



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

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JUSTICE ROSS, PRESIDENT

AM2014/224

AM2014/225

AM2014/229

AM2014/230

AM2014/234

AM2014/246

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards

Group 3 modern awards: sub group 3B

Sydney

9.31 AM, TUESDAY, 7 JUNE 2016

PN1

JUSTICE ROSS: Good morning. The purpose of the mention is to find out where each of these matters are up to and to ascertain whether there are any substantive issues that remain and have not been allocated to another Bench. The intent is that we're likely to issue revised exposure drafts and a revised summary of submissions towards the end of July. I'll then have a further mention to work through how any outstanding matters are to be determined and what sort of process the parties in each matter seek. I might begin by taking the appearances in all matters. If you can just indicate your organisation and which award you have an interest in. Perhaps if we begin in Sydney?

PN2

MR D CHIN: May it please the Commission, Chin, initial D. I seek permission to appear for the Bond University Academic Staff Association in matter 229.

PN3

JUSTICE ROSS: Thanks, Mr Chin. If you can remain seated, and it's not necessary to seek permission; it's only a mention, I'm not making any determinations in relation to any of the issues. In the event that any of the matters go for determination before the Full Bench, you could make the application at that point.

PN4

MR CHIN: If your Honour pleases.

PN5

JUSTICE ROSS: Yes, Ms Bhatt?

PN6

MS R BHATT: If it pleases your Honour, Bhatt, initial R, for the Australian Industry Group in respect of the Local Government Industry Award.

PN7

JUSTICE ROSS: Thank you.

PN8

MR A DANSIE: If it please the Commission, Dansie, initial A, from the Local Government and Shires Association of New South Wales, appearing for the combined State and Territory Local Government Associations for the Local Government Industry Award.

PN9

JUSTICE ROSS: Thank you.

PN10

MR K SCOTT: If the Commission pleases, Scott, initial K, on behalf of Australian Business Industrial and the NSW Business Chamber in the Educational Services (Post-Secondary Education) Award and the Educational Services (Schools) General Staff Award.

PN11

JUSTICE ROSS: Thank you.

PN12

MS L ISCHA: If it pleases the Court, Ischa, initial L, for AFEI, appearing for the four Education Awards, so 224, 225, 229 and 230.

PN13

JUSTICE ROSS: Thanks. Nobody else in Sydney? In Melbourne?

PN14

MR M RIZZO: Yes, your Honour. Rizzo, M, on behalf of the ASU, interested in the Local Government Award.

PN15

JUSTICE ROSS: Thank you.

PN16

MR A ODGERS: If your Honour pleases, my name is Odgers, initial A, from the IEU, and I appear in respect of the Educational Services (Schools) General Staff Award and (Post-Secondary Education) Award respectively.

PN17

JUSTICE ROSS: Thank you.

PN18

MS L GILMORE: Your Honour, Gilmore, initial L, and with me is MS F NETHERCOTE, and we appear for Independent Schools Victoria, Independent Schools Queensland, Independent Schools Tasmania, and the Associations of Independent Schools of New South Wales, of South Australia and of Western Australia in matter 225, the General Staff Award.

PN19

JUSTICE ROSS: Thank you.

PN20

MS L GALE: Commissioner, Gale, initial L for the National Tertiary Education Union, appearing in 224, 229 and 230.

PN21

JUSTICE ROSS: Thank you.

PN22

MS C PUGSLEY: Pugsley, initial C from the Australian Higher Education Industrial Association, appearing in matters 224, 229 and 230.

PN23

JUSTICE ROSS: Thank you.

PN24

MR S PILL: If your Honour pleases, Pill, initial S. I appear on behalf of the Group of Eight universities in respect of those same matters, 224, 229 and 230.

PN25

JUSTICE ROSS: All right. Anyone else in Melbourne? No? Adelaide?

PN26

MS K VAN GORP: Van Gorp, K, appearing for Business SA in the matter of Educational Services (Post-Secondary Education) Award and Educational Services (Schools) General Staff Award.

PN27

JUSTICE ROSS: All right, thank you. And in Canberra? Brisbane?

PN28

MR D WILLIAMS: Yes, your Honour, Williams, initial D, appearing for Bond University in the Higher Education Industry-Academic Staff-Award 2010, which is number 229.

PN29

JUSTICE ROSS: Thank you. From the way the appearances have gone, would it make sense to deal with the Educational Services (Post-Secondary Education) and the two Higher Education Awards together?

PN30

MR WILLIAMS: Yes, your Honour.

PN31

MS GALE: Yes, your Honour.

