimum wage. If I can take you to page - and that may be where some of the confusion from the Chamber of Commerce has arisen I believe, just simply in the change of the naming. If I can take you to page 18 of the award restructuring implementation manual.

PN2100

This was an employer's manual and a union manual which was agreed, the text. On page 18 you can quite clearly see at 6.5, foremen and supervisors metal and industry award part 5, "The old foremen and supervisors classification have been replaced by a new classification known as trainer supervisor coordinator," and there underneath you have the three tables, level 1, 2 and then technical. In the modern manufacturing award it has survived in pretty much the same sort of terms. Your Honour, if you go to the very last page of the extract of the manual on page 22 you can see at 6.7, "On-site construction work metal industry award

appendix A. Appendix A of the metal industry award which covers on-site construction work has effectively been replaced by a separate new award, the National Metal and Engineering On-Site Construction Industry Award 1989," in other words MECA, "this award became operative from 18 April 1989. The new award is part of the award restructuring process in the building and construction industry. Employees engaged in construction work and previously covered under appendix A are now covered by the new award."

PN2101

Unfortunately and for reasons unknown to me I wasn't around working in this industry at the time, the modern language used and adopted in what is now the manufacturing award, the metals award 98, didn't carry over into MECA. I can't explain quite why that was the case and why the formatting of the relevant charges and the rates didn't carry over either and nor can I explain why the date didn't go in. I've looked, I've done quite a lot of research into this and I just haven't been able to find any cogent reason why it hasn't. Also as part of the fact that the 1978 savings clause in the manufacturing award was dropped in manufacturing, I have asked widely of those who were closely engaged in the negotiations of that award, and one of them is present here today, as to why that savings clause was dropped, I haven't been provided with any information which can assist. The only information that I received really was it wasn't deemed to be an issue any longer. This is a modern award, it's just not necessary.

PN2102

I have another hand out if I can, this is the award restructuring stage 2 metal and engineering industry. This is the Metal Trades Association of Australia document which is an employer organisation.

EXHIBIT #AMWU2 EXTRACT OF AWARD RESTRUCTURING STAGE 2 PUBLICATION

PN2103

MR NOBEL: This booklet is essentially to explain to its members the changes that were involved. I mean the introduction is of use and there is something about the structural efficiency part on page what is 7 on this document there's a table 1 and it talks about supervisory employees, all foreman, supervisors and general foremen supervisors in the old sexist language of the day, what wage increases they get. But what is more important is again on page 21 new classifications definitions and then on that last page, on page 22, there is a table there which as you can see the old classification which currently exists in the award that we have before us in the modern construction award is the old classifications. Here in the second column are the new classifications and in the final column the rates.

PN2104

We proposed in - or we identified in our original application that we were trying to have talks with parties to see if we could arrive at any way of fixing up what ABI at least of the employer groups have acknowledged appears an error in the way that the general supervisor foreman et cetera seem to be the wrong way round. Your Honour, in that regard - have I also handed out, I believe I have, thank you. The same bundle. I am proposing a revised schedule which adopts the table for forepersons and supervisors that is reflected in the modern manufacturing award and I have also proposed - I know AI Group have actually

agreed there is a problem with the definition in relation to the forepersons and I am hoping that they won't oppose the insertion of a revised definition which more closely reflects that which currently exists in the modern manufacturing award.

