

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

55257-1

VICE PRESIDENT LAWLER

C2011/4864

s.604 - Appeal of decisions

**Appeal by Shop, Distributive and Allied Employees Association
(C2011/4864)**

Melbourne

9.39AM, WEDNESDAY, 29 JUNE 2011

PN1

THE VICE PRESIDENT: Appearances, please. Mr Friend.

PN2

MR W. FRIEND: If your Honour pleases, I seek permission to appear with MR C. DOWLING for the SDA.

PN3

THE VICE PRESIDENT: Thank you.

PN4

MS J. DUFF: If your Honour pleases, I appear for the National Retail Association.

PN5

THE VICE PRESIDENT: Thank you, Ms Duff.

PN6

MR D. MAMMONE: Your Honour, Mammone, initial D., appearing for the Australian Chamber of Commerce and we're seeking permission to intervene to be heard as well.

PN7

THE VICE PRESIDENT: Thank you. Ms Mikkelsen.

PN8

MS S. MIKKELSEN: Your Honour, Mikkelsen, initial S., for the Department of Business and Innovation, appearing on behalf of the Victorian Minister for Employment and Industrial Relations.

PN9

THE VICE PRESIDENT: Thank you. Is there any objection to Mr Friend having permission to appear today? There being no objection, permission is granted. I think the criteria in section 596(2)(a) is met. Yes, Mr Friend.

PN10

MR FRIEND: Thank you, your Honour. Your Honour, I should make a couple of observations to start with. The decision in this matter was made on 20 June, last Monday week. His Honour proposed a draft determination on the last page. He left open a period for submissions in relation to that until last Monday, the 27th, but proposed an operative date for the determination of 1 July. That's this Friday. So in one sense it's an early appeal because we haven't got the final wording of the determination. Then in another sense we have got a decision which is going to operate so we could apply for a stay but we have to do it in the absence of knowing what his Honour will determine - - -

PN11

THE VICE PRESIDENT: What the final order will be.

PN12

MR FRIEND: Yes.

PN13

THE VICE PRESIDENT: Are you proposing that that round of submissions conclude so that the final order is issued or are you seeking a stay that will operate - - -

PN14

MR FRIEND: No, we have made our submissions and we await his Honour's decision. It would probably be helpful for everyone ultimately when the appeal is heard if we know what the draft determination is but it may have some bearing on the outcome, perhaps not, but at least it will be clearer.

PN15

THE VICE PRESIDENT: But does that mean that the practical consequence is that I should refrain from making any stay decision until after the determination is finalised?

PN16

MR FRIEND: Well, your Honour could hear the application. What we want to avoid is the determination issuing on 30 June, and there being no opportunity to make an application for a stay, and it commencing on 1 July.

PN17

THE VICE PRESIDENT: Yes. No, I understand that.

PN18

MR FRIEND: It may be a difficulty but it's one that I'm sure could be overcome but we would seek to be heard on the stay this morning.

PN19

THE VICE PRESIDENT: Yes.

PN20

MR FRIEND: The second preliminary matter I wanted to raise, your Honour, is a housekeeping matter. The appeal books look very voluminous and they shouldn't be. Only the first 10 pages of the second appeal book are relevant, the submissions of the Victorian government. The balance of volume 2 is comprised of submissions which were made by the ARA, which had an application as well but which withdrew it, and they were never tendered in evidence and never formed part of the proceedings. So at some stage, your Honour, I just indicate that - - -

PN21

THE VICE PRESIDENT: They're in the appeal book because?

PN22

MR FRIEND: That's a good question, your Honour. They're not in the index.

PN23

THE VICE PRESIDENT: Your client enjoys killing trees.

PN24

MR FRIEND: I think there was an error, your Honour, yes, but we will at some stage approach the tribunal and seek to uplift the appeal books within the next few days if that's convenient and just remove those pages, or if your Honour prefers, we can write and ask the tribunal to do so.

PN25

THE VICE PRESIDENT: Yes. No, I'm happy to do that. Does anyone say that these pages should be made? Nobody is speaking up. Appeal book pages 556 through to the end of volume, which is 1081, will be removed from appeal book 2.

PN26

MR FRIEND: Thank you, your Honour.

