



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**VICE PRESIDENT ASBURY**

**AM2024/7**

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

**Application by Smith**  
**(AM2024/7)**

**Rail Industry Award 2020**

**Brisbane**

**10.00 AM, FRIDAY, 5 APRIL 2024**

**Continued from 23/02/24**

PN1

THE VICE PRESIDENT: Good morning. Could I just confirm the appearances, please. Perhaps I will just go through them. Mr [REDACTED], we have you?

PN2

MR [REDACTED]: Yes, I'm here.

PN3

THE VICE PRESIDENT: Mr [REDACTED]?

PN4

MR [REDACTED]: Yes, I'm present, thanks.

PN5

THE VICE PRESIDENT: All right. Mr [REDACTED]?

PN6

MR [REDACTED]: Yes, I am present. However, I have camera issues, so I am audio only, sorry.

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THE VICE PRESIDENT: All right. And Mr Smith?

PN8

MR A SMITH: I am present, Vice President.

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THE VICE PRESIDENT: All right. Thank you. We don't have an appearance, as I understand it, from [REDACTED], or [REDACTED], or [REDACTED], who is unable to attend. Okay, for the respondent - - -

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MR SMITH: Sorry, I thought you were asking that as a question, and I just said - - -

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THE VICE PRESIDENT: No, I am just observing it. Thank you. So for interested parties, as I understand, we have got you, Mr Ferguson, from Ai Group?

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MR B FERGUSON: Yes, with Ms Connor, initial R.

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THE VICE PRESIDENT: Thank you. And we have, from the RTBU, Mr Aldridge?

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MR K ALDRIDGE: Correct, Vice President.

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THE VICE PRESIDENT: From the ASU, Ms McKeown?

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MS M McKEOWN: Apologies, my microphone was muted.

PN17

THE VICE PRESIDENT: Thank you. So they are the interested parties at this point. We had a request for an observer, who hasn't entered an appearance, in any event, so we don't have to deal with that issue.

PN18

As I understand it, the point we have reached is that the applicant, or one of the applicants, has filed a draft order and his outline of submissions in relation to what is being sought. That's the case?

PN19

MR SMITH: Yes, that is the case.

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THE VICE PRESIDENT: Mr Ferguson, from your perspective, are you in a position now to get instructions from your members, given you've got a draft order?

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MR FERGUSON: Yes, Vice President, and I can foreshadow what the position is at the moment about the timetabling, if that's what you want to go to.

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THE VICE PRESIDENT: Yes.

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MR FERGUSON: But we do have something to consider. I think the short point is, as framed, we will be opposed to the application. There is an engaged group of members that we have been working with and I don't see that there is scope to reach any sort of agreement on it. I anticipate, on instructions, that those members are likely to be willing to assist us with the provision of evidence in response to it, so we will want to put submissions and evidence.

PN24

In terms of time frames, if nothing further is put by the applicants, we would ideally seek six weeks, and I will explain why. It is, firstly, because we have the group of members that we need to consult with, and rankled, to put it simply, and also because, we are obviously, as you would appreciate, juggling at the moment an extraordinary number of industry matters with the Annual Wage Review, the three streams of the Award Review, the delegates' right to proceedings, test cases around labour hire arrangements, and I anticipate proceedings around the right to disconnect, possibly guidelines around the (indistinct) provisions as well, without going further. Obviously not wanting to delay it, but it is placing some constraints on our ability to do this particularly quickly. So six weeks is what we would seek.

PN25

THE VICE PRESIDENT: At the end of that six weeks, you would be in a position to file an outline of submissions in response and statements from any witnesses that you intend to call?

PN26

MR FERGUSON: Yes. Thank you, Vice President.

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THE VICE PRESIDENT: From the perspective of the applicants, do all of the applicants support the position that has been put in terms of the draft order that has been filed and the outline of submissions? Do you all support that, or do some of you have a different view about how the award should look at the end of this proceeding?

