



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**VICE PRESIDENT HATCHER**

**s.156 - 4 yearly review of modern awards**

**Four yearly review of modern awards  
(AM2016/23)**

**Sydney**

**10.05 AM, FRIDAY, 17 MARCH 2017**

PN1

THE VICE PRESIDENT: I can take the appearances starting in Sydney. Mr Crawford, you appear for the AWU?

PN2

MR CRAWFORD: Seeking permission to appear, yes, your Honour, and Mr Duncalfe of the AWU is with me.

PN3

THE VICE PRESIDENT: Yes. Mr Aird, you appear for the CFMEU?

PN4

MR AIRD: Yes, thanks, your Honour.

PN5

THE VICE PRESIDENT: Ms Adler, you appear for the HIA?

PN6

MS ADLER: Yes, thank you.

PN7

THE VICE PRESIDENT: Ms Sostarko, you appear for the MBA?

PN8

MS SOSTARKO: (Indistinct)

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THE VICE PRESIDENT: Ms Valarie, you appear for the - what's the MPA? The Master Plumbers.

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MS VALARIE: Master Plumbers Association New South Wales.

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THE VICE PRESIDENT: Yes, and Ms Paul, you appear for the Ai Group?

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MS PAUL: Yes, your Honour.

PN13

MS VALARIE: Excuse me, your Honour, I also appear for Fire Protection Association of Australia.

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THE VICE PRESIDENT: Yes, thank you. Then in Melbourne, Ms Coate, you appear for the National Fire Industry Association?

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MS COATE: Yes, your Honour.

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THE VICE PRESIDENT: Mr Coffey, you appear for the CEPU?

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MR COFFEY: Yes, that's correct.

PN18

THE VICE PRESIDENT: I'm sorry, I'm just returning to Sydney. I missed two in Sydney. Mr Nguyen, you appear for the AMWU?

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MR NGUYEN: Yes, your Honour.

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THE VICE PRESIDENT: All right, and Mr Noble, you're with Mr Coffey are you for the CEPU?

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MR NOBLE: Mr Coffey's here in respect of the plumbing, your Honour, whereas I'm from the national office and it's broader. More of the electrical division really.

PN22

THE VICE PRESIDENT: All right. Mr Eberhard, you appear for the Master Plumbers Services?

PN23

MR EBERHARD: I do.

PN24

THE VICE PRESIDENT: In Brisbane, Ms Hogg, you appear for Australian Business Industrial and the New South Wales Business Chamber?

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MS HOGG: Yes, that's correct.

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THE VICE PRESIDENT: The purpose of today is to finalise the programming for the hearing to commence on 3 April. The parties should have hopefully available to them a document which the Commission has prepared just for reference purposes as to the issues in the proceedings and then we've received in response to a request from the Commission two proposals as to the conduct of the hearing of the matter.

PN27

The first is from the MBA dated 16 March and then the second is a response from the CFMEU. Ms Sostarko, can we start with your proposal. Do I take it that all the employer groups agree with this proposal?

PN28

MS SOSTARKO: Yes, it's my understanding that that's the case.

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THE VICE PRESIDENT: All right. I'm just going through this. The - - -

PN30

MS SOSTARKO: My apologies, the Master Plumbers Association may not necessarily be familiar with the correspondence or proposal that we've put forward. I'm happy to provide her with a copy of that if she wants to have a look. Here you go. There you go. If it assists the Commission - - -

PN31

MS PAUL: Sorry, your Honour. Your Honour, in the main, we've got no issues with this. The Ai Group just wishes to put forward a proposal of having final submissions - - -

PN32

THE VICE PRESIDENT: I'll hear from Ms Sostarko first. Yes, Ms Sostarko.

PN33

MS SOSTARKO: Thank you. Yes, in that email that the parties hopefully have available to them, we proposed what we considered to be a practical approach to programming for this matter. The approach that we've put forward is that we have sought that with the exception of brief opening submissions on the first day, we've proposed that substantive oral arguments be made on a topic by topic basis, sorry, during the second week but in the first week, witness evidence be heard.