PN32

JUSTICE ROSS: All right, well we'll deal with Local Government State Government agencies and then the Educational Services (Schools) General Staff Award, and then we'll deal with the remaining three awards together. In relation to the Local Government Award, a report has been prepared which sets out at attachment A a range of agreed changes and a revised exposure draft has been published. How do the parties with an interest in that matter wish to proceed with it? Is there anything in the report of the Commission or in the revised exposure draft that does not reflect the areas that you've agreed?

PN33

MR DANSIE: Your Honour, the report appears accurate and certainly from our position we believe all of the issues have now been dealt with and resolved to all of the parties' satisfaction, save and except of course for any issues arising from common matters which are still before the Commission.

PN34

JUSTICE ROSS: When you say the common matters, do you mean annual leave, those sorts of issues?

PN35

MR DANSIE: Correct.

PN36

JUSTICE ROSS: Yes, all right, but all of the technical drafting matters have been resolved? Is that the - - -

PN37

MR DANSIE: They have, your Honour.

PN38

JUSTICE ROSS: All right. Is that the position of all parties with an interest in this matter?

PN39

MR RIZZO: Your Honour, Rizzo, M from the ASU. Yes, I broadly agree with Mr Dansie except that that posting to the website only occurred at about 9.20 this morning and so while I've looked at the report, which I think is accurate, I haven't had a chance to look at the exposure draft as such.

PN40

JUSTICE ROSS: Perhaps if we can deal with it in this way, that if the parties with an interest in the Local Government Industry Award can review the report and the revised exposure draft - I think a further revised exposure draft was published on 26 May, that's the most recent version of it - if you could review that and the report and advise my chambers within seven days whether that reflects the agreed position, and if not then identify any outstanding issues.

PN41

MR DANSIE: Your Honour, one thing I probably should just mention is that there have been some changes to the names of superannuation funds mentioned in the default superannuation fund clause of the award.

PN42

JUSTICE ROSS: Yes.

PN43

MR DANSIE: We don't press that those names of the funds be updated as part of the four yearly review, as we understand from previous decisions of the Commission that changes to the superannuation clauses be dealt with outside of the four year review.

PN44

JUSTICE ROSS: No, they can be dealt with in the four yearly review.

PN45

MR DANSIE: Okay.

PN46

JUSTICE ROSS: There's no difficulty with - it's really just a timing question, if you want them dealt with more quickly, because these changes are likely to be made to the award at some point either later this year or early next year.

PN47

MR DANSIE: In that case then we will through further correspondence to the Commission highlight what the new names of those superannuation funds are.

PN48

JUSTICE ROSS: Perhaps in your response to the report and the exposure draft, if you could indicate what those changes are, and could I encourage you to have some discussions with the ASU and other interested parties in relation to that issue?

PN49

MR DANSIE: Yes.

PN50

JUSTICE ROSS: So that there's no dispute about it. Ms Bhatt?

PN51

MS BHATT: Yes, can I raise one matter? The summary of submissions published on 27 May includes reference to various substantive claims that were made. It's my understanding that they have all been dealt with in some way, that is, that the matter has either been determined or the claim was withdrawn. I'm not sure that the summary necessarily reflects that though. We can either go through that today or perhaps that's another matter that can be identified for the Commission within seven days by the relevant parties.

PN52

JUSTICE ROSS: Certainly in the notes it identifies where some substantive issues have been determined; for example, numbers 3 and 4.

PN53

MS BHATT: Yes, it does, but it's my understanding that items 1 and 2, for instance, have been withdrawn, and there are several others of a similar nature that appear in that summary.

PN54

MR DANSIE: Your Honour, just to assist, the United Services Union, abbreviated USU, wrote to the Commission on 3 July 2015 withdrawing their application and seeking to withdraw from the proceedings, so the summary still lists the USU; it appears that it doesn't reflect that the USU has since written to the Commission withdrawing its application.

PN55

JUSTICE ROSS: I see, all right. Does that deal with - - -

PN56

MR RIZZO: Yes, your Honour, that - sorry, your Honour, Rizzo, M.

PN57

JUSTICE ROSS: Yes.

PN58

MR RIZZO: That is correct, your Honour, the USU withdrew those items quite some time ago. My understanding, your Honour, of the summary of submissions is all those issues have been withdrawn or agreed. There are no outstanding matters on the summary of submissions in my view.

PN59

JUSTICE ROSS: All right. If you take into account the USU point, Ms Bhatt, does that deal with - because most of the claims seem to be theirs?

PN60

MS BHATT: I think that's right, your Honour.