EXHIBIT #AMWU3 SCHEDULE A REVISED

PN2105

MR NOBEL: The definition is not quite the same as what is in the manufacturing award. The only difference really is instead of coordinator we have retained the use of the word "foreperson" because it does probably more appropriately sit within the industry and general foreperson as opposed to higher coordinator, and we have also inserted the foreperson supervisor trainer technical. We decided to leave trainer in because there are some mentions of supervision and training within the sub-clauses of that main (indistinct). So the revised schedule, your Honour, the only other main difference is that at clause 14 and so our proposal is modernise that table at 43.2 by deleting it and inserting instead the table that we have there which is a hybrid of the manufacturing award because the manufacturing award instead of saying minimum hourly wage for foreperson supervisor level 1, for example, is 122 per cent of the minimum hourly rate paid to the highest technically qualified supervised qualified employee, supervised or trained, they would then make a reference back to in that award I think it's clause 24.G1, something like that, where it has the 104.3 per cent of the standard rate per hour, whichever is higher, as we don't - - -

PN2106

THE SENIOR DEPUTY PRESIDENT: So that replaces the two level two column depending on numbers of persons.

PN2107

MR NOBEL: Yes, exactly and achieves the effect, we would argue, which was attempted in the award restructuring case and in our view fixes up an anomaly and also modernises the award so it's in keeping with the intent. Just two short other points in response to the employer's reply in submissions - - -

PN2108

THE SENIOR DEPUTY PRESIDENT: Just before you go, I just want to be clear on that. So that subsumes - going back to Mr Calver's table - the 43.6 definition. Your advice schedule picks up all the issues dealt with in Mr Calver's table. I think that's right, you have dealt with all of your application in the amended application. Yes, very well. Go on. Points in the employer (indistinct).

PN2109

MR MAXWELL: We have no submissions other than our written submission, your Honour.

PN2110

THE SENIOR DEPUTY PRESIDENT: Sorry, Mr Nobel was about to go to some points raised in the employer in that period, but thank you for that warning, Mr Maxwell.

PN2111

MR NOBEL: With respect to the definitions as I said earlier, AI Group appears to understand that we're just seeking the maintenance of the MECA definitions.

But I would propose the upgraded version that I've given you. But they make no mention in their reply submissions of the incorrect rates expressed in the modern award I notice. In response to the MBA submission I would say to meet the modern award's objective it is not necessary that the modern award contemplate productivity to the extent that it may be desired by an employer at a workplace level, such matters are best addressed through collective bargaining as indicated by section 134(1)(b) of the modern award's objective, the need to encourage collective bargaining and as we are all aware the emphasis on enterprise collective bargaining is also a key object of the Fair Work Act. I think I've covered off everything I wanted to say, your Honour.

PN2112

THE SENIOR DEPUTY PRESIDENT: Thank you for that, Mr Nobel. I might before going to anyone else go to you, Ms Adler, in respect to the (indistinct) the references to foreperson, forepersons in the metal and engineering construction sector.

PN2113

MS ADLER: Yes, your Honour.

PN2114

THE SENIOR DEPUTY PRESIDENT: Is that affected at all by NWU3? No?

PN2115

MS ADLER: No, these variations relate to the classification schedule B. I don't believe they interact with what is proposed by the AMWU as just handed up. The variation we seek is to clarify that the classification of sub-foreperson at item B.2.7D of schedule B be confined to the metal and engineering construction sector and foreperson as defined at item B.2.8D of schedule B also be confined to the metal and engineering construction sector. We submit that such classification would generally be not applicable in the building industry. Such an assertion is confirmed when examined in the light of the provisions that exist in the National Building Construction Industry Award. Under clause 18.5 of the national award - - -

PN2116

THE SENIOR DEPUTY PRESIDENT: It is the position though they are not in the industry or they are not reflected in the award because they're two different (indistinct) in their prior awards, that is two different concepts in that, it might be both but they are different concepts.

PN2117

MS ADLER: The use of sub-foreperson and foreperson classifications were not generally used in the construction industry, so if they existed in the national award then they were used in a context other than on-site construction.

PN2118

THE SENIOR DEPUTY PRESIDENT: Yes.