PN34

We've put forward a very obviously loose proposal here about how that could potentially be done. The objective being that, certainly in our case, there's a number of claims that cross over as far as the witness evidence goes that witnesses would be required to potentially give evidence on across a number of issues and rather than dealing with the matter on a topic by topic basis, if we're able to hear that witness evidence as a collective, I suppose, in that first week, that would avoid some of the practical implications of having to call those witnesses back and forth if a topic approach was instead adopted. That was the proposal that we put forward.

PN35

THE VICE PRESIDENT: If we just pause there. Have you seen the CFMEU correspondence from Mr Aird?

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MS SOSTARKO: We have, we have seen that.

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THE VICE PRESIDENT: Just in relation to the evidence, he suggested six groupings of topics for the purpose of the evidence. Would that involve any cross over witnesses?

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MS SOSTARKO: In the grouping that he's proposed?

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THE VICE PRESIDENT: Yes, in the grouping that he's proposed.

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MS SOSTARKO: I would suggest - I'm just getting that in front of me, but yes, there would be witnesses that we would - our witnesses?

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THE VICE PRESIDENT: Your witnesses or any witnesses?

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MS SOSTARKO: Yes, they would have - there would be a cross over of issues that some of those witnesses could potentially need to give evidence on.

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THE VICE PRESIDENT: I think Mr Glover in particular was dealing with a number of issues.

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MS SOSTARKO: That's right. But also - - -

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THE VICE PRESIDENT: Mr Spence was, yes.

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MS SOSTARKO: - - - Mr Spence as well, that's correct.

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THE VICE PRESIDENT: All right. Yes, go on.

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MS SOSTARKO: Certainly I can see that - I'm aware that the CFMEU are not necessarily - I'm a little unclear actually as to whether or not they would support that approach and it's probably something that Mr Aird would need to put forward but certainly that would be our preference if it could be dealt with in this manner but we're obviously in the Commission's hands in that regard.

PN49

THE VICE PRESIDENT: Assuming we go down that path, would you, in co-operation with the other parties, be able to prepare for the first week a witness list which identifies the order of witnesses, ideally which day they're going to give evidence and if they can't physically be in Melbourne, what location they want to give their evidence from? I suppose that should be - sorry, I should say there's a step before that. Have the parties identified which witnesses are required for cross-examination? Has that occurred yet?

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MS SOSTARKO: Not at this stage, no.

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THE VICE PRESIDENT: I think there will need to be a first step that the parties will need to identify to each other who's required for cross-examination and then there will need to be a witness list prepared so that there's an order where convenient programming for witnesses.

PN52

MS SOSTARKO: If I could just add, when we put together this program, of course it's purely a draft, we've suggested that perhaps potentially that the union witnesses, if required, could appear in that first part of the week and the employer's in the second of that first week only in consideration of the availability of, for example, that the HIA's, or unavailability, that it - - -

PN53

THE VICE PRESIDENT: I was going to come back to that, all right.

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MS SOSTARKO: Yes, but of course, that's purely a draft at this stage.

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THE VICE PRESIDENT: Then in the submissions in the second week, you anticipate that all the evidence would be dealt with by the end of the first week?

PN56

MS SOSTARKO: That would be our intention, yes.

PN57

THE VICE PRESIDENT: Then if that's the case, I can't imagine the submissions are going to take the whole of the second week are they?

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MS SOSTARKO: I guess that's something that's difficult to predict at this stage but - - -

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THE VICE PRESIDENT: I couldn't possibly imagine that would be the case but I would have thought two days would be sufficient.

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MS SOSTARKO: Yes.

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THE VICE PRESIDENT: Anyway, you want to do it topic by topic in that order?

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MS SOSTARKO: Mm hm.

PN63

THE VICE PRESIDENT: Can I suggest to you that the Full Bench would prefer, if we're going to do it by topic by topic, to deal with it in the order that's identified in the document we've distributed in the broad categories. Would there be any difficulty with that? We've got common claims for all the awards, or for most of the awards, dealing with the redundancy scheme, is the first issue, travelling and living away from home is the second issue, overtime is the third, et cetera, et cetera.

PN64

MS SOSTARKO: The only question that I would have is that obviously the issue of allowances and the claim that we've made, which is the broader claim to do with work health safety and their interaction with the legislation with the allowances, so my apologies, I'm just having a look at this document just to see when that's provided for in the schedule.

PN65

THE VICE PRESIDENT: The allowances the second of the specific claims are for the Building Award.