PN28

MR SMITH: I advise, Vice President, the applicants are united in their agreement of the draft determination.

PN29

THE VICE PRESIDENT: All right. Well, if that's the case, what's your position now about how the matter should be identified because, at the moment, we are not publishing the name of any applicant, and I accept that you have got some difficulties with having names published, but is there one applicant who is prepared to be the named applicant?

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MR SMITH: Vice President, I am prepared to be the named applicant.

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THE VICE PRESIDENT: Would you be likely to be calling any evidence, Mr Smith?

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MR SMITH: Not at this time, no.

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THE VICE PRESIDENT: You might wait to see the employers' material and then have something to say in reply?

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MR SMITH: That is correct, Vice President.

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THE VICE PRESIDENT: So if the application is simply titled 'Smith and Others', is that going to be acceptable to the parties, the applicant parties?

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MR SMITH: Yes, that would be acceptable.

PN37

THE VICE PRESIDENT: Or the other option is that the other named applicants simply withdraw their applications because we've got an application, we don't

need five or six the same where we keep on having to list it and get everybody at the proceeding. That way, Mr Smith is the central person and the others can - anyone else can attend at any time as an interested person.

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MR SMITH: I am happy with that.

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THE VICE PRESIDENT: What's the position of the others. Mr [REDACTED]?

PN40

MR [REDACTED]: Yes, I'm happy to proceed down that path, Vice President.

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THE VICE PRESIDENT: All right. Mr [REDACTED]?

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MR [REDACTED]: Yes, I'm fine with that as well.

PN43

THE VICE PRESIDENT: Mr [REDACTED]?

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MR [REDACTED]: Yes, I agree with that as well, Vice President.

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THE VICE PRESIDENT: So what I will do is I will assume that, by agreeing to that, you are all withdrawing your applications on the basis that you are interested persons in respect of Mr Smith's application.

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SPEAKER: That is correct.

PN47

THE VICE PRESIDENT: All right. I will be corresponding with [REDACTED] and also with the other two, [REDACTED] and [REDACTED], and indicating to them that, unless they confirm by midday on Monday that they still seek to press their applications and they don't wish to simply be interested persons in Mr Smith's application, then I am going to consider that they have withdrawn their applications, because the logistics of this is getting difficult, so, henceforth, the proceedings will be application by Mr Smith in respect of a variation of the Rail Industry Award 2020.

PN48

Is there any objection to the six weeks from the applicant party? Mr Smith, do you object to the six weeks for AiG to provide response material?

PN49

MR SMITH: I do not object, Vice President.

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THE VICE PRESIDENT: Now what's the position with respect to the RTBU? Can I get what your view about all of this is?

PN51

MR ALDRIDGE: Vice President, the RTBU have reviewed the material and we are currently having internal discussions regarding this. The RTBU view is still that the work that the applicants are undertaking is in the technical and civil infrastructure stream. The RTBU has also not done a work value study, so it's difficult for us to offer an evidence-based opinion on some of the proposed variations. However, we confirm that, if the matter progresses, we do intend to file a submission.

PN52

THE VICE PRESIDENT: So are you likely to be opposing, or are you likely to file your own alternative position, or what will the RTBU's position be?

PN53

MR ALDRIDGE: I intend to file a submission and we will wait for the Ai Group's six weeks.

PN54

THE VICE PRESIDENT: Because if you're going to come forth with something different, then you are going to be an applicant as well and the Ai Group is going to want to respond to you, so really I think, Mr Aldridge, you need to get a position before Ai Group because you're either going to be an applicant and supporting the application - you're either going to be supporting the existing application, filing your own alternative position, or joining with Ai Group in opposing it. They are your three options, as I see it.

PN55

MR ALDRIDGE: Yes. I would have to take this up with our legal team.

PN56

THE VICE PRESIDENT: All right. Well, if I give you two weeks to do that, can you do that?

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MR ALDRIDGE: Yes, I will.