PN2119

MS ADLER: Perhaps further to that point is a reference the CFMEU makes in their reply submissions to an allowance that was under clause 18.5 of the national award that was consequently removed by the AIRC full bench which restricted to Tasmania and New South Wales, "The application of the allowance was restricted

to a bridge and wharf carpenter engaged or employed as a foreperson or sub-foreperson upon civil, engineering and construction projects and the supervision of maintenance, demolition or removal of such work." On this basis alone it seems clear that the categories didn't apply in the building industry. Further the comments by the AIRC full bench in the April decision, AIRC full bench 345 at paragraph 69 that remove the general definitions to be placed within clause 43 again indicated the intention by the Tribunal to restrict the application of these classifications to the metal and engineering sector.

PN2120

THE SENIOR DEPUTY PRESIDENT: Sorry, within clause 43?

PN2121

MS ADLER: Within that decision, your Honour, comments were made by the bench that removed general definitions that were within the definition clauses in the exposure draft of the on-site award or there was an intentio not move those definitions to clause 43 and therefore we say to restrict the metal and engineering sector.

PN2122

THE SENIOR DEPUTY PRESIDENT: As the award currently stands it has special conditions which are restricted to the metal and engineering, is that correct?

PN2123

MS ADLER: Yes. Further to that, your Honour, we would submit that it would seem that that relocation of these definitions didn't actually occur, which I think is along the lines of what the AMWU is seeking, a reinsertion of those definitions within clause 43 which doesn't seem to have translated into the final version of the award and the fact that those references to foreperson and sub-person within schedule B and the fact that they weren't constrained to the metal and engineering sector was simply an oversight by the Tribunal. There seems to be a bit of an inconsistency between the comments made in the decisions during award modernisation and what has ended up in the final version of the award including those definitions being excluded and then we would say that those classifications of foreperson and sub-foreperson that their restriction - that the fact that they were not restricted, I should say, to the metal and engineering sector is also an oversight. And that's all I have to say on that, your Honour.

PN2124

THE SENIOR DEPUTY PRESIDENT: Yes. Mr Calver.

PN2125

MR CALVER: Your Honour, Master Builders doesn't dislike history, it contextualises matters but in the context of what is before you all that's passed is prologue, as Shakespeare once said. What is it that this review is required to do? Well, the AMWU seek to increase wages, seek to change wages at the very least. They seek to increase wages by removal at the very least of the exception to fewer than 30 employees from 43.1, ergo one must address item 6 sub-item 4 of the item in schedule 5 of the transitional legislation which deals with wages. It says, "The modern award's objective applies to Fair Work Australia making a variation under this item and minimum wages objective also applies if the variation relates to modern award minimum wages." Boom. Mr Nobel has not addressed the

minimum wages objective and if you go to the Act, it's contained at section 284, and the other issue is it invokes the method for increasing wages in modern awards set out in section 135, "Modern award minimum wages can be varied if FWA is satisfied that the variation just by work value reasons modern award minimum wages can be varied under section 160," not here, dealing with ambiguities (indistinct) errors or section 161, which deals with variation on referral to the Australian Human Rights Commission.

PN2126

If I am wrong in relation to that, and I don't believe I am, the clear implication of removing the exemption of fewer than 30 employees has costs ramifications. The change that we have seen only today in relation to the revision that Mr Nobel has put before us, I have not had the time and I don't much have the inclination frankly to go away and look at the impact that that would have on wage rates if these are referenced by percentages. I believe that the AMWU has completely failed the evidentiary burden in that regard with an explanation of the effect that would have on actual wages and in the removal of the notion that 43 should not apply to those employing fewer than 30 employees. The historical excurses that he took us on is all very well and good, but the real nub of the matter is that the provision is clearly based on appendix B of the MECA award and is in the modern award.

PN2127

If he wishes to change the wage rates he should look to the minimum wage objective. Even if I be wrong in that it will have a cost impact for small business and evidence for a cogent reason for the change or for the increase on wages on small business has not been set out at all either by evidence or explanation. For that reason with respect your Honour we believe the Tribunal should completely reject the AMWUs variations.

PN2128

THE SENIOR DEPUTY PRESIDENT: Anyone else?

