



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

**AG2023/1693
AG2023/1695**

**Sch. 3, Item 20A(4) - Application to extend default period for agreement-based
transitional instruments**

**Application by Drilled Foundations Contracting Pty Ltd
(AG2023/1693)**

**Application by Piled Foundations Pty Ltd
(AG2023/1695)**

Sydney

10.30 AM, FRIDAY, 16 JUNE 2023

PN1

JUSTICE HATCHER: I'll take appearances. Mr Elliot, do you appear for the applicant in each matter?

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MR A ELLIOT: I do, yes.

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JUSTICE HATCHER: And Mr Dunbar, you appear for the CFMMEU in both matters?

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MR P DUNBAR: If it pleases. Thank you, your Honour.

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JUSTICE HATCHER: Mr Elliot, can I start off dealing with a technical matter. Do you have your applications with you?

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MR ELLIOT: Yes, your Honour.

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JUSTICE HATCHER: In section 2 of the application, part 2.1. Can you just turn to that? Either application will do.

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MR ELLIOT: Yes.

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JUSTICE HATCHER: You see it says which application is being made, and it's the third one that's been crossed. Do you see that?

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MR ELLIOT: Yes.

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JUSTICE HATCHER: I think because these agreements, as I understand it, were made in 2007, that it's in fact - that they weren't in fact made during the bridging period there. In fact, agreement based transitional instruments. So it should have been the first box that should have been crossed.

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MR ELLIOT: Okay.

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JUSTICE HATCHER: So look, unless you object, I'll take both applications as being amended to cross the first box and not the third box. Just so we're in the correct category.

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MR ELLIOT: Okay, understood.

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JUSTICE HATCHER: Yes, all right. As I understand it, the applications are being advanced on the basis that employees would be better off if the agreements continued to apply than if the relevant modern award applied, is that correct?

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MR ELLIOT: Correct, your Honour. Yes.

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JUSTICE HATCHER: Yes, all right. Is there any particular matter you want to point to to support that conclusion?

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MR ELLIOT: I can provide documentation. We've got a summary here, that based on a standard 36 hour week, a labourer on the award would get a gross of \$1000 and 1 cent - \$1040 and 1 cents, but under our EBA agreement, it goes with a gross of \$1941.

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JUSTICE HATCHER: What rates of pay is that based on?

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MR ELLIOT: That's the labour of \$32.35 an hour, base rate.

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JUSTICE HATCHER: That's not rates that actually appear in the agreement, is it?

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MR ELLIOT: Within our agreement?

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JUSTICE HATCHER: Yes. The analysis which the legislation requires is between the terms of the agreement and the award, not - if you're paying higher than the agreement, that's not the way the analysis proceeds. I'm just trying to clarify whether the rates you're talking about are rates that we could find in the agreement, or there's some other rate.

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MR ELLIOT: No. They should be in our agreement, I believe. I can confirm that.

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JUSTICE HATCHER: See, I'm looking at the Drilled Foundations agreement, and there's rates of pay on page 35, and there they seem to be the rates of pay for which the agreement provides.

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MR ELLIOT: Okay. The summary I've got in front of me is just based on what we are currently paying. For example, a labourer or a dogman standard, compared to what we would be paying under the award.

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JUSTICE HATCHER: All right. In any event, can you - if you've got that sort of information, can you provide any information or submission you want to make as to why employees are better off to the Commission, so that we can understand the base upon which that proposition's advanced?

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MR ELLIOT: I can. On their basic gross take-home pay per week, they are considerably better off. With their superannuation, et cetera, et cetera, they're significantly better off under our EBA than under the award.

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JUSTICE HATCHER: Okay. Can you provide that analysis to the Commission, please, so that we can have a look at it.

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MR ELLIOT: Submit that documentation to you?

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JUSTICE HATCHER: Yes.

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MR ELLIOT: Yes, absolutely.

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JUSTICE HATCHER: Just submit whatever you want to say to prove the proposition that they're better off under both agreements than under the award.

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MR ELLIOT: Okay - - -

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JUSTICE HATCHER: If you've done a calculation or analysis, can you send that to us?

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MR ELLIOT: I can, yes. Absolutely.

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JUSTICE HATCHER: How long would it take you to do that?

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MR ELLIOT: I can get that out to you this morning.

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JUSTICE HATCHER: Okay. The usual procedure we adopt, is once you've sent that through, we have an internal team which does these sort of analyses. So unless you've got some objection, what I propose is that - and taking into account any information you provide to us, we'll undertake the analysis, send it back to you, and then you'll be given an opportunity to comment.

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MR ELLIOT: Understood.

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JUSTICE HATCHER: That process should take a couple of weeks, I think, so.

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MR ELLIOT: Okay, understood.

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JUSTICE HATCHER: All right. So Mr Dunbar, what's the CFMMEU's attitude to this application?

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MR DUNBAR: Your Honour, we would oppose this application. The agreement itself is, as you've said, 2007 Work Choices Agreement. From a basic analysis, and I have not done an in-depth analysis, but just from the face of things, it appears that the rates of pay that are written are less than what would be under the award, on a strict weighing of hourly rates, anyway. I do understand the agreement does have some other allowances and so forth, but in any event, the document itself is not contemporary. The CFMMEU would oppose it, and may go further and seek to terminate it. The issue that I've had when trying to deal with this matter, is the database system that we have doesn't actually go back to 2007, and I've spoken to some of the older fellows who work here, whose memories don't extend that far either. So I've had some trouble working out where it comes from, or who was actually involved in making it. On top of that, I would ask that - I actually don't have a copy of the application, only the listing. If I could be supplied with that and any analysis that the applicant may rely on, it may assist in determining that, at least, the CFMMEU's further opinion moving forward.

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JUSTICE HATCHER: All right. We'll ensure that's done. If there's no objection to course, we'll take as is. We'll ensure that the CFMMEU, which is a party to the agreement, gets a copy of the applications. Mr Elliot, you'll send in your - any information or submissions you want to provide to substantiate why the, as you say, the employees would be better off the agreement than under the award. We'll then undertake our internal Better Off Overall analysis, take into account what's been provided to us. When that's done, we'll send that to both parties, and then we'll give the parties an opportunity to comment, probably by bringing you back on when that occurs. Is that a suitable course of action?

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MR ELLIOT: Understood. That's fine by me, your Honour.

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JUSTICE HATCHER: Mr Elliot, do you have any information about the typical working patterns of employees? That is, how many hours they typically work?

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MR ELLIOT: 36 to 40 hour week. Potential overtime on the weekend, but we've got varying rates, overtime rates, crib, et cetera, to cover that.

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JUSTICE HATCHER: Yes, all right. If you could provide any information about that that might be of assistance, so that we can model it in accordance with, you know, what is a usual pattern of hours.

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MR ELLIOT: Understood, your Honour.

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JUSTICE HATCHER: Is there anything else anybody wishes to raise at this time?

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MR DUNBAR: No, your Honour.

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MR ELLIOT: (Indistinct)

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JUSTICE HATCHER: Okay. Thank you for your attendance. We'll now adjourn, which means you can simply disconnect from the call.

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MR ELLIOT: Sorry, could I - - -

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JUSTICE HATCHER: Sorry, yes.

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MR ELLIOT: Just one thing. When I submit this information, where do I submit it to?

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JUSTICE HATCHER: It's the email address for my chambers, which you should have, but if you need it, we'll send it to you again.

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MR ELLIOT: Okay. I should have that. Okay, thanks very much, your Honour.

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JUSTICE HATCHER: All right, thank you. We'll now adjourn.

ADJOURNED INDEFINITELY

[10.44 AM]