PN61

JUSTICE ROSS: In any event, within the seven days if there is anything remaining from the summary of submissions that's not been dealt with, then if you could let me know. Okay? Anything further in relation to that award? No? Let's go to the State Government Agencies Award.

PN62

MS BHATT: Your Honour, I wonder if I might be excused.

PN63

JUSTICE ROSS: Certainly, yes.

PN64

MS BHATT: Thank you.

PN65

MR DANSIE: And likewise?

PN66

JUSTICE ROSS: Yes, no problem. Are there any comments on the - who has an interest in this award? Well this will be a short session. Well we'll move through that matter and go to - just bear with me for a second - we might deal with the Education Services (Schools) General Staff Award, which is number 4 on the list. Who would like to begin in relation to this matter? Is it convenient to go through the summary of proposed variations, or is there another way you'd like to deal with it?

PN67

MR ODGERS: Your Honour, Odgers, initial A for the IEU. We may be able to deal with it in an even more summary fashion than that.

PN68

JUSTICE ROSS: Certainly.

PN69

MR ODGERS: All of the items listed divide neatly into one of two categories. They are either applications that were made for substantive variations to the award, which were dealt with by the Full Bench and an order issued on 21 December, although the summary of proposed variations does not reflect the fact of that order having been issued, or - and I'll list those items - that's items 7, 8, 15, 16, 17, 21 and 27 - - -

PN70

JUSTICE ROSS: That was an order issued when, sorry?

PN71

MR ODGERS: On 21 December and the order number was PR575283, so all of the matters that the parties wished to pursue were dealt with in that aspect of the process leaving only those matters arising from the exposure draft. No revised draft has been issued. So the remaining matters are either matters that are agreed between the industry parties, that is, ourselves and the AIS, and we have reached a consent position in respect of the exposure draft, or they're matters that have been agreed between us and are objected to by one of the peak bodies, whether AFEI or others, and I think there are four or five of those matters. It seems to us that prior to the issuing of a revised exposure draft there's very little to say. We wish merely to point you to item 23 which we say is the most significant of the issues arising from the release of the exposure draft, where the industry parties say there's an error, a significant error in the draft, and where the AFEI contends that there is no such error. The other matters are comparatively minor.

PN72

JUSTICE ROSS: All right, thank you. I'm assuming that matter can be resolved by simply looking at the exposure draft and the current award?

PN73

MR ODGERS: We would hope so.

PN74

JUSTICE ROSS: Has there been a conference in relation to this award?

PN75

MR ODGERS: No, there hasn't.

PN76

MS GILMORE: Gilmore, initial L, your Honour. There was a conference called for all of the education awards.

PN77

JUSTICE ROSS: Mm-hm.

PN78

MS GILMORE: However the higher ed and post-secondaries seemed to get most of the air time at that conference and ours was barely touched, and the only parties that appeared in that conference with an interest in this award were the AISs and the IEU, and we have consent positions on these issues.

PN79

JUSTICE ROSS: Yes. Can I just go through - because it seems to be ABI and AFEI that are objecting; I appreciate your observations in relation to the matters you've identified - but I can I just go through the other items just to see whether there's been any change in the position of the AFEI and ABI? In relation to item 1, is there any opposition to that? No?

PN80

MS GILMORE: Your Honour, we believe item 1 is agreed.

PN81

JUSTICE ROSS: Yes. Item 2?

PN82

MS GILMORE: There does still seem to be an outstanding objection from AFEI with respect to a cross-reference.

PN83

JUSTICE ROSS: Yes. Is the AFEI here?

PN84

MS ISCHA: Yes, just here.

PN85

JUSTICE ROSS: Yes, no, I'll hear from them. Yes?

PN86

MS ISCHA: Yes, so we're just thinking that the amendment is unnecessary, because the current reading of the award isn't unclear. It doesn't actually clarify anything in our view.

PN87

JUSTICE ROSS: Are you opposing it?

PN88

MS ISCHA: We're not completely opposing it. We're saying it's unnecessary, so if we could go without it.

PN89

JUSTICE ROSS: All right. Item 3, any opposition?

PN90

MS GILMORE: No objection, your Honour.

PN91

JUSTICE ROSS: Item 4 seems to be agreed, is that right?

PN92

MS GILMORE: That's right, your Honour.

PN93

JUSTICE ROSS: Item 5, any opposition? No?

PN94

MS GILMORE: No.

PN95

JUSTICE ROSS: Item 6?

PN96

MS GILMORE: Yes, there is, with respect to this one, your Honour. It's in respect to examples that the AISs and the AIE suggested.