PN2129

MS ADLER: Sorry, your Honour, just one small general comment in reply. The AMWU seeks to rely on a number of provisions from the modern manufacturing award and the union has made some or the unions have made assertions that relying on other award provisions is not a relevant consideration for the Tribunal and we have sought to do that in relation to specifically the ordinary hours provisions which we spoke about earlier and comparing to similar awards and we would submit that it would be inconsistent in this instance to rely on provisions of the modern manufacturing award to insert that into the on-site award when such a consideration perhaps would not be entertained in relation to other variations on foot.

PN2130

THE SENIOR DEPUTY PRESIDENT: So you are urging me to take a consistent approach?

PN2131

MS ADLER: I am, your Honour.

PN2132

THE SENIOR DEPUTY PRESIDENT: As to either ignoring other awards or not.

PN2133

MS ADLER: That's all I have, your Honour.

PN2134

THE SENIOR DEPUTY PRESIDENT: Yes.

PN2135

MR MURRAY: Your Honour, we dealt with this application in section 5 of the submissions in reply and I have to thank Mr Nobel for taking us back through history at least to this extent, the fact that he has made it clear, as we say, that there has been a very longstanding exemption in relation to those employers with fewer than 30 employees and in fact that exemption continued to subsist under the MECA and the terms of the MECA when they were adopted into the modern award effectively almost holus bolus preserved that same exemption and what you're now being asked to do by the AMWU is now reverse that and extend the operation of the award to a class of persons who have never been covered by the provisions of this award or its predecessors, and that is to say those forepersons and supervisors within the metals and engineering industry employed by employers of fewer than 30 people.

PN2136

We say that the situation is one where that exemption ought to remain and there has not been a good argument in favour of a change and we have consistently argued against the extension of the modern award to these people who have been and continue to be award free salary people rather than being covered under any of the predecessors of this award. So we reiterate that objection. I note that Mr Nobel then moved onto a consideration of what happened in relation to the predecessor of AI Group and that is to say MTIA and the Metal Trades Federation of Unions in respect of restructuring of the metal industry award as it was then known. I point out that this process took place after the two awards had diverged, they had set off on different roads.

PN2137

By the time this process and the documents that have been produced to you by Mr Nobel in respect of award restructuring, by the time that process was underway and these changes had taken place, the MECA award had gone off on a different road and these processes which involved amongst other things the development of competency standards and restructuring the classifications structure, they proceeded after the MECA award had diverged on a different path. So it's hard to see what value could possibly be found in consideration of what occurred historically in relation to a completely separate industry and separate awards and separate discussions which has broader implications that the consideration of whose a foreperson and whose a supervisor. It went well beyond that to a consideration of the whole basis of classifications and the broad banding and the competency base that was developed to support that exercise.

PN2138

THE SENIOR DEPUTY PRESIDENT: I seem to recall Mr Murray the road which the building group award took is a long and winding one that past by Justice Ludeke and ended up with me.

PN2139

MR MURRAY: Yes, your Honour, I came into it a little bit later. I first was involved in the mid-90s and I do recall there being enormously protracted discussions about all of that, but that was a different road that was followed there and that leads me to the document that's been handed up, a revised schedule A. This document changes quite substantially. This document refers amongst other things to training requirements to forepersons, supervisors and trainers. We hadn't had notice of that. That would change very substantially the definitions. In relation to definitions it is correct to say that we were not opposed to the inclusion of definitions modelled on those that had been in the MECA award.

PN2140

It seems that when the provisions in relation to forepersons and supervisors in the metals and engineering sector were incorporated into the modern award that the definitions didn't make the trip and it does seem that there is a place for there to be definitions. But the definitions we would say ought to reply are those that had applied, and that is to say the definitions from the MECA award, perhaps with some updating to change the gender specific language and also to remove some references to awards which no longer operate. We have dealt with that in our submissions in reply based on what we had understood was the position of the AMWU in that respect and what we now have is a very different set of definitions. These, I think it would be fair to say, would need some consideration.