PN66

MS SOSTARKO: Simply that our thought would be that that issue should be dealt with, as far as allowances go, at the outset, only that if, I think, that those submissions will very much have a bearing on any subsequent allowance issues that might flow depending on those submissions, providing that is the way that it is scheduled.

PN67

If the Commission would be minded to allow us to make those submissions on the work health safety issue first, then, to me, that would certainly - we would have no objection to the schedule that the Commission has put forward.

PN68

THE VICE PRESIDENT: Thank you. Anything further? Do you want to say anything about this CFMEU proposal to deal with objections to evidence in some preliminary fashion?

PN69

MS ADLER: Your Honour, we corresponded with the CFMEU this morning in relation to that point. I guess we don't quite see the logic in that. Our view is that the weight of the evidence, in any event, should have been dealt with in reply submissions and then the admissibility of that evidence is dealt with in the normal course of proceedings and then obviously tested on cross-examination.

PN70

A requirement for further written submissions, in our view anyway, seems unnecessary and particularly the timeframe provided to provide those submissions by next Wednesday also seemed impractical, so that was - thank you, your Honour.

PN71

THE VICE PRESIDENT: While you're standing up, Ms Adler, what was latest terms of your availability issues?

PN72

MS ADLER: 5 April is presenting some difficulties for me and for HIA more broadly. Some of our witnesses also will have difficulty appearing on 5 and 6 April.

PN73

THE VICE PRESIDENT: If the parties were to be directed to co-operatively put together a witness list, you could engage in that on the basis, for example, that your witnesses will be called on the 7th?

PN74

MS ADLER: Absolutely.

PN75

THE VICE PRESIDENT: Yes, all right. Do any of the other employer parties want to say anything about the programming of the matter? Ms Paul?

PN76

MS PAUL: Your Honour, just one comment, your Honour, in terms of our submission about (indistinct) planning wage, and I understand the notation about the status of (indistinct), and I understand that our submissions were accepted by our (indistinct) proposal weren't accepted by (indistinct), if that matter could be dealt with, from our view, if that matter is dealt with on the papers (indistinct) submissions in terms of that.

PN77

THE VICE PRESIDENT: Can you just identify where that is in the issue list.

PN78

MS PAUL: Item three, your Honour, in national (indistinct)

PN79

THE VICE PRESIDENT: Where did you say it was?

PN80

MS PAUL: Industry specific claims, your Honour, item three.

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THE VICE PRESIDENT: Specific claims.

PN82

MS PAUL: It's on the (indistinct) last thing on that section.

PN83

THE VICE PRESIDENT: Is that right, Mr Aird and other unions, that that's an agreed proposal?

PN84

MR AIRD: I apologise, your Honour, I'm not able to assist the Commission in answer to that question.

PN85

MR NGUYEN: Yes, and it's Mr Nguyen from the AMWU, it is correct only in relation to the change to 28.3(a) which is the variation to replace skill level in table with wage level.

PN86

THE VICE PRESIDENT: Yes, sorry, just I meant the AIG claim.



PN87

MR NGUYEN: Yes, only in relation to that claim. We don't oppose that particular.

PN88

THE VICE PRESIDENT: If that's done on the papers, then assuming we get confirmation of consent, you don't otherwise seek to appear in the proceedings?

PN89

MS PAUL: No, sorry, we intend to appear. We just wanted to take it off the list of issues to be dealt with, so we will be appearing on the other matters.

PN90

THE VICE PRESIDENT: Okay, all right. We don't need to worry too much about that if you're going to be there anyway. Thank you.

PN91

MS SOSTARKO: Your Honour, if I could just add one more point about the scheduling. I'll stand up if that might make it easier. We too would agree with the HIA in that the proposal that the CFMEU have put forward is not a course to which we are disposed. Obviously understanding that it does crystallise some of the considerations that the parties are facing but in saying that, we would certainly agree with those submissions about this issue that the HIA have just put forward.

PN92

I understand that there are some points in here that have been highlighted that the Commission requires some clarification on that are directed - - -

PN93

THE VICE PRESIDENT: Yes, if you can do that now, good. What I was going to say is I was going to give the parties an opportunity to identify, they can do it orally today but otherwise in writing, any errors or omissions in the document and so that we can finalise it and upload it to the website, so.