PN97

JUSTICE ROSS: No, I appreciate that. I just want to hear from the party that's putting the objection for the moment. Why can't you include an example?

PN98

MS ISCHA: We're saying that if we include an example in the award we just don't want it to be misinterpreted to look like it's an actual term of the award. So it's not that we're completely against it. If it could go as an annotation, just so that it's clear that it's not an actual provision of the award, in case it's misinterpreted.

PN99

JUSTICE ROSS: There are other examples in awards that they're not misinterpreted, they're just examples.

PN100

MS ISCHA: Yes, I know.

PN101

JUSTICE ROSS: There are examples, for example, in the Model TOIL Award, and no exception's been taken to that by your organisation.

PN102

MS ISCHA: Yes, they're my instructions.

PN103

JUSTICE ROSS: All right. Seven? That's been dealt with by a Full Bench. Eight - been dealt with by a Full Bench. No opposition to 9, is that right?

PN104

MS GILMORE: That's right.

PN105

JUSTICE ROSS: Ten?

PN106

MS ISCHA: That's just similar again with the example.

PN107

JUSTICE ROSS: That's the example issue?

PN108

MS ISCHA: Yes.

PN109

JUSTICE ROSS: What's AFEI's interest in the award area?

PN110

MS ISCHA: We've got members who are covered by the award.

PN111

JUSTICE ROSS: Item 11?

PN112

MS GILMORE: Yes, your Honour, the AISs and the IEU do not believe the amendment being sought is necessary. The Australian Business Industrial is looking to have a bit of a structure change in relation to the ordinary hours of work for shift workers in the exposure draft.

PN113

JUSTICE ROSS: Mm-hm.

PN114

MS GILMORE: We did not think a further change was necessary.

PN115

JUSTICE ROSS: Is ABI pressing the change?

PN116

MR SCOTT: We are.

PN117

JUSTICE ROSS: And have you said all you want to say about it?

PN118

MR SCOTT: We have, yes. I mean, it's a fairly minor technical matter. We do press it because - and my clients consider it sensible. We appreciate that that's not a view that's shared, however we press it. But I think it is a matter that can be resolved by a Full Bench fairly quickly.

PN119

JUSTICE ROSS: All right. Item 12, AFEI?

PN120

MS ISCHA: Yes, we've just got an opposed view on this, just because we say that a change of roster by mutual agreement or with seven days' notice shouldn't invoke the consultation provisions of the award.

PN121

JUSTICE ROSS: Doesn't that depend on just a reading of the current provisions and the model consultation term?

PN122

MS ISCHA: Yes, but we're just saying that if an employer and an employee would agree to the change, just not too sure if they'd need to invoke the consultation provision.

PN123

JUSTICE ROSS: Mm-hm. Item 13 is agreed?

PN124

MS GILMORE: Yes, your Honour.

PN125

JUSTICE ROSS: And item 14 is opposed?

PN126

MS GILMORE: It is, your Honour, and it's somewhat borne out of item 13. It relates to how the broken shift penalties apply to a casual employee. The AISs and the IEU have sought the clarification in the exposure draft that the words "other than a casual employee" should be inserted back into the broken shifts clause relating to the penalty rate.

PN127

JUSTICE ROSS: Yes.

PN128

MS GILMORE: The AFEI's proposal is that that would also mean that there did not need to be a minimum engagement for a casual in a broken shift.

PN129

JUSTICE ROSS: Yes.

PN130

MS GILMORE: The AISs and the IEU believe that due to the separate entitlement for a minimum engagement for a casual employee in the award that that engagement would still apply. It may be more an interpretation issue, if anything.

PN131

JUSTICE ROSS: All right. Items 15, 16 and 17 have been dealt with. Is there any opposition to items 18 and 19?

PN132

MS GILMORE: No, your Honour.

PN133

JUSTICE ROSS: Any opposition to item 20?

PN134

MS GILMORE: No, your Honour.

PN135

JUSTICE ROSS: Item 21 has been dealt with. Any opposition to item 22? No?

PN136

MS GILMORE: No, your Honour.

PN137

JUSTICE ROSS: There seem to be - can I characterise it this way? The issues that have arisen either relate to the inclusion of an example to illustrate a particular point, or they deal with interpretation issues on the translation from the current modern award into the exposure draft and the interaction between particular clauses. None of those issues seem to require - it's not a case where they'd be supported by evidence or anything of that nature. Are the parties content to rely on the submissions they've made about those issues, or do you want an opportunity to say something further about them? In other words, can the

Full Bench now deal with the outstanding issues on the basis of what you've already said?