PN2141

We have some concerns at first blush, and quite frankly your Honour I haven't had time to consider them because they have been presented to me this morning, but the implications of these in respect of training requirements for example haven't been a feature of the definitions under the MECA and those might have some consequences unintended by any of the parties, so we would need to consider those in some detail before responding formally to those. As I say our response was to a proposal of the definitions from the MECA apply and that would still be our first preference and in the written submissions in reply we have also adverted to what we say should also remain in terms of an exclusion of those who again and continue to be salary personnel such as site managers, departmental heads and the like and that wording is lifted directly from the definitions that had applied under the former MECA. So that is our position unless you have any questions of me, if the Tribunal pleases.

PN2142

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Murray. Ms Patterson.

PN2143

MS PATTERSON: Your Honour, I'm in a similar position to my friend from the AIG, I am unable to comment on the amended proposal today and would need to seek instructions in regard to it.

PN2144

THE SENIOR DEPUTY PRESIDENT: Very well. Mr Moss.

PN2145

MR MOSS: Thank you, your Honour, we would rely upon our written submissions but we also adopt the promise made by Mr Calver with respect to the possible impact with respect to wages by reducing or moving the current definition for less than 30 employees. I also mention just with respect to the proposed definitions, one of the other things I want to say in addition to the other comments which were made which I also do agree with, is the inclusion of the trainer in that. It would seem to me on first blush potentially expanding the coverage of the award yet again.

PN2146

THE SENIOR DEPUTY PRESIDENT: Very well. Do you support the observations of Mr Shakespeare?

PN2147

MR MOSS: I don't read enough Shakespeare to qualify.

PN2148

THE SENIOR DEPUTY PRESIDENT: I think they arose in a conversation with Hegel. Mr Maxwell.

PN2149

MR MAXWELL: Thank you, your Honour. Your Honour, as the variation proposed by the AMWU affects forepersons et cetera in the metal engineering sector and affect their members rather than ours, we don't make any submissions in regard to that. In regard to the proposed variation to schedule B we deal with this in section 24 of our submission in reply 20 October 2012.

PN2150

THE SENIOR DEPUTY PRESIDENT: That's the HIA matter.

PN2151

MR MAXWELL: The HIA matter, yes, it's found on page 61. As set out in paragraph 24.3 we oppose the HIA variations. We point out that paragraph 69 in the 2009 AIRC FB 345 decision that they refer to dealt with the definitions with which are then set out in our outline of submissions. These definitions were taken from clause 3 of appendix B of the metal award and as such only applied to that sector. It was therefore appropriate for the AIRC full bench (indistinct) of the part 10A award modernisation process to remove them from the general definitions that applied under the award and put them in a specific clause 43 which they did and if you look at the award, the way the award is structured it's clear that clause 43 is found in part 7 which deals with industry specific provisions.

PN2152

Your Honour, the same full bench made further references to forepersons when deciding on the allowances to be contained within the modern award. We include the extract there from paragraph 88 and the full bench stated, "We have deleted clause 20.6 from the exposure draft. That provision was based on rates payable under the building infrastructure award but only apply to forepersons in Tasmania and bridging wharf carpenters in New South Wales. Transitional arrangements may be required in respect of these state based payments. Otherwise we have retained the allowances provisions in the exposure draft." We submit it is clear from this paragraph that although the additional allowances were removed by the full bench on the basis that they have limited state application they intended that

the award would continue to cover forepersons and sub-forepersons and that the payment of state-based allowances would possibly be covered by transitional arrangements. We say the intention of the full bench is hardly surprising given that the CW classification structure had included foreperson or sub-foreperson at the CW8 and CW7 level since it was inserted - sorry, I think that's CW6 - CW7 of the sub-foreperson since it was inserted into the main body of the National Building and Construction Award 2000 and 2002.