PN27

THE VICE PRESIDENT: If I can just - - -

PN28

MR FRIEND: It's 554, I think it starts, your Honour. I'm sorry.

PN29

THE VICE PRESIDENT: Yes, sorry, 554.

PN30

MR FRIEND: One can probably put those 10 pages in volume 1 and make your Honour's life a little easier.

PN31

THE VICE PRESIDENT: I'm going to do that, Mr Friend.

PN32

MR FRIEND: Thank you, your Honour.

PN33

THE VICE PRESIDENT: I'm going to amend the index to appeal book 1. Volume 2 item 23 will be pages 543 through to pages 553.

PN34

MR FRIEND: Thank you, your Honour.

PN35

THE VICE PRESIDENT: The reference to volume 2 in the appeal book will be removed. Yes.

PN36

MR FRIEND: Thank you, your Honour. Your Honour, we've taken the opportunity to prepare an outline of submissions, and I've got a copy with the cases referred to.

PN37

THE VICE PRESIDENT: The other parties have a copy of that, do they?

PN38

MR FRIEND: They're just coming, your Honour.

PN39

THE VICE PRESIDENT: Would the other parties like an adjournment for an opportunity to read those submissions?

PN40

MS DUFF: No, thank you, your Honour.

PN41

THE VICE PRESIDENT: Mr Mammone?

PN42

MR MAMMONE: No, thank you, your Honour.

PN43

MS MIKKELSEN: No, your Honour.

PN44

THE VICE PRESIDENT: That's fine. Yes, Mr Friend.

PN45

MR FRIEND: Your Honour, I'll go through them, but we've tried to set out, to speed things up, what we do rely on. You'll see the introduction deals with the background to the matter. Your Honour will be familiar with section 157 of the Act, which is the section under which the Vice President was proposing to make the order. The variation is predicated on satisfaction. The modern awards objectives are not being met. We accept that that means it's a discretionary decision and we accept therefore that we need to bring the appeal within the principles in *House v the King*.

PN46

THE VICE PRESIDENT: Yes.

PN47

MR FRIEND: Your Honour, the first case that we've got there, I won't read it to your Honour and everyone is familiar with it. It's the full bench decision, the last application by the NRA which dealt with the construction of 157. His Honour in an earlier decision had talked about it only being applicable in exceptional circumstances, and the full bench said, properly of course, that one just goes back to the words of the statute, so what we have to find is a necessity and a necessity to achieve the modern awards objective. The first basis on which we say his Honour erred is that he acted on a wrong principle. I take it your Honour has had an opportunity to read the decision?

PN48

THE VICE PRESIDENT: Yes.

PN49

MR FRIEND: I should not take your Honour through it.

PN50

THE VICE PRESIDENT: No, that's fine. I've read it, yes.

PN51

MR FRIEND: Can I take your Honour to paragraph 46. Your Honour will recall that his Honour noted that there was very little evidence, only indirect evidence of most of the relevant things, but at 46 he said that the issue of promoting social inclusion by increased workforce is a significant matter in the retail industry, so he rejected the proposition that the flexibility ground had been made out and turned to social inclusion. He found that granting the application in the form that it was made would disadvantage some people and advantage others, and at 48 he said that:

PN52

A modified variation to the award should be made which confines the proposed exception to the three-hour minimum engagement period to circumstances where a longer period of employment is not possible.

PN53

What his Honour appears to have done, your Honour, is to adopt the proposition that if there is a benefit in terms of social inclusion, then the grounds for the variation are made out. In other words, he's looked at the matter - - -

PN54

THE VICE PRESIDENT: He doesn't state that expressly, does he?

PN55

MR FRIEND: No, your Honour, no, but if one reads through the decision, that's the way he's approached it, because starting at 46, he says that that's a significant matter. He can't grant the application in the terms sought and then grant the narrower variation, but the whole focus seems to be on - if there is more social inclusion because more employment is available for some people, so long as others are not disadvantaged, then the variation should be granted.

PN56

THE VICE PRESIDENT: Yes.

PN57

MR FRIEND: The point we make is that the modern awards objective is a singular thing. It's not a question of looking at each of the things in section 134 and saying, "Does it help that or not?"