PN138

MS GILMORE: Yes, we believe so, your Honour. The AISs and the IEU feel we can rely on what has already been filed.

PN139

JUSTICE ROSS: All right. Anyone else?

PN140

MS ISCHA: That's the same with AFEI.

PN141

MR SCOTT: Yes, happy to rely on what's on the record.

PN142

JUSTICE ROSS: All right. We'll deal with those issues in due course and issue a revised exposure draft reflecting that decision and the outcomes of the Full Bench proceedings. Is there anything else in relation to that award? No? Then let's go to the awards 3, 5 and 6 on the list, that is, the Educational Services (Post-Secondary), Higher Education-Academic Staff and Higher Education-General Staff. What's the best way of approaching these matters from the perspective of the interested parties? The NTEU or the higher education organisations?

PN143

MS GALE: Your Honour, the parties have been through a few conferences with these matters of course, having been referred to a separate Full Bench. In relation to the exposure drafts, we've been through conferences and have provided written feedback to the exposure drafts. There are still a few issues that need ironing out in there but I think that we're reasonably content with the process we have of providing written feedback to Commissioner Johns. In relation to the summary tables, the tables as they're currently presented do still include some matters that we think have been resolved.

PN144

JUSTICE ROSS: Yes.

PN145

MS GALE: But there are a large number of substantive issues. The relevant Full Bench has scheduled hearing dates through to November, and we're at the stage of having exchanged our materials in reply and preparing final replies to that. So I think our view is that things are all on track.

PN146

JUSTICE ROSS: Can I put this to all of those with an interest in these awards? Is there much utility in us pressing on with the exposure draft and the range of technical issues between you at this stage, or do you think we should await the outcome of the Full Bench decision and incorporate those matters into an exposure draft? I mean, how far along the track are you in relation to the other

drafting technical issues that are not being dealt with by the separately-constituted Full Bench? Is it worthwhile completing that process or waiting?

PN147

MS GALE: I think it is worthwhile completing that process. There are a number of points which will depend on the outcome of the final hearings, but I think that we are 98 per cent along the path of tidying up the rest.

PN148

JUSTICE ROSS: All right, then it does make sense to conclude that and then we'll finalise those matters, and then when the Full Bench hands down its decision in the substantive matters we'll make the necessary amendments to the finalised exposure draft. Are all the parties content to allow that technical drafting process to continue before Commissioner Johns? I'll talk to the Commissioner and get a finalised revised exposure draft from him that all parties could then have a final opportunity to comment on, and that would conclude that aspect of the review of these awards until such time as the Full Bench deals with the substantive matters.

PN149

MR PILL: Yes, your Honour - Pill on behalf of the Group of Eight universities - in substance, yes. Perhaps I could just make a couple of comments and a suggestion.

PN150

JUSTICE ROSS: Sure.

PN151

MR PILL: There are some matters raised in the exposure drafts that effectively duplicate or cut across existing substantive claims that were referred to the Full Bench. Secondly, there were, in accordance with directions of the Full Bench, a range of substantive submissions about the substantive matters filed as recently as yesterday and Friday which currently aren't reflected in the summary tables.

PN152

JUSTICE ROSS: Sure, yes.

PN153

MR PILL: The Commission most recently issued an exposure draft on Friday, so Friday the 3rd.

PN154

JUSTICE ROSS: Yes.

PN155

MR PILL: We wouldn't anticipate that there's any further exposure draft. Consistent with the comments that have been made, our suggestion would be that the parties have - we've already had two opportunities - but the parties have a final opportunity to make any final comments about the exposure draft that was released on 3 June. Secondly, if the Commission is minded to update its summary tables to reflect obviously the most recent round of submissions, I think it would be appropriate for the parties to then have, for example, seven days just to provide

back what I think would be a consent summary. There are a number of matters in the summaries, your Honour, that aren't accurate at the moment. It's not - we're in your hands obviously, but I'd suggest it's not best use of your time for us to step through each and every one of those at this juncture.

PN156

JUSTICE ROSS: No, I agree with that. Is it correct that the revised exposure draft published on Friday was intended to capture all of the matters that had been agreed between the parties of a technical drafting nature, leaving aside the matters that have been dealt with by the separately constituted Full Bench? Is it reflecting the end of the process? Is that the purpose of it?

PN157

MR PILL: Yes, your Honour, that was the intention.

PN158

JUSTICE ROSS: All right.

PN159

MR PILL: There are a couple of minor wording issues that perhaps weren't religiously reflective of the transcript and the parties are intending to comment on that.