PN2153

Your Honour, I have included there a reference to print PR922009. I would strongly urge the Tribunal to look at that variation to the award to see that it was indeed included in the CW classification structure, the sub-foreperson and foreperson references in the CW structure. Your Honour, I would also seek to hand up an extract from the clause 18 of the MBIA 2000. Your Honour, you will see that 18.1.1 deals with wage rates of the classification structure, the CW structure. 18.1.2 dealt with the wage rates and the translated classifications and it stated, "The following hourly rates have been calculated in accordance with 18.3 of this award. These rates include industry allowance, tool allowance, with respect to special allowance and the allowances in 18.5 and 18.1.4 but do not include (indistinct) allowances."

PN2154

Over the page it's got the old wage groups and there we see foreperson and CW8, it's got sub-foreperson at CW7. The allowances that Ms Adler referred to are found in clause 18.5. It says, "The following allowances should be paid to all persons under the award, to the foreperson in Tasmania in charge of a complete project and a bridging wharf carpenter engaged when employed as the foreperson or sub-foreperson upon civil engineering construction projects and the supervision of maintenance, demolition or removal of such work." I wasn't sure whether Ms Adler was seeking to infer that bridging wharf carpenters were not part of the construction industry but clearly they are. But the point we make is that the foreperson and sub-foreperson have been included in the CW structure contained in the construction award ever since the matter was determined during the torturous award restructure process in the building and construction industry. We would also point out that there was also an award in Western Australia that covered foremen on building projects which was part of the group of awards that were considered during the part 10A award modernisation process. So clearly there has been award coverage of forepersons and sub-forepersons in the construction industry and we believe there's no justification to support the variation sought by the HIA to remove them as sought in their application. If the Tribunal pleases.

PN2155

THE SENIOR DEPUTY PRESIDENT: Thank you Mr Maxwell. I intend at some point to put together all the extracts the MBCIA has handed up and identify the three clauses you haven't brought to my attention and are still hiding. Ms Angus. Nothing from you?

PN2156

MS ANGUS: No.

PN2157

THE SENIOR DEPUTY PRESIDENT: Mr Kentish, you'll keep out of this. Mr Nobel.

PN2158

MR NOBEL: We know that the AI Group oppose inclusion of forepersons and supervisors in the Metal and Engineering On-Site Construction Award. But such employees have been long covered by the award. We know that AI Group's views that such employees should be award free and salary employees and that may well be the case but they are still award covered, is one point I would like to make.

PN2159

THE SENIOR DEPUTY PRESIDENT: Subject currently to the exemption, the less than 30.

PN2160

MR NOBEL: Yes, correct. It was stated that AI Group had made substantial submissions in relation to forepersons and so on. I trawled through all the transcripts and I didn't find any reference to forepersons and sub-forepersons in any discussions that were had in the AIRC. There were - what I've come across was three mentions of supervisors in relation to this discrete area. One was in the submissions made by the AMWU very briefly on 17 February 2009 and that's just two short paragraphs in response to the exposure draft (indistinct) which basically pointed out that appendix B from MECA is missing and we would like it inserted. But there was no discussion with any of the parties about how that might be done, other than just an assertion that it should go in. AI Group in their submission on the exposure draft on 13 February at paragraph 114 said this about forepersons classification, "The exposure draft extends towards coverage of forepersons when most forepersons in the industry are award-free salaries staff. The modern award should not apply to forepersons consistent with sub-clause 2A of the modernisation request." That's all they said. They did repeat on 24 February, they made some additional submissions and they said in relation to clause 20, minimum wages 20.6, "Forepersons and sub-forepersons, we reiterate our submissions made on 13 February about coverage of forepersons and sub-forepersons." So it's one (indistinct) paragraph in the whole of the modernisation process. In relation to the minimum wage, and as your Honour would no doubt well be aware, you do have the power under section 160 of your own volition to actually vary those wages if you are so inclined to do so.