PN94

MS SOSTARKO: Okay.

PN95

THE VICE PRESIDENT: I know the parties have only just seen it so I didn't want to press you about that but is there anything you want to say about those matters now?

PN96

MS SOSTARKO: Certainly we would appreciate that opportunity to have a thorough review just to ensure that all that is reflected is covered off. I guess the two key points that are highlighted here that perhaps we can flag at this point in time though are our claims relating to the payment of wages clauses within the awards and the fact that those claims are potentially being dealt with in the common issue matter as well, which has been highlighted here, and certainly it would be our preference that those claims that we've actually made some issues

on in the common issue matter as well to cover off both, because it has been a little unclear as to how those matters are going to be determined.

PN97

It would be our preference that those issues be dealt with in the common issue matter but, as I said, if the Commission pleases, we'll provide that position in writing as well. A similar, I guess, position can be taken with regard to the national training wage schedule matter, which is also being heard as a common issues matter.

PN98

We've made submissions in that matter and, again, we support the Commission's approach that's proposed in that matter to have a standard schedule for all modern awards. Again, we would be most pleased to have that issue dealt with in that matter but, again, we'll put forward those submissions in writing, if the Commission pleases.

PN99

THE VICE PRESIDENT: Thank you.

PN100

MS SOSTARKO: Thank you, your Honour.

PN101

THE VICE PRESIDENT: Does any other employer party wish to say anything about the programming of the matter? No? All right, Mr Aird.

PN102

MR AIRD: Thank you, your Honour. I just want to let his Honour know that I think my phone is frozen at the moment, I can't turn it off so I apologise if it happens to ring. Your Honour, we felt it would be best to proceed in this matter by way of filing written submissions in regard to some of the witness evidence that's been submitted. It would help with the timetabling and process issues in this matter.

PN103

We had put that to the parties. Obviously we've heard today from the MBA and HIA about their position. I mean, the alternative, we would understand if those submissions are made at the commencement of the proceedings.

PN104

THE VICE PRESIDENT: You want evidence excluded altogether do you?

PN105

MR AIRD: We think much of the evidence that has been filed, and I'm not in a position to be specific at this stage, but we have obviously indicated a short filing of submissions to deal with that, that much of the evidence is, in effect, not probative and is submissions and should be dealt with as such and if some of that evidence is called as witness evidence, it leaves parties in a difficult position to, for example, cross-examine witnesses on opinion evidence and it should be more properly dealt with as submissions.

PN106

THE VICE PRESIDENT: Yes, all right. Why can't it be dealt with as a matter of weight in closing submissions?

PN107

MR AIRD: We are in the Commission's hand about how the evidence should be dealt with but certainly it would be our position of the CFMEU that we deal with the matter formally or alternatively, it would seek to be heard at the commencement of proceedings about evidence that's going to be objected to.

PN108

I mean, of course, we could then simply do it as each witness is brought on. Our preferred position is that we deal with this matter formally before the hearing takes place and evidence is formally called. Alternatively, that we would deal with it at the commencement of the proceedings. Of course - - -

PN109

THE VICE PRESIDENT: That's very unwieldy because we've got a Full Bench of five so that for you to put on submissions then the employers to respond then to get a Full Bench of five to make rulings and objections prior to the start of the hearing is probably not a very practical course. But in any event, alternatively, could you be - if there was a direction made for you simply to file a list of objections prior to the start of the hearing, you could do that?

PN110

MR AIRD: We would be in a position to do that, sir.

PN111

THE VICE PRESIDENT: All right. Opening submissions, you don't want to do that? I mean, you don't have to, but.

PN112

MR AIRD: We don't think they're necessary in this matter, no, sir. My instructions for today are that opening submissions are not necessary and would simply delay the matter getting into the nitty gritty of hearing the evidence.

PN113

THE VICE PRESIDENT: The only comment I make is that parties often assume that the members of the Bench are as fully alive to all the issues as the parties are, which is usually a false assumption, so opening submissions are often useful for the Full Bench to get a full understanding of the nature of the issues involved which sometimes doesn't jump out of the written submissions.

PN114

But in any event, no, if there's an opportunity to make opening submissions, if a party doesn't want to take advantage of the opportunity, that's a matter for them.