PN58

THE VICE PRESIDENT: That's obvious, but I don't think the Vice President's reasons assert that that is so either. I mean, he focuses on the aspects of the modern awards objective that are relevant on the evidence and submissions before him for the application.

PN59

MR FRIEND: Yes.

PN60

THE VICE PRESIDENT: Are you saying that if he finds that there are significant social inclusion benefits to the variation that he proposes, which is narrower than that proposed by the National Retail Association, and there are no disadvantages to other people that are sufficient to outweigh the social inclusion benefits, that's sufficient to ground a conclusion that the variation is necessary to achieve the modern awards objective. You say that that's just - - -

PN61

MR FRIEND: It's not sufficient because he's got to look at it more broadly. If one took that test and said, "Well, why not make the minimum half an hour? Why not - - -"

PN62

THE VICE PRESIDENT: When you say "look at it more broadly", he did, didn't he, in the sense that it was open to the parties to address arrangements by reference to each of the elements of the modern awards objective - - -

PN63

MR FRIEND: It was.

PN64

THE VICE PRESIDENT: - - - and they in fact did so.

PN65

MR FRIEND: Two predominantly.

PN66

THE VICE PRESIDENT: Yes.

PN67

MR FRIEND: Yes, but it's not elements, your Honour. 134 is - - -

PN68

THE VICE PRESIDENT: No, I appreciate what you're saying, but when one talks about the modern awards objective, it's a single objective that has a number of constituent elements, parts - use whatever adjective you think is appropriate - noun.

PN69

MR FRIEND: I think it's a bit different even to that, your Honour. 134 is:

PN70

FWA must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions -

PN71

and then taking into account those things, but the objective is the "fair and relevant minimum safety net of terms and conditions, taking into account" those matters.

PN72

THE VICE PRESIDENT: Yes.

PN73

MR FRIEND: That's the point we make. The approach that we think that his Honour has adopted is simply to take none of those matters and say, "If that is promoted by the variation, then it's necessary," whereas it needs to be looked at more broadly. The example that I was trying to put forward before - and it's in the outline - is that if you apply the logic that his Honour has applied to a reduction to anything, if it's going to promote any employment, then that's a good thing and it's necessary, but you've got to balance that against the existence of the minimum, a fair and relevant minimum, and that's what hasn't been done in this case.

PN74

THE VICE PRESIDENT: What hasn't been balanced? There's been no balancing of the increased employment opportunity benefits of the modified - - -

PN75

MR FRIEND: Yes.

PN76

THE VICE PRESIDENT: - - - variation. He has failed to balance that against what?

PN77

MR FRIEND: The concept of a fair and relevant minimum standard in relation to - - -

PN78

THE VICE PRESIDENT: But doesn't that - - -

PN79

MR FRIEND: What he's done is he's said, "Look, we've got to this point, and I find that there is some benefit in respect to some people perhaps," and if you look at the decision, when you go back to the actual findings of fact, there may be some benefit - is as far as it gets on the evidence. He doesn't find that anyone will in fact get a job or that there will be additional employment. There may be. "May" is the word that's used, but he hasn't gone back and taken a step back and said, "Well, now, should I? Is it necessary to make this change in order to meet the modern awards objective?" Rather, he's said, "Well, we've got one of the things to be taken into account in the modern awards objective. That will be promoted. Therefore I make the variation." We say that that's the wrong test.

PN80

THE VICE PRESIDENT: You agree that the ultimate correct question is whether the variation was necessary to achieve to modern awards objective?

PN81

MR FRIEND: Of course, your Honour.

PN82

THE VICE PRESIDENT: So you agree that he addressed the correct question.

PN83

MR FRIEND: But not in the correct way, because he said that's the question. If, your Honour, it might be said that because he said that's the question, he has somehow addressed it, then - - -

PN84

THE VICE PRESIDENT: No, I appreciate it's not enough to - - -

PN85

MR FRIEND: (indistinct)

PN86

THE VICE PRESIDENT: (indistinct) posing the correct question and then answering it the wrong way. I understand that.

PN87

MR FRIEND: Yes.

PN88

THE VICE PRESIDENT: Okay. Is that all you wanted to say on the question of error?