PN160

JUSTICE ROSS: Was that exposure draft in respect of each of the awards - each of the three awards?

PN161

MS GALE: Yes.

PN162

JUSTICE ROSS: All right.

PN163

MS GALE: Yes, it was, your Honour, but can I just say, just to be clear, there are a few matters which I dealt with in the exposure drafts which in our view conclude some of the issues that are still listed in the revised summary.

PN164

JUSTICE ROSS: Yes.

PN165

MS GALE: For instance, in relation to annual leave loading and the relevant point of reference - - -

PN166

JUSTICE ROSS: I'm not sure - - -

PN167

MS GALE: - - - but can I just say that there are some matters which the exposure draft is agreed as far as it goes but it deals with subject matter which is also the subject of substantive applications, for example, there is an agreement to include a

list of employers that are bound by one of the particular clauses of the agreement; that is agreed between the parties as reflecting the list prior to the hearing of the substantive application in relation to Bond University.

PN168

JUSTICE ROSS: Sure, yes.

PN169

MS GALE: So yes, it does conclude those matters as far as technical drafting goes, but it doesn't conclude them in one sense.

PN170

JUSTICE ROSS: Yes. I mean, the revised exposure draft will obviously need to be amended to reflect any outcome from the Full Bench decision.

PN171

MS GALE: Yes.

PN172

MR PILL: Your Honour, the other suggestion that we would have, 90 per cent of the matters between the parties are now with the separately constituted Full Bench.

PN173

JUSTICE ROSS: Yes.

PN174

MR PILL: One further iteration of comments on the exposure draft will effectively exhaust the technical process. It would be preferable, in my respectful submission, that that draft then be referred to the same Full Bench to conclude the process.

PN175

JUSTICE ROSS: Yes - no, that's not the course we've adopted in other Full Benches, and I don't intend to do it in this one.

PN176

MR PILL: If your Honour pleases.

PN177

JUSTICE ROSS: There will be one Full Bench that will deal with all of the Group 3 awards, just to avoid any inconsistency of approach or treatment. We won't finalise these three awards until after the Full Bench has made its decision and it can be incorporated in it at that point. Is there - I'm just not sure if the utility of revising the summary of submissions, bearing in mind from what you've all said the issues have pretty much been exhausted. They fall into one of two camps; either they've been agreed and they're in the revised exposure draft or they're before the other Full Bench. So wouldn't it make more sense to give everyone seven days to check the revised exposure draft to ensure it reflects the matters you've agreed and that there are no outstanding technical or drafting issues, and that would then complete the process from the point of view of the

Group 3 Bench, and then the substantive matters will be dealt with by the other Full Bench? I don't know - I mean, updating the submissions table would simply indicate: matter agreed, matter withdrawn, matter referred to the other Full Bench; I don't know if that's a productive use of either your time or ours.

PN178

MR PILL: Your Honour, I respectfully agree with your comments and observations. We were minded that the Commission had generated these documents and were therefore prepared to amend them if required, but, respectfully, they're not of great utility to the parties.

PN179

JUSTICE ROSS: No, well if they're not useful to you then I don't see any point in doing it at all. So if you're content, we'll adopt that process that parties will have seven days to comment on the exposure drafts released on 3 June. If you can forward any comments to my chambers and to Commissioner Johns, then that would seem to deal with the technical drafting aspects of each of these three awards, and we'll await the decision from the Full Bench as to the substantive matters. Is there anything further anyone wants to say about these three awards?

PN180

MR WILLIAMS: Your Honour, I do have a submission to make in respect of Bond University's position.

PN181

JUSTICE ROSS: Sure.

PN182

MR WILLIAMS: Your Honour, the - - -

PN183

JUSTICE ROSS: Can you remain seated and speak into the microphone, please?

PN184

MR WILLIAMS: Yes, I was standing aiming to get closer to the microphone but I've managed to move it. Your Honour, my client's position is a little different from the other parties. The application which is a particular concern to my client is an application by the Bond University Academic Staff Association who are represented of course by Mr Chin to extend terms of the award to my client for the first time. Those provisions relate to restrictions on fixed term contracts of employment and in some case severance payments for fixed term employees.

PN185

JUSTICE ROSS: Sure.

PN186

MR WILLIAMS: These provisions have a genesis in an award which was made in hotly contested circumstances in the late-90s affecting only a number of universities. The issue as to whether there should be some extension of those terms or indeed whether they should be contained in the modern award at all was considered in detail by the Full Bench which first made this award, and the

decision was made for those provisions to apply but only to those who are party to the proceedings in the late-90s. The result of that is that my client, which is one of a limited number of private universities with a completely different industrial history and funding circumstance, has never been bound by these provisions at all. The effect of the application would be that the provisions would therefore apply for the first time and that - - -

PN187

JUSTICE ROSS: No, I understand that, but that's not the application that's before me; that's before the separately constituted Full Bench.

