

TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

26107-1

SENIOR DEPUTY PRESIDENT HAMBERGER

AM2010/4

s.158 - Application to vary or revoke a modern award

**Application by Central Australian Aboriginal Media Association
(AM2010/4)**

Broadcasting and Recorded Entertainment Award 2010

(ODN AM2008/35)

[MA000091 Print PR988989]

Sydney

10.07AM, TUESDAY, 4 MAY 2010

Reserved for Decision

PN1

THE SENIOR DEPUTY PRESIDENT: Can I have the appearances, please.

PN2

MR S. AMENDOLA: If it please the tribunal, I seek permission to appear on behalf of the applicant in the matter, and I also seek permission to appear on behalf of the Australian Indigenous Communications Association Incorporated that seeks to leave to intervene in the proceedings. If the tribunal pleases, my name is Amendola, initial S.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MS C. MONTGOMERY: Thank you. If it pleases the tribunal, my name is Montgomery, initial C. I appear on behalf of the Media Entertainment and Arts Alliance.

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THE SENIOR DEPUTY PRESIDENT: I assume you don't have any problems with Mr Amendola being given permission.

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MS MONTGOMERY: I don't, your Honour.

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THE SENIOR DEPUTY PRESIDENT: You're given permission. Just before we start, there is a bit of confusion about who the applicant actually is. I understand that of course originally the application was made by the Australian Indigenous Communications Association Incorporated. We received an email foreshadowing an application to actually vary the applicant to the Central Australian Aboriginal Media Association, which is actually an employer, as I understand it.

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MR AMENDOLA: That's correct.

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THE SENIOR DEPUTY PRESIDENT: If there be any doubts about it, I will make that variation to who the applicant is, rather than having to - I think technically you actually hadn't asked for it. You had foreshadowed you were going to ask for it but - - -

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MR AMENDOLA: That's correct, your Honour, and then we got this email that said it had been made and we thought, "Mm," and then the email said that you'd made it and we thought, "Okay."

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THE SENIOR DEPUTY PRESIDENT: I must say I've got a pretty good memory but I actually don't remember ever having made it, but lest there's any doubt, I have now made it.

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MR AMENDOLA: Thank you, your Honour.

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THE SENIOR DEPUTY PRESIDENT: So CAAMA is now the applicant.

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MR AMENDOLA: Thank you. As you're aware, your Honour, an application was made on 18 January 2010 to vary the Broadcasting and Recorded Entertainment Award 2010 and there were submissions filed then by AICAI, the Australian Indigenous Communications Association Incorporated, on 24 February 2010. My client, CAAMA, relies upon the application and the submissions made in relation to the application by AICAI. It's an application pursuant to section 158 and the test that we have to meet is set out at section 157(1), and that is:

PN15

Fair Work Australia may make a determination varying a modern award otherwise than to vary modern award minimum wages if Fair Work Australia is satisfied that making the determination or modern award outside the system of four-yearly reviews of modern awards is necessary to achieve the modern awards objective.

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So the test is, on the face of it, fairly high in section 157(1).

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If one then goes to the modern award objectives, what it really does is confirm that it's a high threshold that has to be met. I might foreshadow that in respect of 134(1), the objectives that we would rely upon that we say support the applications to vary are 134(1)(c) -

PN18

the need to promote social inclusion through increased workforce participation -

PN19

and that would be relied upon in relation to the application to vary the Broadcasting Award to put in the language allowance, and we would rely upon subsections (d) and (f) of 134 in respect of the application that's made to put in the cross-functional classification. I foreshadow, just on the face of sections 157 and 134, that it is a high threshold.

PN20

Perhaps before I proceed further, there is a folder that I gave my friend and which I do want to hand up to the tribunal, which has the materials in there to which I'd advert. In opening, your Honour, the decision that I think perhaps succinctly sets out the way in which the tribunal has approached these applications is set out in a case behind tab 6, which was an application by Integrated Trolley Management Pty Ltd (2010) FWA 3317. That was an application that was made by the employer to vary two awards. One was the General Retail Industry Award 2010, and the application that was made in that regard was to effectively have that award, the General Retail Industry Award, cover trolley collectors. Then there was otherwise an application made to vary the Cleaning Services Award 2010, to put in junior rates and other transitional type provisions.

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Watson VP, in the course of dealing with the applications, said at paragraph 10 of his decision, which is at page 3, the following:

PN22

The ability to vary modern awards is limited by the terms of the act. A variation to terms other than wages can only be made if Fair Work Australia is satisfied that the variation outside the four-yearly reviews of modern awards "is necessary to achieve the modern awards objective." In my view this is a significant hurdle that any applicant in a matter under section 158 is required to meet. The clear import of this provision is that award variations outside the four-yearly reviews will be the exception. Other provisions of the act deal with variations to resolve ambiguities or errors. Applications to vary awards on other grounds must be shown to be necessary to meet the modern award's objective rather than desirable or justified in a general sense. In my view, this means that an applicant must establish that the modern award's objective cannot be achieved unless the variation is made.