PN89

MR FRIEND: Your Honour, we've got no reasons, which is just what I was - your Honour has understood what I've said about that. There are passages about no evidence. You'll see from 22 to 31 of the outline, no-one gave evidence that there would be more employment, that there was a need for this to promote

employment, that there was a difficulty out in the community because people were being prevented from being employed. This is against a background, your Honour, where there's been a three-hour minimum in most of Australia for many, many years: four hours in Tasmania, two hours in Victoria for about 20 years. There was no evidence that there was a problem. The highest it got was a survey that the NRA had undertaken - - -

PN90

THE VICE PRESIDENT: You say - - -

PN91

MR FRIEND: (indistinct)

PN92

THE VICE PRESIDENT: You say that's the highest that it got.

PN93

MR FRIEND: Yes.

PN94

THE VICE PRESIDENT: That's a material piece of evidence that was open to the Vice President to place significant weight upon, wasn't it?

PN95

MR FRIEND: Not significant weight, your Honour, because it was roundly criticised.

PN96

THE VICE PRESIDENT: Mr Friend, do you agree that a practical approach has got to be brought to the determination of the issues of the sort that are raised in this case?

PN97

MR FRIEND: Of course, your Honour.

PN98

THE VICE PRESIDENT: Yes. It's inherently difficult to call evidence about the particular problem. It's inherently difficult. You call evidence from one, two, three, four, 10 individuals and the union would turn around and say, "Well, that's just 10 individuals. They're not representative of anything."

PN99

MR FRIEND: I understand that, your Honour.

PN100

THE VICE PRESIDENT: Then survey evidence is called and then you say, "Well, gee, you know, there's A, B, C, D, E, F and G wrong with the survey." It's a very difficult factual problem to prove, which is why I'm just wondering whether or not you can be so dismissive of the survey in relation to a no-evidence argument, not a weak-evidence argument, not a, you know, poor-evidence argument, a no-evidence argument.

PN101

MR FRIEND: Your Honour, there are surveys and there are surveys. Obviously you can't call everyone. I accept that. You can call someone. You can say there is a problem in the previous case. Witnesses were called, suggesting that there

might be a problem. The case where the full bench on appeal said a weak evidentiary case is harder to imagine - and in relation to the case on students, it said it was not much better.

PN102

THE VICE PRESIDENT: Yes.

PN103

MR FRIEND: Here we have a survey which is roundly criticised by an expert, and the union presented two experts who prepared witness statements of considerable complexity based on considerable research about whether there was a problem and what the nature and extent of it might have been, and against that, someone from the NRA rang people up. There was no record of the question asked, no record in relation to how the survey was conducted. We asked for that and it wasn't given.

PN104

THE VICE PRESIDENT: But, Mr Friend, it's still evidence. You can't just say, "It's not evidence and therefore we've got a no-evidence case. We'll just put that survey aside, because although it's weak evidence, that doesn't help us in relation to a no-evidence argument." I remember addressing the High Court in a refugee case.

PN105

MR FRIEND: Yes.

PN106

THE VICE PRESIDENT: My Sikh client, they accepted he'd been tortured three times, that he'd had chillies stuck up his rectum and he'd had things stuck under his fingernails. There was one solitary document from the Canadian Refugee Board who said Sikhs don't have a problem going back to the Punjab at the moment. That one solitary sheet of paper was enough to cause that refugee to lose his case.

PN107

MR FRIEND: Yes.

PN108

THE VICE PRESIDENT: Notwithstanding the vast quantity of material in respect of people who have been mistreated upon return.

PN109

MR FRIEND: I understand what your Honour is saying.

PN110

THE VICE PRESIDENT: I think Gleeson J was able to say (indistinct) there is some evidence that the tribunal can rely upon and there is - - -

PN111

MR FRIEND: Yes, the evidence - - -

PN112

THE VICE PRESIDENT: I wouldn't have relied upon it. I don't think Gleeson CJ would have relied upon it.

PN113

MR FRIEND: What we submit, your Honour, is the evidence has to be probative. It can't be evidence which should be given no probative value and that's the way we put it and that's on the basis of what is put and it's quoted in our outline by Dr Campbell. The NRA survey is so poorly organised and presented it does not merit the title "a survey". It's a series of notes drawn from conversations with NRA members. Your Honour, how does that get to the point of justifying a proposition that it is necessary to vary the award to achieve the modern award's objective? That's the way we put that.