PN188

MR WILLIAMS: Well I did wish to clarify that, your Honour, because the summary released by the Commission is perhaps a little unclear about that; it doesn't refer to the matter as one which had been referred.

PN189

JUSTICE ROSS: Well let me make it clear. The only thing that the Group 3 Full Bench, which I'm presiding on, is dealing with is the technical drafting issues in relation to the transition of the three modern awards to the exposure drafts. That's the issue that's before us today. The substantive matters, including the one you've raised, are all being dealt with by a separately constituted Full Bench and it's issued directions.

PN190

MR WILLIAMS: Your Honour, thank you, and I seek - that was perhaps not as totally clear from the summary. My client's position, your Honour, which we have foreshadowed in correspondence, is that this is an idiosyncratic application which is directed only at one university but has the potential to affect other universities in a similar position. Our submission would be that it's a matter which ought to be stood aside from this review process and dealt with, if at all, by separate application under section 158. But if that's a submission I should make to the Full Bench, I'd be happy to do so.

PN191

JUSTICE ROSS: Well it is a submission you should make to the Full Bench. They've made an application. They can make it in the review or separately. The purpose of the review is to review the awards. It can include a review of coverage, as it has in many other awards. But ultimately that application is not one that you would make to me. The matters have been referred to the other Full Bench; they should be addressed to it.

PN192

MR WILLIAMS: Yes, thank you, your Honour.

PN193

JUSTICE ROSS: All right.

PN194

MR CHIN: Your Honour, may I say, we don't understand the assertion that the proposal, the association for which I appear, has implications for universities

beyond Bond University. The application that we make is confined to extending the fixed term provisions and to bring Bond University in line with virtually the entire university sector on that issue.

PN195

JUSTICE ROSS: Yes, I don't really - it's not that I'm not interested.

PN196

MR CHIN: Yes, I understand.

PN197

JUSTICE ROSS: But it's not a matter that I'm dealing with.

PN198

MR CHIN: No, your Honour.

PN199

JUSTICE ROSS: And I think any comments you make are likely to provoke a response and it will be an arid exercise for both of you because - and I understand why you want to put it on the record - but the comments you are both making this morning won't be conveyed by me to the Full Bench; they'll be matters for you to put in argument to that Full Bench because that's where the matter lies.

PN200

MR CHIN: Yes, I understand that, your Honour. I should just also add the proposal put by my association; we've been proceeding upon the basis that it's been uncontroversial up until very recently and the intervention by Bond University. We also anticipate that before the Full Bench will be the issue of the University's entitlement to intervene at this late stage, but that's for another forum.

PN201

JUSTICE ROSS: At the moment, Bond University's not covered by this award, is that the - - -

PN202

MR CHIN: Your Honour, they are but they're excised from the operation of the fixed term employment provisions generally.

PN203

JUSTICE ROSS: I see, all right, yes. Well they're right to be heard will be determined by the other Full Bench, happily for me.

PN204

MR CHIN: As I said, we proceed on the footing that the issue has remained uncontroversial to this point. In the event that the University is afforded an opportunity to make submissions or bring evidence, then we'll need to revisit the material upon which we wish to rely in support of the application, so I can just foreshadow that.

PN205

JUSTICE ROSS: Yes, but that's perhaps a point you should make to the other Full Bench.

PN206

MR CHIN: Yes, your Honour.

PN207

MR WILLIAMS: And your Honour, bearing in mind what you've said about the aridity of this discussion, I should place on record - - -

PN208

JUSTICE ROSS: Without any success, but still - - -

PN209

MR WILLIAMS: Well perhaps, but in response to that I should place on record in fairness to my client that the matter was contentious as soon as my client became aware of it, and the application had not been provided to Bond University, although we accept that it was provided in compliance with the protocol in these proceedings.

PN210

JUSTICE ROSS: All right. I'm sure the other Full Bench is looking forward to that debate.

PN211

MR CHIN: I'm sure, your Honour.

PN212

JUSTICE ROSS: So if there's nothing further in relation to those three matters - or is there?

PN213

MR PILL: Sorry, your Honour, just a point of clarity if I may?

PN214

JUSTICE ROSS: Certainly.