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Interestingly enough, in relation to that decision, his Honour rejected the application to vary in respect of the General Retail Award because the question of coverage had in fact been aired and dealt with or raised and articulated before the relevant full bench. On the other hand, he determined to vary the Cleaning Services Award on the basis that's set out in paragraph 18 of that decision, where he said:

PN24

It is clear that the employers involved in the processes leading to the making of the Cleaning Services Award were primarily from the contract cleaning industry. Trolley collection contractors had limited involvement even though it was determined that they would fall within the scope of the award. An application by the SDA to include them within the General Retail Award was rejected.

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Then he says, in paragraph 19:

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I am satisfied in these circumstances that the position of trolley collection contractors has not been fully considered in the making of the Cleaning Services Award.

PN27

Now, you might ask why am I referring to that part of the decision, your Honour, and the reason why is because in this instance context is a bit important in relation to the application that's before you today. As you're probably aware, during the making of stage 2 awards, the full bench indicated in relation to some submissions that had been made by the CCNT and also by the National Aboriginal Community Controlled Health Organisation - it determined in a decision, at making stage 2 awards, that it would deal with indigenous organisations and indigenous businesses in stage 4 of the process. At that point in time AICAI contacted us, my firm, to ask us to act in relation to the interests of their members. As it turned out, we were also acting for the National Aboriginal Community Controlled Health

Organisation but we put two quite different submissions into the tribunal in respect of stage 4.

PN28

In respect of the National Aboriginal Community Controlled Health Organisation, we put in submissions that they should have a stand-alone award for their health organisation and that their was a uniqueness to what they did in relation to the provision of health that justified making an award for them stand-alone. Insofar as AICAI was concerned, they put in a submission that recognised that their members or employees of their members would be covered by the Clerical Award, which had been concluded through stage 1, and the Broadcasting and Recorded Entertainment Award 2010, which was in stage 3. At the time at which AICAI put in its submissions - and you will see in the materials, we've just put it in there - at tab 3 of the materials that are in front of you are the submissions that were made on 24 July by AICAI.

PN29

So on 24 July, they made their submissions. There was an exposure draft out of the Broadcast and Recorded Entertainment Award. At paragraphs 5 to 7 is the relevant part of those submissions on 24 July that I would seek to rely upon. There AICAI indicated that there was an award that covered its members. Paragraph 6 indicated the matters that were of importance to them in an allowances and public holidays or observed holidays sense. So you can see that they referred to a provision of their then award. In 6(a) dealing with language allowance; (b) dealing with NAIDOC day; and (c) dealing with the observance of Aboriginal and Torres Strait Islander customary and traditional law - special leave, should I say. Then paragraph 7 adverted to the issue of cross-functional classifications.

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So that was put in their formal submission on 24 July 2009. When the hearing for stage 4 for indigenous organisations came on before the tribunal on 10 August - my friend tells me it's at the very end but I'm not sure it's in your materials, regrettably, your Honour. What I will do is - Ms Bissett was appearing for the ACTU and I will provide a copy of this - I'm sorry, your Honour - and she said at PN439 and PN440 the following in respect of AICAI's submissions, the submissions that are in fact part of the material:

PN31

With respect to the Australian Indigenous Communications Association, at paragraph 8 of their submission they suggest that organisations currently covered by the Indigenous Media Organisations Award will post 1 January 2010 be covered by the Class Private Sector Award 2010 and the proposed Broadcasting and Reported Media and Entertainment Award, I think as it's known, on the basis that these two awards are amended to include the language allowance, NAIDOC holiday and special leave for the observance of customary and traditional law. There appears to be no issue with coverage of those awards and we would support the amending of those awards to include those particular provisions.

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That was at paragraph 439. At 440 she says:

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I do note that they have raised a matter with respect to classifications and we would seek to have some further discussions. We note Mr Amendola is representing them today so we would seek to have some further discussions with them about that particular matter and what they mean and what the issue is that they attempt to address, with a view to reaching, if we can, consensus on a way forward on that, and we would convey the outcome of such discussions to the commission as soon as possible.

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So that's what she said in respect of those submissions.

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What then occurred was that there were discussions between the parties. Those discussions took place between 17 August right through to 14 December. There were discussions that took place - and when I say this, I don't mean any criticism of the MEAA, by the way - award modernisation was hard-going for all unions involved in it, so it's not put critically but it is put contextually. So there were discussions on 17 August, 20 August, 28 August and 31 August. At that stage, whether or not there would be consent to these cross-functional provisions, consent to an application to vary to put those cross-functional provisions in there hadn't been reached as at 31 August.