PN114

THE VICE PRESIDENT: You say it's so weak and so poor and so flawed that has in truth no probative value?

PN115

MR FRIEND: That's right, your Honour. Obviously it will take some time to develop that on the appeal. Your Honour, there's a discrimination ground, I am not going to develop that before you today, it's actually quite a complex issue. It wasn't dealt with in the decision but we will be relying on that. The other issue that obviously needs to be considered is balance of convenience putting it that way. Your Honour, we would be prepared to cooperate in as earlier hearing of the appeal as the tribunal can accommodate. What we would hope would not happen is that there would be a change and some people would be employed and some people perhaps have their hours reduced or lose their jobs and then if we succeeded on the appeal a good deal of that couldn't be undone. One of the things - - -

PN116

THE VICE PRESIDENT: The people who are going to have their hours reduced or lose their jobs are who?

PN117

MR FRIEND: People who are currently employed who might be replaced by students on one-and-a-half-hour shifts. Now, your Honour, the draft determination currently provides that the employer can employ a student on a shift no shorter than one and a half hours if that's needed for the operational requirements of the employer. If you turn to the decision - now, obviously we have complained about this in terms of our submissions about what should be in the draft determination but at the moment one of the conditions is employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee.

PN118

The operational requirements means everything - profit - they only need someone for one and a half hours. There may well be a possibility to work for three hours but we're concerned about the sorts of changes that will occur in that case, that people now working three hours are being told that they're down to one and a half. I am talking about students, your Honour, on about \$7 an hour. Those are my submissions.

PN119

THE VICE PRESIDENT: Thank you, Mr Friend. Yes, Ms Duff?

PN120

MS DUFF: Thank you, your Honour. NRA opposes the stay application that's before you this morning. You will be aware that the issues the subject of Watson VP's decision have been canvassed extensively in several decisions of this tribunal. It is our submission that it was reasonably open to his Honour to exercise his discretion to make the findings that he did on the evidentiary material before the tribunal and we say that there's no evidence that his Honour's exercise of discretion miscarried. We would submit that the balance of convenience does not favour granting of the stay.

PN121

The application by the NRA the subject of Watson VP's decision was made on 8 October 2010. Pending the outcome of the appeal the NRA and its members ought to be entitled to the benefits flowing from Watson VP's decision including the enhanced employment opportunities for school students, the promotion of social inclusion through workforce participation, flexible work practices and the reduction of the unnecessary regulation on business. That is the NRA's position, your Honour.

PN122

THE VICE PRESIDENT: Yes, Mr Mammone?

PN123

MR MAMMONE: Your Honour, very brief submissions. ACCI supports the submissions of the NRA in this matter. We have been involved early in proceedings and continue to be involved. In this matter we also believe that the balance of convenience does not lie with the SDA, it's put - - -

PN124

THE VICE PRESIDENT: Well, do you accept that there was some evidence called on the SDA side as to the range of adverse consequences that might flow from a reduction or elimination of the minimum in respect to students? I mean I thought that what Mr Friend put by way of submission was stuff that was covered in the material letter and filed by the SDA, that full-time employees can be displaced - replacement by part-time student employees who are much cheaper to employ and therefore there may in fact be adverse consequences for individuals.

PN125

MR MAMMONE: Without looking at the - - -

PN126

THE VICE PRESIDENT: See, at the moment Mr Friend has said balance of convenience favours a stay and has articulated a specific reason. Ms Duff has essentially asserted that the balance of convenience doesn't favour a stay or doesn't grapple with Mr Friend's reason (indistinct) you seem to be going down the same path, and I'm inviting either or both of you to say what is wrong with Mr Friend's contention other than there's no final or finding of fact on an application of this sort but you say that that's - he is just out of school in saying that?