PN2161

THE SENIOR DEPUTY PRESIDENT: Subject to giving the parties notice and (indistinct).

PN2162

MR NOBEL: We do have the option to retain you definitions, it's the fall back position but the rates do need to be correctly expressed and I think that needs to be taken into account. What we are proposing is modern and a relevant approach to such classifications and I would urge that you adopt them. There is a possible solution today in relation to the 30 or fewer employees, not that we're pressing this too hard because this is definitely a fall back position, is to agree to a savings provision on the basis that it states the date of effect of the insertion of part 3 in 1989, or possibly may go in 2002. Just so that it doesn't go on in perpetuity

because that was certainly not the intent when the original awards which this was based on were made and argued out.

PN2163

THE SENIOR DEPUTY PRESIDENT: In relation to the rates, Mr Nobel, you are now proposing a more modern expression but you say there was a problem with the 43.2 even expressed in the non-modern terms, is that correct?

PN2164

MR NOBEL: Yes, your Honour.

PN2165

THE SENIOR DEPUTY PRESIDENT: That went only to the foreperson supervisor other than the three or more, is that correct?

PN2166

MR NOBEL: I think so.

PN2167

THE SENIOR DEPUTY PRESIDENT: That was the omission of the proviso in respect to juniors and apprentices being supervised, but that's the only issue was it?

PN2168

MR NOBEL: Also the wages seem to be the wrong way around.

PN2169

THE SENIOR DEPUTY PRESIDENT: The wages need to be sorry?

PN2170

MR NOBEL: The general foreperson is being paid less than the forepersons.

PN2171

THE SENIOR DEPUTY PRESIDENT: So they need to be reversed, is that the - - -

PN2172

MR NOBEL: I think so, your Honour, we would of course prefer our revised proposal.

PN2173

THE SENIOR DEPUTY PRESIDENT: Sorry, just to get it right or just to understand what you're saying. I'm not sure exactly what you are saying, I wonder if you'll just explain that second point to me, Mr Nobel.

PN2174

MR NOBEL: This is why we didn't actually put it in our original application.

PN2175

THE SENIOR DEPUTY PRESIDENT: Yes. Which rate is deficient? The foreperson's supervisor?

PN2176

MR NOBEL: The foreperson supervisor.

PN2177

THE SENIOR DEPUTY PRESIDENT: So it's only the last column (indistinct).

PN2178

MR NOBEL: The foreperson supervisor in both of them actually get more. In the first column 758.40 compared to the general foreperson supervisor who gets 737.80 and the foreperson supervisor in the second column gets 822, whereas the general foreperson supervisor gets 804.6.

PN2179

THE SENIOR DEPUTY PRESIDENT: They should be reversed?

PN2180

MR NOBEL: Yes.

PN2181

THE SENIOR DEPUTY PRESIDENT: Okay, and the caveat of that is juniors and apprentices, that's all that was addressed.

PN2182

MR NOBEL: Yes, but of course we would prefer the revised - - -

PN2183

THE SENIOR DEPUTY PRESIDENT: (Indistinct) version.

PN2184

MR NOBEL: Yes, and your Honour in relation to consultations we have tried to consult with employer groups and we have been open but we have just been shut down in this industry. There was no real discussion. We attended consultations and meetings and we put suggestions forward and we were open to discussion but nothing was forthcoming. In other industries that hasn't been the case and if I may crave your indulgence, your Honour, here - - -

PN2185

THE SENIOR DEPUTY PRESIDENT: Mr Maxwell keeps going with the history, they're not very modern.