PN36

Then on 4 September the full bench made the stage 3 awards, which included the Broadcasting and Recorded Entertainment Award. At that point there were some further discussions which were also accompanied, from AICAI's perspective, with a draft application to vary, which set out what it would do and the grounds upon which it would do it. There were further discussions that took place through October-November which ultimately resulted in the MEAA indicating that they would consent to an application to vary, to put those cross-functional classifications.

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THE SENIOR DEPUTY PRESIDENT: The two issues that this application deals with: there's the cross-functional classification but there's also the allowance.

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MR AMENDOLA: The language allowance.

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THE SENIOR DEPUTY PRESIDENT: This was part of the foreshadowed application or not?

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MR AMENDOLA: Yes, it was.

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THE SENIOR DEPUTY PRESIDENT: What happened with that?

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MR AMENDOLA: As you will see, Ms Bissett said they had no difficulty with that but we wanted to sort of just do it all in a package.

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THE SENIOR DEPUTY PRESIDENT: All together.

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MR AMENDOLA: Interestingly enough, your Honour - and it was something I was going to come to - as you can see, NAIDOC day and special leave was also raised. The reason that's not part of the application is, in respect of what I'd describe as - what is the Aboriginal Community Controlled Health Organisation, we articulated before the full bench that there should be NAIDOC day in that award and also special leave and the commission, when it handed down its stage 4 decision, indicated that whilst it understood the basis of why we put that forward, that the NES had effectively set a floor in respect of both leave and public holidays and that those issues were perhaps better dealt with not in a modern award setting minimum terms and conditions.

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THE SENIOR DEPUTY PRESIDENT: So the allowance issue hasn't actually - there was no decision by the commission that referred to it.

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MR AMENDOLA: No. The only thing that I would put - and it is relevant, I think, your Honour, and it is in your materials - is I put the Aboriginal Community Controlled Health Services Award in there, and it is at tab 4. If I can just take your Honour to it. In the allowances part of that modern award, at clause 15, which is at page 16, there is a bilingual qualification allowance and it's in very similar terms to that which is part of the application today. The main difference between that that's in the application and what's in this instrument is that because it's intended to be part of a broader instrument, rather than just indigenous organisations, it makes it clear that the language allowance only applies to indigenous people who meet the terms.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR AMENDOLA: So if I can just foreshadow the argument, your Honour. We would say that in the only instrument that was made by the tribunal in respect of indigenous organisations, that without expressing it, in effect they accepted that that allowance was appropriate for that instrument. In relation to AICAI's members, of which CAAMA is one, we would say that it's similarly appropriate and fulfils and, we would say, is necessary in the relevant sense to fulfil the modern award objectives set out in section 134(1)(c), but it fell off the edge of the discussions in a sense because when Ms Bissett appeared on 10 August, she indicated that there wasn't an issue with it and so we didn't feel the need to sort of take the matter further in discussions because it was seen as a given.

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THE SENIOR DEPUTY PRESIDENT: Yes, but of course the award doesn't actually include it and that's why we're here.

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MR AMENDOLA: That's true.

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THE SENIOR DEPUTY PRESIDENT: I just sort of wondered whether there was any reasoning behind that.

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MR AMENDOLA: No, I think that - - -

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THE SENIOR DEPUTY PRESIDENT: I mean, it's not impossible, things could have just slipped through the net. It's a very long award already.

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MR AMENDOLA: The reality is, your Honour, that in a sense this should perhaps best have been dealt with before 1 January 2010 and it's sort of - without criticising anyone - it just did slip through the net. That's not a reason to grant the application, although it's relevant context. At the end of the day, we have to meet the tests. What in a broad sense I'm putting is that it's not as if the bench considered and rejected either of the matters that we put forward. In fact, when it comes to the issue of language allowance, implicitly it was accepted as being appropriate in the ACCH Award and we'd say similarly, given the nature of what's sought and in the terms in which it's expressed in the application being limited to indigenous people within these organisations, it's also appropriate.

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On the question of the cross-functional classification, what we've sought to do is we've sought to survey AICAI's membership to get some answers to some questions with an attempt to support the view that we meet section 134(1)(d) and (f). So my client, AICAI, who is intervening, has 140-odd members. 20 of them are stand-alone radio stations and then about 120 of them are known as remote indigenous broadcasting services that take feeds and satellites. So they sort of run their own stories and what have you but they're far more slimline operations.