PN127

MR MAMMONE: No, he is entitled to put the argument. The way we would put it is that all of those matters were of contention before his Honour Watson VP, the benefits of granting an application in the terms sought by the NRA and the

disadvantages as put by the SDA in that matter were all agitated, it was all the subject of submissions, written and oral. In our view, Watson VP did not err in exercising his discretion. That's on the matters of appealable error. But in terms of the disadvantage that the SDA says would ensue if this stay was not granted, we would say there's disadvantage to those individuals that remain unemployed either for their full shifts that they were currently working prior to the modern award operating or thereafter. It's a concern to the chamber that people that wish to work are prohibited from working - and we're only talking about a very defined category of employees here. This is not a general - - -

PN128

THE VICE PRESIDENT: Yes.

PN129

MR MAMMONE: So it was confined to a small group of employees. We did say - - -

PN130

THE VICE PRESIDENT: School students, it's between that 3 pm and 6.30 pm - - -

PN131

MR MAMMONE: Very narrow circumstances. It wasn't pointed out by any party I don't think but - we would just take your Honour to the paragraph in Watson VP's decision which was the final - paragraph 50. His Honour did say that - the last sentence - in terms of the two-yearly review under the transitional provisions of the act, "That review may provide an opportunity to review the operation of the revised clause I had approved in this decision." So Watson VP was aware that there would be a period of time to review the operation if there were any adverse impacts in terms of the final determination that would be issued by his Honour. So we reiterate that we see more negative impact if the - on school students if the stay is granted. I don't have any further instructions on that, your Honour.

PN132

THE VICE PRESIDENT: No, that's fine, thank you, Mr Mammone.

PN133

MR MAMMONE: Thank you.

PN134

THE VICE PRESIDENT: Ms Mikkelsen?

PN135

MS MIKKELSEN: Your Honour, the government does not make any submissions on the stay application.

PN136

THE VICE PRESIDENT: Thank you. Is there anything you want to say in reply, Mr Friend?

PN137

MR FRIEND: No, your Honour.

PN138

THE VICE PRESIDENT: I am just going to adjourn for 10 minutes and I'll resume after that.

<SHORT ADJOURNMENT [10.10AM]

<RESUMED [10.44AM]

PN139

THE VICE PRESIDENT: This is an application pursuant to section 606 of the Fair Work Act 2009 for a stay of a decision of Watson VP given on 20 June 2011. The decision was to vary the General Retail Industry Award 2010 to vary the minimum engagement clause in that award, to provide for engagements of secondary school students between the hours of 3.00 and 6.30 pm on a day which they're required to attend school for a period of one and a half hours. The Vice President has proposed a determination in the following terms: Clause 13.4 is varied by the addition of the following words at the end of the clause:

PN140

Provide that the minimum engagement period for an employee will be one hour and 30 minutes if all of the following circumstances apply (a) the employee is a full-time secondary school student and (b) the employee is engaged to work between the hours of 3 pm and 6.30 pm on a day which they are required to attend school, and (c) the employee agrees to work and a parent or a guardian of the employee agrees to allow the employee to work a shorter period than three hours and (d) employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee.

PN141

The Vice President has proposed that the variation take effect from 1 July and will receive submissions in relation to the terms of the proposed variation. The test to be applied in relation to an application for a stay are well established. The applicant for the stay must demonstrate an arguable case both on the appeal and on the question of permission to appeal, and the balance of convenience must favour the granting of a stay. Turning to the first of those requirements, I'm satisfied that there was a strongly arguable case for permission to appeal given the obvious public interest considerations that arise in relation to an award of such broad application as the General Retail Industry Award 2010.

PN142

So far as the prospects of success or the arguable case in relation to the substantive appeal is concerned, Mr Friend has developed an argument to the effect that the Vice President has misconceived the proper application of the modern award's objective for the purposes of the test in section 157 of the Act. I remain to be persuaded that there's a strongly arguable case of error in relation to that aspect of the matter. However, Mr Friend's argument cannot be dismissed as obviously unarguable. I find that it is an arguable case, albeit one that is not, as it presently strikes me, particularly strong.

PN143

So far as the balance of convenience is concerned, the appellant contends that there is a real risk that some non-secondary school student employees may be

prejudiced and indeed prejudiced in a medial fashion because they will be displaced from their employment by less expensive school students. That was a matter of assertion, and I was not taken to any evidence on the stay application in support of that particular proposition, albeit it's clear that there is, amongst the evidence led by the appellant at first instance, material that suggests that that may be one of the outcomes. I note that the Vice President acknowledged the possibility of adverse consequences flowing to other employees, but he concluded that it was not clear what impact may flow to other employees from such a change.