PN115

MR AIRD: Thank you, your Honour. Same in regard to - I just might briefly respond to the discussions that have taken place. We wouldn't raise any strenuous objections if your Honour and the Full Bench wanted to proceed on the basis of

the topic issues as outlined in the document. We would actually - we might seek some changes to that which my friend's seeking that WHS be dealt with as a upfront issue.

PN116

We think there's some technical issues around that which is better to be dealt with at the commencement of proceedings with the redundancy arrangements. We'd also seek issues that involve some greater technicality be dealt with first up and we'd like to add to that coverage issues which are - I'm actually changing the document that we outlined but at point four in the document, in our document that was emailed around this morning, and I apologise if I've missed some parties in outlining our position, we would propose that the coverage issues be dealt with, the WHS issues and the redundancy issues, at the commencement of proceedings. Otherwise, we would - - -

PN117

THE VICE PRESIDENT: Sorry, what do you mean commencement of the proceedings?

PN118

MR AIRD: Just that the topic issues, I think your Honour indicated - - -

PN119

THE VICE PRESIDENT: You're talking about the evidence now are we?

PN120

MR AIRD: Yes, apologies, your Honour, we're talking about how the evidence would be led and I understood from your Honour's comments this morning that you'd seek evidence be led in a consistent with the document that's been distributed in a - - -

PN121

THE VICE PRESIDENT: I was talking about submissions.

PN122

MR AIRD: Okay, I apologise. I - - -

PN123

THE VICE PRESIDENT: The problem with the evidence is that although a topic approach might be desirable, there are a number of witnesses whose evidence straddles a number of topics and find it difficult to work out how that's going to work without having to recall witnesses multiple times, which is obviously inconvenient to them.

PN124

MR AIRD: We're not suggesting that occur, your Honour. We are just simply suggesting that it's a matter of practicality if we can - and to maintain the flow of the hearing, that it be dealt with on a topic basis. If a witness is going to give evidence across the board, there would be a discussion and that would be appropriately timetabled.

PN125

We're not suggesting that a witness should appear and come back on multiple occasions but we're seeking to try and deal with this matter as conveniently as possible by a topic by topic basis and we would seek, with the evidence being led on that basis, that also closing submissions be led on that same basis and we are seeking - I mean, we've put a proposal around for topics - sorry, I misunderstood your Honour's earlier comments. I understood that to be an indication of how the evidence would be led.

PN126

THE VICE PRESIDENT: Anyway, so you want the WHS, allowances, redundancy and coverage issues to be the primary issues and then the rest to follow, is that the sum?

PN127

MR AIRD: No, that's correct, your Honour.

PN128

THE VICE PRESIDENT: All right. If I leave it to the parties to come up with a witness list which broadly corresponds with that order of topics but firstly, doesn't require any witness to be called more than once and secondly, accommodates the HIA's unavailability, is your client prepared to co-operate in that endeavour?

PN129

MR AIRD: We would be prepared to co-operate in that endeavour. I mean, all parties have got to obviously make contact with their witnesses and check availability and we'll do what we can to co-operate in that. Obviously we'd seek the parties try to be able to lead witness evidence where the topics are listed but we're aware people have got other things that they're called to do and there may be issues why people can't attend on a specific date and that may be the case for some of our witnesses as well.

PN130

THE VICE PRESIDENT: Do you anticipate that all the evidence can be done in the first week?

PN131

MR AIRD: We would anticipate that all the evidence could be done in the first week. Obviously at this point in time, we've said that we want to raise some objections to some of the evidence that's been admitted, that may have some impact on that, and we would agree with your Honour's comment and assessment earlier that closing submissions should be able to be concluded in the two day timeframe as well. Thank you, your Honour. Unless there's anything further.

PN132

THE VICE PRESIDENT: Mr Crawford. Sorry, I'll grant you permission to appear for the purpose of today.

PN133

MR CRAWFORD: Thank you, your Honour. I don't think I've got much to add, your Honour. I think if the direction is made for parties to identify the witnesses

that are required for cross-examination and also parts of the evidence that they object to, hopefully that will - well, I guess until we see all that, it's not going to make any progress in terms of finalising a witness list but hopefully when that is produced, that will help in providing a sensible path forward, so it seems like that's the direction it's heading and we're comfortable with that, your Honour.