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So in April we sought to survey the membership. The way that was done was by sending surveys to the 20 stand-alone stations and also to regional managers in which these remote indigenous broadcasting services are aggregated and ask them a series of questions and tried to get forward a series of responses. What we got back was 10 survey outcomes, which I will concede is not extensive in terms of their membership. What we've done is we've attached the survey responses, which don't identify the specific employer, but attached the survey responses which constitutes the direct evidence but also provided a table at the front which aggregates the responses and does make some comment. We rely upon it but we understand, your Honour, that where you're talking about 140-odd members, that a response of 10 is not high.

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THE SENIOR DEPUTY PRESIDENT: Do you know how many of these respondents though were the actual radio stations as opposed to the - - -

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MR AMENDOLA: I will get some instructions on that, your Honour. Thank you, your Honour, I've got some further instructions. In terms of the survey being sent out, there are eight regions that represent the 120. Of the 10 organisations

that responded, six of them were radio stations, stand-alone. Four of them were regional responses representing an aggregation - - -

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THE SENIOR DEPUTY PRESIDENT: So they weren't just in fact - so it's not four out of 120, it's unclear about the number.

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MR AMENDOLA: That's correct, your Honour. I mean, it's still - - -

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THE SENIOR DEPUTY PRESIDENT: A minority probably.

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MR AMENDOLA: Yes, but nevertheless there it is.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR AMENDOLA: We would say that when you look at the totality of the responses in respect of the questions that were asked, and they were asked, as you can see under the heading Efficiency and Employment Costs - that whilst there's an equivocal in a sense - and we'd say and we certainly accept that it's equivocal on the question:

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If you do engage different people to perform broadcasting journalist roles, will this impact on the efficiency of your organisation as a whole?

PN66

When you look at the totality of the questions relating to efficiency and the responses, we'd say that from an efficiency perspective the granting of the application to vary in respect of having a cross-functional classification is met. It's less equivocal in respect of employment costs.

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We do rely upon the information in there to establish that, from both an efficiency and an employment cost perspective, there would be a consequence of this application failing because you're not talking about wealthy organisations. They rely heavily on government subsidisation and the capacity within a small organisation to have someone who can both prepare a story and broadcast it is seen as being important.

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In the discussions with my learned friends from the MEAA, they had a concern about making sure that it was not across the board; that it was restricted to the nature of the organisation, which we accept and we put the variation in those terms. So whilst we accept that there is a high hurdle that has to be met, we say in a context where the whole discussion arose in the middle of the Broadcast and Recorded Entertainment Award being made, without there being an adverse determination from the award modernisation full bench in respect of either of the matters that are raised, and in the context particularly of the language allowance where the one indigenous award actually contains it, and on the basis of the survey results - which whilst we admit doesn't constitute the totality of the

membership, it is indicative in an evidentiary sense of the efficiency and employment cost issues - we say we meet the threshold and we'd ask that the variations be made.

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THE SENIOR DEPUTY PRESIDENT: In terms of the details of the application in terms of the proposed amendments to the variations to the award, I just - which is helpful, they are drafted in some detail - can I just confirm that you're confident that they do all that is necessary. I mean, if it gets to the point of actually - - -

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MR AMENDOLA: Your Honour makes me nervous now because of the amount of time that's actually past in respect of all this but at the time, we did look - - -

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THE SENIOR DEPUTY PRESIDENT: It looks like they are but it's a complicated award and - - -

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MR AMENDOLA: Yes, we believe so, your Honour. We certainly don't want to come back again. We believe so.

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THE SENIOR DEPUTY PRESIDENT: Now is the time to tell me if there are any corrections.

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MR AMENDOLA: If the tribunal pleases, those are - - -

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THE SENIOR DEPUTY PRESIDENT: Yes, thank you very much, Mr Amendola. Ms Montgomery.

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MS MONTGOMERY: Thank you, your Honour. My submission is not so long. The alliance would like to support the submissions of the applicants to vary the modern award in the terms that they are seeking and we confirm that we had a number of discussions with the applicants, which included myself and Mark Ryan, via telephone hook-up, and we can confirm that we consent to the applications.

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THE SENIOR DEPUTY PRESIDENT: Thank you very much.

PN78

MS MONTGOMERY: Thank you, your Honour.

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THE SENIOR DEPUTY PRESIDENT: I presume you don't need to say any more, Mr Amendola.

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MR AMENDOLA: No, your Honour.

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THE SENIOR DEPUTY PRESIDENT: I actually will indicate now that I will be granting the applications but I will issue formal reasons in the next few days or so.

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MR AMENDOLA: Thank you, your Honour.

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THE SENIOR DEPUTY PRESIDENT: We can adjourn. Thank you.

PN84

MS MONTGOMERY: Thank you, your Honour.

<ADJOURNED INDEFINITELY

[10.37AM]