PN58

THE VICE PRESIDENT: Then, Mr Ferguson, your six weeks can start from then because you are going to have to go back and do it all again if the RTBU is going to come out with a different position.

PN59

MR FERGUSON: I appreciate the approach, Vice President. I think that's the sensible way forward.

PN60

If I may make one other observation: the applicants, or applicant, by supporting, appear to be suggesting they are not intending to file any evidentiary material in

the matter, which is entirely a matter for them and I understand that. We don't want to go around and around in a merry-go-round with this, so I think the directions should initially contemplate that, if they do want to file any evidence accompanying their submissions, they should do so in the first instance and the first round of submissions, if they are going to file further.

PN61

What I would like to avoid is a situation where we file material, which will be responsive to what sort of case they put on.

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THE VICE PRESIDENT: Yes.

PN63

MR FERGUSON: And then, in response, they turn around and file fresh evidence dealing with things and we have to do this all again, because, obviously, the nature of the evidentiary case and submissions we put on will be coloured by what material they put on in the first instance.

PN64

THE VICE PRESIDENT: Well, I am assuming they put on what they are going to put on, Mr Ferguson, and, if anything, the submissions and the evidence might be intertwined, and I would just be expecting that Mr Smith would adopt those, because, Mr Smith, you know, as I understand it, that's your case; what's there is your case?

PN65

MR SMITH: Yes.

PN66

THE VICE PRESIDENT: And the only thing that you will be doing, once AiG files its material, or potentially RTBU and perhaps ASU, is responding - sorry, Mr Smith, we can't hear you. I think you are on mute.

PN67

MR SMITH: I'm sorry, Vice President. I'm at work and I did not hear what you just said, sorry.

PN68

THE VICE PRESIDENT: Mr Smith, you are not performing rail safety work at the moment, are you, while you are in a hearing?

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MR SMITH: No, I am not. I'm on lunch.

PN70

THE VICE PRESIDENT: All right.

PN71

MR SMITH: I am trying to reach my car so I can provide this hearing with my full attention. I do apologise to all.

PN72

THE VICE PRESIDENT: That's okay, not a problem. How long is it going to take you to reach your car?

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MR SMITH: One minute.

PN74

THE VICE PRESIDENT: We will just stand the matter down for a minute while you do that, get comfortable, and then we will restart.

PN75

MR SMITH: Thank you very much, Vice President.

**SHORT ADJOURNMENT**

**[10.13 AM]**

**RESUMED**

**[10.18 PM]**

PN76

THE VICE PRESIDENT: Mr Smith, all I am trying to understand is what you have filed so far - so there's an outline of submissions with justification for the award variation that you're seeking, the draft determination?

PN77

MR SMITH: Yes, that's correct.

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THE VICE PRESIDENT: Then there is also some material that another person seems to have filed - just bear with me for one moment - which is a document filed by [REDACTED] that's got the list of tasks, procedures and requirements required by Safe Work and personnel?

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MR SMITH: Yes, that's correct.

PN80

THE VICE PRESIDENT: So is that all the material that you intend to rely on for this application? Are you going to want to put any more information - and, obviously, the Rail Safety Standards, which I think will be - you have also tendered some guidelines, ONRSR guidelines, identifying rail safety work under the RSNL?

PN81

MR SMITH: Yes, that's correct.

PN82

THE VICE PRESIDENT: You have referred to the document in the submissions, so is that material everything that you want to rely on for this variation, and then have the AiG respond to that, and then you can respond to what they say, but not call new evidence?

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MR SMITH: That is correct.

PN84

THE VICE PRESIDENT: So you understand this bundle of material is all the material that you will be relying on?

PN85

MR SMITH: I understand.

PN86

THE VICE PRESIDENT: Now is [REDACTED] going to be a witness and give evidence about the tasks and procedures, or are you just going to adopt his - because what you can do is you can say, 'I've made the submissions in the draft variation' and we can take that as being some evidence from you, to the extent it is, which Mr Ferguson can cross-examine you about, or any opposing party can, and you can also say, 'I have seen the list of tasks, procedures and requirements prepared by [REDACTED] and I adopt those and that's my evidence', or you can call [REDACTED] to talk about that and he can be a witness. So what would you prefer to do?