PN134

THE VICE PRESIDENT: Thank you. Any other union representatives want to say anything? We'll just go back to you, Ms Sostarko. Just in terms of that order of issues - - -

PN135

MS SOSTARKO: The order put forward by the Commission?

PN136

THE VICE PRESIDENT: CFMEU.

PN137

MS SOSTARKO: By the CFMEU. Yes, your Honour.

PN138

THE VICE PRESIDENT: Are you broadly comfortable with that order which I thought was more or less consistent with what you said?

PN139

MS SOSTARKO: Certainly, your Honour, we wouldn't have any objection, for example, to the coverage issue being moved to the top of the list. I'm just having a look as how it compares with the proposal that we've put forward. Certainly, I can't imagine that we would have any objection to it.

PN140

Obviously, our primary position is that we simply didn't want to have to drag our witnesses back and forth but if the Commission's minded to take this approach where we hear witness evidence in that first week, then certainly we wouldn't object to the order of those topics that the union has proposed.

PN141

THE VICE PRESIDENT: What I had in mind was that the parties should, broadly speaking, stick to that order but can group between themselves as to what the order should be. No witness should have to come twice, I should make that clear, and availability of particular parties and witnesses need to be accommodated so it's a broad guide without being too restrictive.

PN142

MS SOSTARKO: Yes, your Honour. If we could seek just some time just to consider those and how those topics can converge in terms of everyone's availability and if the direction will be that we're to have those discussions out of session, we'd be quite happy to do that.

PN143

THE VICE PRESIDENT: What I have in mind is that by the close of business by Wednesday next week, that's the 22nd, the parties can firstly, communicate to the Commission any errors or omissions in the issues document and secondly, inform the Commission and each other which witnesses are required for cross-examination and then by close of business Wednesday the following week, that's the 29th, the parties prepare a witness list which identifies the order of witnesses and which days they're going to appear and their location. Does any party have any difficulty with that?

PN144

MS SOSTARKO: Just to clarify, your Honour, I noted earlier in your comments that you mentioned about appearing in Melbourne. The hearing's set down for Sydney though, is that correct?

PN145

THE VICE PRESIDENT: No.

PN146

MS SOSTARKO: My apologies.

PN147

THE VICE PRESIDENT: Yes, it's always been in Melbourne, Ms Sostarko.

PN148

MS SOSTARKO: Okay. If I have a look at the directions, I don't think that it actually says that but - - -

PN149

THE VICE PRESIDENT: I'm the only Sydney member on the Bench which is why we're sitting in Melbourne.

PN150

MS SOSTARKO: Okay, thank you.

PN151

THE VICE PRESIDENT: Is there any other issues with that broad timetable?

PN152

MR AIRD: Your Honour, just - - -

PN153

THE VICE PRESIDENT: I'm sorry, and Mr Aird, could you also, by the 29th, file a list of objections to evidence?

PN154

MR AIRD: I'm in his Honour's hands but we're happy to do so but I just wondered what the other parties - how they're going to deal with the evidence that might be contested as well but I mean we just seek that CFMEU file their objections.

PN155

THE VICE PRESIDENT: If any other party has any objection, or wishes to make any formal objections, submissions, evidence, they would also do so by the 29th.

PN156

MR AIRD: Thank you, your Honour.

PN157

THE VICE PRESIDENT: Yes, Ms Adler.

PN158

MS ADLER: Sorry, your Honour, just on those couple of points identified in your summary, the payment of wages claim and the national training wage schedule claim, I note that the hearing in relation to the payment of wages is on 23 March so I guess an indication of where those matters would be heard, particularly our claim which is very much a live issue in that common matter proceedings, would be helpful for the parties to know in which proceedings we should - - -

PN159

THE VICE PRESIDENT: Yes, that would be helpful I'm sure. I'll find that out.

PN160

MS ADLER: Thank you, your Honour.

PN161

THE VICE PRESIDENT: Yes. Does anybody else have any other issues? I thank you for attendance. What I'll anticipate is issuing in writing directions later today or at latest first thing on Monday which would allow for the proper programming of the matter but, again, liberty to apply is granted if some unanticipated procedural difficulty arises. I will now adjourn.

**ADJOURNED UNTIL MONDAY, 03 APRIL 2017**

**[10.36 AM]**