PN215

MR PILL: There are a number of matters listed in the summaries which bear notes that they've been referred to the Full Bench. There are some matters that don't bear that notation but nevertheless are before the Full Bench. I just raise it from the point of view of - because there was some overlap between matters that were already the subject of substantive applications and matters that arose from the technical exposure drafts, I'd just seek some clarification or clarity on the record that those various matters are being dealt with by the Full Bench. Perhaps by way of example, your Honour, in the academic summary at item 21 - - -

PN216

JUSTICE ROSS: Yes, I think the best way of dealing with it is if you can write to me indicating which matters you believe are before them. I've certainly - when constituting the Bench I've made it explicit which matters they have before them. They're not at liberty to enlarge those matters. So if there's any issue of clarity, that a party believes that another matter is related or should be before it, then you

should write to me so that I can consider varying the direction that's been given to the Full Bench.

PN217

MR PILL: Yes, as your Honour - - -

PN218

JUSTICE ROSS: None of the specially constituted Full Benches are at large to consider any issue the parties want to raise. They've only been constituted for specific purposes, and those purposes or those issues are identified in the document that constitutes the Full Bench. So I only say that lest you run into a problem later of the power of the Full Bench to deal with certain related matters. It's best to clear that up at the beginning.

PN219

MR PILL: Yes, your Honour. Can I just indicate that this is not that situation; this was clearly the situation where there was a substantive matter before the Full Bench. The ambiguity arises because then there are some drafting issues within the clause that is the subject of that application.

PN220

JUSTICE ROSS: Right.

PN221

MR PILL: And it would make no sense, in my respectful view, for those issues to be split.

PN222

JUSTICE ROSS: No, that's probably right, but if they're dealing with the substantive claim, then wouldn't they deal with how that's expressed? If they grant the claim they'll deal with the other claims, give an effect - - -

PN223

MR PILL: Indeed, and the summary just doesn't reflect that at the moment.

PN224

JUSTICE ROSS: Yes, I'm not so much troubled by the summary anymore. I'm more concerned whether there's something else that needs to be referred to the Full Bench at this stage.

PN225

MR PILL: Yes, your Honour. Well perhaps we'll take your opportunity just to confirm amongst the parties and then hopefully on a consensus basis what's before the Full Bench.

PN226

JUSTICE ROSS: Yes, I think that would be useful before they go too much further down the track. Anything further?

PN227

MS GALE: I'm afraid so, your Honour. There's just one issue that's arisen in the course of the exposure draft discussions, which is not currently reflected in the

exposure drafts. We understand that there is a separate Full Bench dealing with annual leave issues.

PN228

JUSTICE ROSS: Yes, there is.

PN229

MS GALE: But the Academic Award and the Higher Education-General Staff-Award provisions in relation to the substitution of public holidays, the issue has arisen as to whether the current provisions are consistent with the NES in relation to the NES requires that in order for substitution to occur there be agreement with the relevant employee, and the current provisions don't provide for that. That's not an issue that's arisen out of any of the applications for parties and nor is it an issue that's been referred to the Full Bench in these proceedings. It does arise squarely out of examination of the exposure drafts, and we're not sure where that goes at this stage.

PN230

JUSTICE ROSS: It would go to the Group 3 Bench and we'll deal with it. We've dealt with other NES inconsistency matters on the way through in Group 2 as well.

PN231

MS GALE: Thank you.

PN232

JUSTICE ROSS: So probably - in your response to the revised exposure draft, if you can identify that issue there as one for determination by the Full Bench and we'll issue short directions about the filing of any submissions, et cetera. Is it likely that your proposal will be opposed?

PN233

MS GALE: We don't specifically have a proposal, your Honour; we have a question as to what should happen.

PN234

JUSTICE ROSS: That's fine.

PN235

MS GALE: We have already provided written submissions in relation to that and we'll forward them with our next response.

PN236

JUSTICE ROSS: All right.

PN237

MR PILL: We should flag, your Honour, it appears to be an issue that cuts across a number of awards, including outside education.

PN238

JUSTICE ROSS: Sure.

PN239

MR PILL: I'm not sure whether they're all Group 3 awards, and in fact I'm pretty confident that they would not be.

PN240

JUSTICE ROSS: Yes, but that's fine. If you raise it in relation to this award, we can undertake a search of all other awards and call all of them at the one time and deal with the issue in one go. There's nothing to stop the Group 3 Bench from doing that. Okay?

PN241

MS GALE: Thank you, your Honour.

PN242

JUSTICE ROSS: Anything further? No? Thanks very much. I'll adjourn.

ADJOURNED INDEFINITELY

[10.18 AM]