PN144

It seems to me that where the decision that is the subject of the appeal relates to an amendment or variation to a modern award, that there is a public interest that feeds into the balance of convenience and considerations in avoiding a situation where a modern award is varied for a short period only to have that variation reversed as a result of the successful appeal. It seems to me that the balance of convenience favours if only slightly the grant of a stay in this case, provided that the appeal can be dealt with expeditiously by the tribunal and I'm confident that that can occur in this case.

PN145

In the exercise of my discretion and on the fine balance, I'm satisfied that a stay should be ordered, but there should be expedition in the hearing and determination of the appeal pursuant to section 606. I order that the decision of Watson VP in matter number (2011) FWA 3777 be stayed until further order of the tribunal and until the appeal, whichever occurs earlier, a formal stay of that effect will issue. Now, in relation to the programming of the appeal, Mr Friend, are you retained to argue the appeal?

PN146

MR FRIEND: Yes.

PN147

THE VICE PRESIDENT: I assume you are.

PN148

MR FRIEND: I assume so, your Honour, yes.

PN149

THE VICE PRESIDENT: Do you have availability problems in the week commencing 17 July?

PN150

MR FRIEND: The 17th is a Sunday, your Honour, but - - -

PN151

THE VICE PRESIDENT: I'm sorry, the week commencing Monday the 18th.

PN152

MR FRIEND: The 18th? No, your Honour. I can be available in that week at the moment.

PN153

THE VICE PRESIDENT: How are you placed at the end of next week?

PN154

MR FRIEND: Not good, your Honour. Next week? No, I'm overseas at the end of next week.

PN155

THE VICE PRESIDENT: Are there any availability issues so far as the other parties are concerned?

PN156

MS DUFF: No, your Honour.

PN157

THE VICE PRESIDENT: Mr Mammone?

PN158

MR MAMMONE: I don't have my full diary, but no, I don't anticipate having one.

PN159

THE VICE PRESIDENT: All right. Ms Mikkelsen, are you - - -

PN160

MS MIKKELSEN: We're in the tribunal's hands.

PN161

THE VICE PRESIDENT: All right. How are you placed on 14 July, Mr Friend?

PN162

MR FRIEND: I have another matter at the tribunal.

PN163

THE VICE PRESIDENT: Not the (indistinct) matter?

PN164

MR FRIEND: No, your Honour. It's the Police Association matter.

PN165

THE VICE PRESIDENT: The 13th?

PN166

MR FRIEND: The 13th I - - -

PN167

THE VICE PRESIDENT: Are you like to be appearing on the 13th (indistinct) on that day?

PN168

MR FRIEND: No. It's not the (indistinct) but I have been - I was asked for dates about mediations and I was told that the 13th is the only one the parties agree on for a mediation on Brisbane, or that the parties are all available for mediation in Brisbane but they haven't actually fixed it, so that's why I hesitate.

PN169

THE VICE PRESIDENT: What about the 15th?

PN170

MR FRIEND: 15th I'm available, your Honour.

PN171

THE VICE PRESIDENT: Well, I won't list it now because I need to - the President is absent on leave at the moment (indistinct) because there are some housekeeping matters internally to the tribunal that need to be considered because we already have a full bench assembled to deal with the two weeks appearing (indistinct) applications by (indistinct) originally - - -

PN172

MR FRIEND: Yes, I remember those ones.

PN173

THE VICE PRESIDENT: (indistinct) awards being reduced to a quite smaller amount, but it's still the same territory, albeit broader than the application in this case, but I think what needs to be avoided like the plague is any possibility of full benches adopting inconsistent approaches. So there's going to be a need to have some thinking about how best to deal with this, but suffice it to say one of those days that I've mentioned is a date that's likely to be listed.

PN174

MR FRIEND: Thank you.

PN175

THE VICE PRESIDENT: The tribunal is adjourned.

<ADJOURNED INDEFINITELY

[10.57AM]