PN87

MR SMITH: I would like to call [REDACTED] as a witness at the appropriate time, thank you, Vice President.

PN88

THE VICE PRESIDENT: But all [REDACTED] will be doing is confirming the list of tasks and procedures and answering questions; he won't be able to give any evidence beyond what has been filed. Do you understand that?

PN89

MR SMITH: I understand.

PN90

THE VICE PRESIDENT: All right. So we are likely to have yourself and [REDACTED] as witnesses and, Mr Ferguson and other parties, the approach I will take is, given that the applicants are unrepresented, I will treat the submissions, to the extent they are evidence, as evidence, and you can assume that that's all the material that you are dealing with in the proceedings. Okay?

PN91

MR FERGUSON: Thank you, Vice President, that assists.

PN92

THE VICE PRESIDENT: Great. Having heard that, Mr Aldridge, from the RTBU's perspective, I would like, in two weeks, your position: we either support the application, we oppose the application, or here's our alternative proposition.

PN93

MR ALDRIDGE: We can manage that in two weeks.

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THE VICE PRESIDENT: All right. Thank you.

PN95

Ms McKeown, what's the position of the ASU in relation to all of this?

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MS McKEOWN: Thank you. May it please the Commission, the ASU's interest in this matter relates to our coverage. We do have coverage of members in certain public sector entities in a number of states. At this stage, I am here to really observe proceedings and try and understand the extent to which this may relate to our members. We have reviewed the transcripts of the previous hearing to try and get a better understanding of what the application is, but we haven't been able to  
- - -

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THE VICE PRESIDENT: (Indistinct), Ms McKeown.

PN98

MS McKEOWN: It was very interesting. So, look, we weren't able to establish from that whether we do have coverage, obviously, because we were unable to establish who the employer is, and that's critical to us in terms of, you know, understanding if this may have impact on our members. So, look - - -

PN99

THE VICE PRESIDENT: Not knowing who the employer is I don't think really affects you because you have got a draft determination and an application to vary the Rail Industry Award, so if you have members that are covered by the Rail Industry Award, then it will affect it, so, on that basis, I think you would be in a position to respond because, if they are public sector entities, they have either got an agreement that covers them or they don't.

PN100

MS McKEOWN: Yes.

PN101

THE VICE PRESIDENT: And, if they don't, then, arguably, this is the award that covers them.

PN102

MS McKEOWN: Yes.

PN103

THE VICE PRESIDENT: Mr Ferguson, just while I'm on that subject - and I'm sorry to be jumping around - is there any issue from AiG's perspective - and you might not be in a position to answer this - but is there any issue as to whether the award does currently cover rail safety workers? Do your members accept that the relevant modern award is the Rail Industry Award?

PN104

MR FERGUSON: I think that is not an entirely clear situation, to the extent of my discussions with my colleagues.

PN105

THE VICE PRESIDENT: All right.

PN106

MR FERGUSON: And there might be conflicting views, and that might be mixed up with precisely who these people are and the fact that they might be doing a particular set of tasks at one employer, but I'm not sure there's a view that every employer does things the same way.

PN107

THE VICE PRESIDENT: Well, I am assuming, if there's National Standards, they are all complying with it, but, in any event - - -

PN108

MR FERGUSON: I - yes.

PN109

THE VICE PRESIDENT: - - - you have got the application and the material, so your members can look at it and say, 'We either employ people that are doing those things or we don't.'

PN110

MR FERGUSON: Yes. I think that's right. I think one of the live issues is the extent to which they're a national - there is consistency nationally, but I can't take it much further now, Vice President.

PN111

THE VICE PRESIDENT: All right.

PN112

MR FERGUSON: We will work through that and we can respond to it as best we can.

PN113

THE VICE PRESIDENT: All right.

PN114

MR FERGUSON: But there will be a live issue, probably, at some point in the proceedings around revealing the nature - who the employer is, but I can think through that - - -

PN115

THE VICE PRESIDENT: I don't think that it really matters who the employer is, once you have got the draft determination, because what you can then do is go out to your membership and say, 'Here's what's proposed, and if any of you are in this sector, this is what's proposed' and they can respond to it.

PN116

MR FERGUSON: And I won't take it further now until I've had those discussions. It may well be the veracity of what's put now as evidence can only be tested once we know who their purported employer is, but I'm not pressing that now, Vice President, because we will work through that, and it may just go to weight.

PN117

THE VICE PRESIDENT: All right. Sorry, Ms McKeown - [REDACTED] and Mr Smith, that's an issue for you. I mean Mr Smith is wearing a logo shirt on the video, so I don't know that it's secret, but, in any event, [REDACTED] and Mr Smith, if you are going to be giving evidence, you are going to be asked who your employer is, so you might want to consider what your view is about that and whether, you know, how - if you want that to be kept confidential, it's arguably going to be pretty difficult, but I guess we can cross that bridge when we come to it.

PN118

However, Mr Ferguson, I'm not necessarily accepting that the identity of the employer matters because, once you have got the nature of the work that's, you know, said to be covered, and you've got National Standards that apply to the work, I don't think it's too difficult to handle it.

PN119

MR FERGUSON: I hear what you are saying and we will - we may not need to take that point, but I thought, in fairness to everyone, we should put it now.

PN120

THE VICE PRESIDENT: Yes. I understand. All right, thanks.

PN121

Ms McKeown, you wanted to say something. I'm sorry, I cut you off.

PN122

MS McKEOWN: No, no, that's okay. Look, I mean I think we're pretty comfortable with the timeline that's been discussed today. We just ask that - I mean I need to get further instructions as to how we might engage with this matter, and so we would be asking that any directions include liberty to apply.

PN123

THE VICE PRESIDENT: Well, how about if you had the same two weeks as the RTBU to get a position?

PN124

MS McKEOWN: Yes, agreed, thank you.

PN125

THE VICE PRESIDENT: All right. Because you're both - you're either going to be aligned interests with the applicants, aligned interests with the AiG, or your own interests - I'm not sure - or maybe you're going to have a different position than the RTBU and we're going to end up with three applications instead of one, but, in any event, I would like to know that within two weeks, please.

PN126

MS McKEOWN: Yes.

PN127

THE VICE PRESIDENT: All right. Once we get that material, then we will - so I am going to issue directions that require the RTBU and the ASU to put on their position and, you know, what their position is in relation to the application and outline of submissions, and then whether you want to participate further. If you are going to make your own application, then you need to let me know and we will relist the matter, but I would expect it to be made pretty quickly because, you know, the applicants have been waiting some time to have this matter dealt with.

PN128

MS McKEOWN: I appreciate the complexities of this matter, so we will make sure we meet that.

PN129

THE VICE PRESIDENT: All right. So I will issue those directions and, depending on what the position of the RTBU and the ASU is, we will relist the matter, but, otherwise, we will have the six weeks running from the end of the two weeks for the AiG and we will then relist the matter to determine how it's going to be heard, and where it's going to be heard.

PN130

Mr [REDACTED] and Mr Smith, where are you both located? What state?

PN131

[REDACTED]: New South Wales.

PN132

MR SMITH: New South Wales.

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THE VICE PRESIDENT: So would a hearing in Sydney be problematic, or would you be able to get to the city in Sydney for a hearing?

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MR SMITH: I could reach the hearing, no issues.

PN135

[REDACTED]: Yes, that would be fine with me.

PN136

THE VICE PRESIDENT: All right. Thanks for that. On that basis, I will adjourn and issue those directions. Thank you for your time today.

**ADJOURNED INDEFINITELY**

**[10.30 AM]**