PN2186

MR NOBEL: In exactly the same point has arisen in relation to supervisor trainer coordinator, same schedule which we've been seeking to insert into this award along with the definitions and the rates has also arisen in the sugar industry which was pointed out by Commissioner Spencer and we have been in negotiations with the Sugar Milling Association and despite their initial push back we have actually come to an agreed position and if I can hand you up some correspondence in respect of that. I know this is another award and I know it's a comparison which has been made, but we would argue that the type of work and so on is pretty similar and the principle of equal remuneration and work of comparable value I think is of relevance, your Honour.

EXHIBIT #AMWU4 SUGAR MILL AWARD DOCUMENT

PN2187

THE SENIOR DEPUTY PRESIDENT: At what point is that being dealt with in the 2012 review, Mr Nobel, is that being dealt with in the first stage?

PN2188

MR NOBEL: Yes, yes your Honour, and as you can see at the bottom of the letter Mr Warren, he is submitting that it would be appropriate for the

Commission to call a conference of the parties to satisfy herself that it would be appropriate to proceed on this matter on the basis of section 160(2)(a) of the Fair Work Act. I know it's a discrete separate matter, but different employer groups behaved in different ways and they were a lot more amenable to the suggestion because they think it fixed the problem and it's a modern solution, your Honour.

PN2189

THE SENIOR DEPUTY PRESIDENT: Very well.

PN2190

MR CALVER: With the greatest respect to the bench and to Mr Nobel, we have only received his revised schedule A this morning.

PN2191

THE SENIOR DEPUTY PRESIDENT: Yes. Anything in response, Ms Adler?

PN2192

MS ADLER: No, your Honour.

PN2193

THE SENIOR DEPUTY PRESIDENT: Very well. It takes us to schedule E, what's that about?

PN2194

MS ADLER: Your Honour, if it would assist schedule E is in relation to allowances and proposes a separate schedule attached to the award.

PN2195

THE SENIOR DEPUTY PRESIDENT: So that will be dealt with in the next - - -

PN2196

MS ADLER: That's right, your Honour, thank you.

PN2197

THE SENIOR DEPUTY PRESIDENT: Have we covered everything other than those other matters?

PN2198

MR CALVER: Your Honour, the issue of the Master Builders reference rates and the matter of allowances would be deferred to after the OH&S full bench has been convened because that will - any decision from that full bench will impact markedly on allowances.

PN2199

THE SENIOR DEPUTY PRESIDENT: Yes, go on, I was going to propose to go off the record to discuss how we might proceed.

PN2200

MR CALVER: Thank you, your Honour, that's terrific, yes, we would support doing that.

PN2201

THE SENIOR DEPUTY PRESIDENT: Just bear with me whilst I recreate my books just in case I need to refer to them. I will go off the record now.

OFF THE RECORD **[12.43PM]**

ON THE RECORD **[12.56PM]**

PN2202

THE SENIOR DEPUTY PRESIDENT: The first thing I will do coming back on the record is amend the Sugar Milling Association correspondence exhibit number to AMWU4 and I will indicate that we will adjourn these proceedings until 10.30 on Thursday 6 December in Sydney for conciliation or hearing. In that respect I require Mr Calver and Mr Maxwell jointly to advise me by 27 November for what purpose that date will be used and if it is conciliation which matters provide some reasonable prospect of successful conciliation. I will also indicate that I will reserve the date of Friday 21 December 10 a.m. for hearing if that becomes necessary. The parties in the mean time will discuss issues of reference rates and the MBA applications, rationalisation allowances including the travel allowances, arrangements in the non-civil area at least and will have the opportunity to consider the revised proposal of the AMWU in respect of foreperson supervisor in AMWU3, anything that arises from CCIWA in respect to questions raised during their submissions. If they or indeed any other matter that has arisen over the last three days, provide some basis for some discussion between the parties that should occur and any final submissions if necessary in relation to the AMWU proposal CCI, any additional CCI response will obviously - the opportunity for submissions will be available on that final day of hearing. I will adjourn now until 6 December.

<ADJOURNED UNTIL THURSDAY 6 DECEMBER 2012 **[12.59PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs