



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
COMMISSIONER SAUNDERS**

C2013/5139 C2013/6333

s.302 - Application for an equal remuneration order

**Independent Education Union of Australia
and**

**Commonwealth of Australia as represented by the Department of Education,
Employment and Workplace Relations; Australian Chamber of Commerce and
Industry; Australian Childcare Centres Association; Australian Community Children's
Services; Australian Community Services Employers Association, Union of Employers;
Australian Federation of Employers and Industries; Association of Independent Schools
of South Australia; The Association of Independent Schools of Tasmania Incorporated;
Association of Independent Schools of Western Australia (Inc); Association of Quality
Child Care Centres of NSW Inc; Australian Childcare Alliance Victoria; Childcare
Queensland Inc; Childcare South Australia; Child Care Association of Western
Australia; Community Connections Solutions Australia; Australian Municipal,
Administrative, Clerical and Services Union-New South Wales and ACT (Services)
Branch; NSW Business Chamber Limited; The Association of Independent Schools of
New South Wales Limited; Catholic Commission for Employment Relations
(C2013/6333)**

Sydney

11.06 AM, WEDNESDAY, 13 SEPTEMBER 2017

PN1

VICE PRESIDENT HATCHER: I'll take appearances starting in Sydney. Mr Taylor you appear with Mr Wright for the IEU?

PN2

MR I TAYLOR: If it please.

PN3

VICE PRESIDENT HATCHER: Mr Arndt, you appear for the Australian Childcare Alliance, ABI and others?

PN4

MR J ARNDT: That's right, your Honour.

PN5

VICE PRESIDENT HATCHER: Ms McDonald, you appear for the Australian Federation of Employers and Industries?

PN6

MS J MCDONALD: If it please.

PN7

VICE PRESIDENT HATCHER: Mr Gunn, you appear for Community Connections Solutions Australia?

PN8

MR J GUNN: If it please the Commission.

PN9

VICE PRESIDENT HATCHER: Is that all the appearances in Sydney? In Melbourne, Mr Borenstein, you appear with Mr Dowling for the United Voice and the Australian Education Union?

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MR H BORENSTEIN: I do, your Honour.

PN11

VICE PRESIDENT HATCHER: In Canberra, Ms Masters, you're from the Australian Government Solicitor appearing for whom?

PN12

MS V MASTERS: Appearing for the Commonwealth. Thank you, your Honour.

PN13

VICE PRESIDENT HATCHER: Yes, for the Commonwealth. Thank you. We might start, Mr Borenstein, with the United Voice application in 5139 of 2013. I note that United Voice has sent in some proposed directions earlier today. Have the other parties seen those?

PN14

MR BORENSTEIN: I believe they've been distributed to all of the people in our matter, your Honour.

PN15

VICE PRESIDENT HATCHER: Yes, all right.

PN16

MR ARNDT: We have seen them, your Honour.

PN17

VICE PRESIDENT HATCHER: Yes. Thank you. What do you want to say about those, Mr Borenstein?

PN18

MR BORENSTEIN: Your Honour, can I say firstly that in relation to item 2, which is the time for filing answering material, that was developed after discussion with certain of the employer parties who wanted to have the option of filing evidentiary material and who nominated a period of eight weeks that that provides for.

PN19

In relation to the following order we are a little bit in the dark because we are not clear of the extent and nature of the evidentiary material that we will be receiving from the various parties who will, we anticipate, want to file material in response, and given that that period expires late in the year, and given the problems of getting instructions and evidence over January we have nominated a figure in February which gives, in realistic terms, some four to five weeks to get the reply material.

PN20

Can I say that that was developed in the context of the discussions, as I say, that our instructors had persons responding to the application. On further reflection overnight, your Honour, and having regard in particular to what the Full Bench said in the decision of 6 July, and in particular the caution that was expressed, particularly at paragraph 21 about the possible consequences of a preliminary matter coming to involve large amounts of evidentiary material and the impact that that would have on the view of the Full Bench about dealing with this matter as a preliminary matter we thought that the directions might be improved if the date in the first order, which is the date for our filing of the materials - - -

PN21

VICE PRESIDENT HATCHER: Sorry, I didn't catch that, Mr Borenstein. What was that again?

PN22

MR BORENSTEIN: I'm sorry, I was saying that we thought that the directions might be improved if, in relation to the first item, which is the date for our filing of material, that date were brought forward by a week to 11 October.

PN23

VICE PRESIDENT HATCHER: Yes.

PN24

MR BORENSTEIN: Then consequentially if the Commission is prepared to allow the opposing parties the period they wish the date in order number 2 would be brought forward by seven days to 6 December, and then we had proposed that perhaps on 13 December, or some date around there, there might be a report back to the Commission because, at that time, we would be in a position to see the scope of the evidentiary material that the respondent parties wish to adduce, and the Commission would also see it, and decision could then be made about what, if anything, would flow from that, including the amount of time that the unions would require to answer it, but also whether the Commission was still of the view that it was a matter suitable to be dealt with as a preliminary matter.

PN25

VICE PRESIDENT HATCHER: Yes, all right. I'll come to the employer parties in a while, and I appreciate what you've said, Mr Borenstein, that the input from the employers has caused the draft directions to have reference to evidence, but I must say that we thought it was made reasonably clear on our 6 July decision that we did envisage that the hearing of the preliminary question, which we expressed in paragraph 25, would involve the hearing of any evidence except perhaps some establishment of some formal background matters. Do you want to say anything about that?

PN26

MR BORENSTEIN: Yes. That was our initial approach, your Honour, but, as I've said, and as your Honour's noted, these directions reflect the feedback we've had from the respondent parties.

PN27

VICE PRESIDENT HATCHER: Mr Borenstein, if the directions didn't accommodate the filing of evidence except for some formal background matters is there any reason from your client's perspective why the matter could not be heard in December this year?

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MR BORENSTEIN: We would think that the directions could be significantly shortened in a way that could well accommodate that, your Honour.

PN29

VICE PRESIDENT HATCHER: Thank you. Who would like to go next? Mr Arndt?

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MR ARNDT: Your Honour, as was indicated, the directions as filed earlier in the week were, as I understood, agreed, but in light of what's just been said I can't see any difficulty in moving the dates a week forward. I need just to establish, and perhaps to take instructions in relation to the evidentiary question. I personally wasn't involved in the discussions in relation to the employer side introduction of that particular element to order 2, and so I quite frankly can't speak to the necessity of that on my feet.

PN31

VICE PRESIDENT HATCHER: How long do you need to get those instructions? We've convened this for the Full Bench with some notice to the parties, and we intend to make the directions arising out of today. So how long would you need?

PN32

MR ARNDT: Five minutes.

PN33

VICE PRESIDENT HATCHER: I don't want to confine you that much. If you can get it within some reasonable amount of time we'll adjourn to allow it to occur.

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MR ARNDT: Thank you, your Honour.

PN35

VICE PRESIDENT HATCHER: But I might just get the position of the other parties before we do that. Ms McDonald?

PN36

MS MCDONALD: Your Honour, AFEI received those proposed directions yesterday afternoon, so we have not had the chance to form a view in regards to evidentiary content as well, so we would also seek some time to gain some instructions on that point. Thank you.

PN37

VICE PRESIDENT HATCHER: Thank you. Mr Gunn?

PN38

MR GUNN: Your Honour, we'd be able to adjust to those new dates that have been given by the unions, and in regards to being able to provide our responses in December at a hearing we'd be able to meet that timeline.

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VICE PRESIDENT HATCHER: Does your organisation anticipate any desire to adduce evidence?

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MR GUNN: No, your Honour.

PN41

VICE PRESIDENT HATCHER: Thank you. Ms Masters?

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MS MASTERS: We're comfortable with the directions as amended.

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VICE PRESIDENT HATCHER: Yes. But I've raised a more substantive question to which I'd like a response; that is, from your client's perspective is it necessary to adduce any evidence to resolve the preliminary question, and can the

matter be heard before the end of the year? And, again, if you need an adjournment to provide an answer we'll grant that.

PN44

MS MASTERS: No. From the Commonwealth's perspective, there's no need for evidence, and the matter could be heard before the end of the year, your Honour.

PN45

VICE PRESIDENT HATCHER: Thank you. Is it useful before we adjourn to deal with your directions, Mr Taylor?

PN46

MR TAYLOR: I'm content to do so.

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VICE PRESIDENT HATCHER: We might do that to just avoid the need for multiple adjournments in case another request arises.

PN48

MR TAYLOR: The Bench I think might've seen a letter that my instructors sent to Australian Business Lawyers of 11 September.

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VICE PRESIDENT HATCHER: Yes.

PN50

MR TAYLOR: That suggested an amended timetable. We suggest that's an appropriate timetable. What the letter omitted to ask for, and we do ask for in addition, is for the matter to be set down for hearing we anticipate the need for two weeks of evidentiary hearing followed after some short period by two days of submissions. So whilst of course we're in the hands of the Commission two weeks of hearing in August or September of next year followed by two days of submissions in October or November of next year would allow the matter to conclude within a further 12 months. We're mindful of the fact that this application was filed - I think, the fourth anniversary will be in a couple of weeks' time, and we would respectfully suggest to the employer parties that a further 12 month period is one that gives ample opportunity to the parties to prepare evidentiary cases and to prepare for hearing.

PN51

VICE PRESIDENT HATCHER: Mr Taylor, these directions have the submissions being filed after the evidence is on rather than the usual way where the submissions are filed together with the evidence, and that seems to add a couple of months to the timetable.

PN52

MR TAYLOR: Yes.

PN53

VICE PRESIDENT HATCHER: Is there any reason why we can't make the more normal directions where the submissions travel with the evidence which is filed, which would allow us to set hearing dates in about July?

PN54

MR TAYLOR: No, I think, on reflection, that would be appropriate. Certainly earlier hearing dates would be preferred.

PN55

VICE PRESIDENT HATCHER: All right. Mr Arndt?

PN56

MR ARNDT: Your Honour, the chamber of those who I represent is articulated dated 30 August.

PN57

VICE PRESIDENT HATCHER: Yes.

PN58

MR ARNDT: It clearly has a different approach to the setting of the timetable, and the short point is we propose that orders be made requiring the IEU to file its case, and then after that point a directions hearing be held so as the parties are in a position to actually determine how long it will actually take to respond to that case.

PN59

It is correct that this matter has been going on for a considerable period of time. Such as it is, that fact in of itself shouldn't compromise the ability of the parties to adequately respond to the case. We just aren't in the position to estimate how long it will take to respond to the case in circumstances where we don't know the extent of that case. It's a novel application. Well, perhaps not novel but certainly quite rare, and in circumstances where the matter has been proceeding for a number of years, the case that could be put by those on my right could be a substantial one which would far exceed the estimates that have been put by the union in setting down the timetable, and we don't see any utility in pulling a date out of the air, and then basically if that date is inappropriate having to come back most probably in the early part of next year to ask for more time. We see it far more appropriate to proceed on the basis that the case should be filed and then it should be determined on what would be a reasonable amount of time to be taken. I think a similar idea was ventilated in the matter that was called on before this one, that in circumstances where you don't you know what the case that will be filed is it's difficult to give a date on how long it will take to respond to it.

PN60

VICE PRESIDENT HATCHER: The difficulty is if you wait until a directions hearing in January that will prejudice the capacity to get dates as compared to setting them now.

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MR ARNDT: I accept that, your Honour.

PN62

VICE PRESIDENT HATCHER: I mean, if the IEU can get its case on before the end of the year and we're looking at hearing dates in July, say, then conceivably we could make directions which – say, late July, we could make directions which have the employer respondent's putting their evidence on some time in May which would be a period of five months. Surely that would be sufficient.

PN63

MR ARNDT: I think it's appropriate. If the Bench isn't minded to accept that approach in terms of directly engaging with the IEU's proposal - - -

PN64

VICE PRESIDENT HATCHER: Yes.

PN65

MR ARNDT: I think your Honour's suggestion that the submissions be joined to the evidentiary position in the normal course is an appropriate one. We would seek to extend the filing date. If the Bench is minded to set down dates now we do think that 11 April is a bit short, particularly given the circumstances of the industry, and any relevant academics means that January is essentially dead time, we would seek a filing date in May, as your Honour has just indicated.

PN66

VICE PRESIDENT HATCHER: Thank you. Yes, all right. Thank you. Ms McDonald?

PN67

MS MCDONALD: Your Honour, if the Commission would like to set dates today we think a filing date in May would be more appropriate than the April date proposed. Thank you.

PN68

VICE PRESIDENT HATCHER: Thank you. Mr Gunn?

PN69

MR GUNN: Your Honour, we agree that linking submissions and evidence would make sense. Just looking at the previous matter and just making sure that the two dates – because teachers are covered by both of these applications, I think we just need to be mindful of that. In that case I see the IEU dates working best if we're able to resolve this other issue at the end of this year.

PN70

VICE PRESIDENT HATCHER: Yes, I understand.

PN71

MR GUNN: Yes.

PN72

VICE PRESIDENT HATCHER: Ms Masters?

PN73

MS MASTERS: Thank you, your Honour. We're comfortable with the evidence and submissions going together. The Commonwealth recognises the potential precedent value of these proceedings and will require time to consult across agencies and undertake various Government approval processes for its submissions, so May would be better than April.

PN74

VICE PRESIDENT HATCHER: Thank you. Mr Taylor, we'll take the adjournment in a minute that Mr Arndt requested.

PN75

MR TAYLOR: Yes.

PN76

VICE PRESIDENT HATCHER: But while we do so would you be able to draft some modified directions which would accommodate a hearing commencing on 23 July for two weeks?

PN77

MR TAYLOR: Yes.

PN78

VICE PRESIDENT HATCHER: And within that timeframe it, perhaps confirm with the employer parties, maximises the time they would have to put on their evidence.

PN79

MR TAYLOR: Yes. Whilst my fellow advocates were on their feet I was checking the school holidays. There will be witnesses who are teachers whose availability will be affected by the school holidays. Does the Bench have availability the following week? If not, I'll get instructions as to the week of 23 July.

PN80

DEPUTY PRESIDENT DEAN: I think the 23rd is the first week back post school holidays.

PN81

MR TAYLOR: I think that's right. The only issue, in my mind, is availability of witnesses immediately before the hearing commences. It may be a difficulty if we are unable to speak to the witnesses in advance, but it is an issue that we could perhaps deal with by how we schedule the witnesses.

PN82

VICE PRESIDENT HATCHER: Yes, all right.

PN83

MR TAYLOR: Thank you.

PN84

VICE PRESIDENT HATCHER: The other thing that's one possibility which the parties may want to think about, though obviously we can't provide the answer

now, is in the event that United Voice was successful on the preliminary question how that would affect programing and whether that would mean that United Voice's claim should be heard in some way to finality together with the IEU or separately. So I'm not sure that we can resolve that today, but the parties might need to give that some thought at some stage down the track. We'll proceed to adjourn now and can the parties advise my associate when they're ready for us to come back?

SHORT ADJOURNMENT

[11.25 AM]

RESUMED

[11.46 AM]

PN85

VICE PRESIDENT HATCHER: (Recording commenced) an indication to the parties that the Full Bench would be available to hear the matter on 19 and 20 December this year. Having regard to that matter, Mr Arndt, what were your instructions?

PN86

MR ARNDT: In regards to that matter, and specifically in relation to the dates that your Honour has just indicated, we have a difficulty in that the advocate involved from our side, Nigel Ward, is involved in the Family Friendly proceedings on those dates. So that's a difficulty we have in accommodating those dates.

PN87

VICE PRESIDENT HATCHER: What dates is he available in or around that period?

PN88

MR ARNDT: If you'll just excuse me. Unfortunately the Family Friendly arrangements take up the final two weeks before Christmas, save for Monday the 11th.

PN89

VICE PRESIDENT HATCHER: Right.

PN90

MR ARNDT: Any time before that. But the current listing of that matter before the President goes from the 12th to the 22nd.

PN91

VICE PRESIDENT HATCHER: Perhaps we can make it sooner. Let's get back to the evidentiary question. What's your instructions about that?

PN92

MR ARNDT: I thank you very much for that accommodation. I have now taken instructions and actually had a discussion with Mr Ward. The insertion of the requirement to file evidence in accordance with order 2 of the proposed directions, I believe those matters were canvassed before your Honour, and were actually referred to in the transcript of the – the transcript was referred to in the decision,

and having regard to paragraph 22 of the decision and your Honour this morning, we understand that it's the view of the Full Bench that it should not be an evidentiary case and if that's the case then we're content to drop that evidentiary element of the orders.

PN93

VICE PRESIDENT HATCHER: Thank you for that indication. So in terms of submissions in response to United Voice's submissions filed on 11 October, why would you need more than, say, three or four weeks?

PN94

MR ARNDT: I think we've just had a discussion - - -

PN95

VICE PRESIDENT HATCHER: Yes.

PN96

MR ARNDT: - - -over the video that we would have, and I'll be corrected if these are incorrect, that the date in order 1 would change to 11 October. The date in order 2 would change to 8 November, which would be approximately four weeks.

PN97

VICE PRESIDENT HATCHER: Yes.

PN98

MR ARNDT: Then another four weeks would take the third order to 6 December.

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VICE PRESIDENT HATCHER: Four weeks.

PN100

MR ARNDT: Might I had, that's the dates that have been put to me.

PN101

VICE PRESIDENT HATCHER: Anyway, from your perspective, you can get your submissions on by 8 November?

PN102

MR ARNDT: I would think so.

PN103

VICE PRESIDENT HATCHER: Yes, all right. Does any employer respondent take a different view about that?

PN104

MS MCDONALD: Your Honour, AFEI does not take a different view. Thank you.

PN105

VICE PRESIDENT HATCHER: Mr Gunn?

PN106

MR GUNN: No, your Honour.

PN107

VICE PRESIDENT HATCHER: Ms Masters?

PN108

MS MASTERS: No position, thank you, your Honour.

PN109

VICE PRESIDENT HATCHER: All right. Mr Borenstein, can we speed up that last step, so that we can try and find a date that we can all do this year?

PN110

MR BORENSTEIN: Your Honour, we had proposed these dates in response to the dates that the Bench had indicated for the 19th and 20th.

PN111

VICE PRESIDENT HATCHER: Yes.

PN112

MR BORENSTEIN: If they need to come forward we would be content for the third order, the date in that to be brought forward to 29 November if that assists?

PN113

VICE PRESIDENT HATCHER: All right.

PN114

MR BORENSTEIN: We note that Mr Arndt's advocate was available on, I think he said, 11 December. Maybe that is a suitable date.

PN115

VICE PRESIDENT HATCHER: No, we can't do that date, but all right.

PN116

MR BORENSTEIN: Very well.

PN117

VICE PRESIDENT HATCHER: I think those directions are broadly acceptable but we'll have to make investigations about when we can do the hearing dates.

PN118

MR BORENSTEIN: Yes.

PN119

VICE PRESIDENT HATCHER: Can we turn to your matter now, Mr Taylor?

PN120

MR TAYLOR: Yes, of course.

PN121

VICE PRESIDENT HATCHER: Can I give an indication that just a slight adjustment to the proposed hearing dates, that we could hear the evidence on 26

and 27 July, 30 July through to 2 August, and 6 to 10 August. Does that deal with your issue about conferencing witnesses?

PN122

MR TAYLOR: Yes. Thank you. I proposed some directions while we were off the record to the other parties. I didn't hear any opposition, but some people didn't indicate one way or the other. The proposal that I put I have written down. I can hand it up but my handwriting is not perfect, so I might also need to speak to it.

PN123

In respect to the hearing dates I scribbled into the document some of the dates your Honour has just given me, but the Commission will see, and for those Commission Members that don't have access to that written document, by reference to the letter of 11 September that the first two proposed directions are unchanged from that which my client put to the parties, so that the applicant would file any amendment to its application by 27 September and file and serve its evidence and submissions, that is a change, by the previously suggested date of 20 December. It's then proposed that those other parties wishing to oppose the application would file and serve evidence and submissions by 14 May, and the applicant would then have until 9 July to file evidence and submissions in reply allowing the matter to be set down for hearing on the dates that your Honour has proposed.

PN124

The last proposed order is to have a separate hearing for closing submissions. I had earlier proposed two days. Mr Borenstein asked me to consider whether two days would be sufficient. My own view is it should be, but Mr Borenstein might have more experience in dealing with multiple employer parties and the time that those hearings can take, and if the Bench thinks the potential of a third day is necessary then we'd obviously prefer that to be pencilled in now than find ourselves part-heard.

PN125

VICE PRESIDENT HATCHER: Just in terms of that length there's no proposition that there would be some further filing of written closing submissions before the oral hearing?

PN126

MR TAYLOR: Sorry, I should have added that. That is certainly in our contemplation that there will be a gap between the completion of the evidence and the hearing of the closing submissions sufficient to allow the parties to file outlines of closing submissions, and it's partly with that in mind that I thought two days would be sufficient, so that on their feet the advocates only need to deal with the more limited number of matters, such that the closing submissions date, I would respectfully suggest, be something in the order of three to five weeks after the evidence closes to allow for a timetable for filing and exchange of submissions.

PN127

VICE PRESIDENT HATCHER: Does any other party wish to comment upon these directions?

PN128

MR BORENSTEIN: Your Honour, if I might just briefly say this; that your Honour indicated before the adjournment a possibility of having to coordinate what was happening in our application with what was happening in the IEU application, and we think that's a very sensible consideration, and we would propose that the IEU matter be listed for a directions hearing in the week of 5 February. We would anticipate that there may be some indication of the fate of our preliminary issue by then perhaps, and we would by then have had a chance to consider the IEU material, and be able to form a view about the role which our clients wish to play in the IEU matter.

PN129

VICE PRESIDENT HATCHER: I mean, I suppose even if you're unsuccessful on the preliminary question that wouldn't stop you immediately filing a new application of a different nature, and we end up with the same issue, I suppose.

PN130

MR BORENSTEIN: That's so. It's just really a matter of, it seems to me, just sort of taking stock of where we all are at that point.

PN131

VICE PRESIDENT HATCHER: Yes, all right.

PN132

MR BORENSTEIN: Or certainly where our clients are at that point.

PN133

VICE PRESIDENT HATCHER: I should have asked this before, Mr Borenstein, in respect of your client's matter, is one day sufficient to hear the preliminary question, having regard to the fact that parties are filing written submissions in advance?

PN134

MR BORENSTEIN: We would have hoped so, your Honour.

PN135

VICE PRESIDENT HATCHER: Yes, all right.

PN136

MR TAYLOR: Can I just indicate a response to Mr Borenstein's suggestion that that would seem to us to be a sensible one. The only hesitation is to the timing. In light of what Mr Borenstein said about the things that may or may not be said about his client's involvement it might be convenient for it to be the week after the week that he suggested so that in that week we could be corresponding or dealing with the matter inter-parties and have some understanding of the parties' positions prior to that directions hearing.

PN137

VICE PRESIDENT HATCHER: So 12 February?

PN138

MR TAYLOR: If it pleases.

PN139

VICE PRESIDENT HATCHER: Employer parties, any response?

PN140

MR ARNDT: Obviously having regard to what I opened with in regards to this matter, it's difficult to say with any certainty that those dates are entirely appropriate. In terms of the spacing they seem regular and we don't have any submissions as to any peculiarities in terms of how the dates are set up, so that would be our position.

PN141

VICE PRESIDENT HATCHER: Ms McDonald?

PN142

MS MCDONALD: Your Honour, AFEI does not oppose those dates put forward.

PN143

VICE PRESIDENT HATCHER: Mr Gunn?

PN144

MR GUNN: Your Honour, CCSA supports those dates, especially the idea of having some form of directions hearing on 12 February or around that time.

PN145

VICE PRESIDENT HATCHER: In terms of the United Voice application, apart from Mr Ward's issues, are there any other availability issues from the employer side in late November or December?

PN146

MR GUNN: No, your Honour.

PN147

MS MCDONALD: No, your Honour.

PN148

VICE PRESIDENT HATCHER: Ms Masters?

PN149

MS MASTERS: I've been unable to speak with counsel. They're not here today because they're in other matters, so I don't know their availability. We'll deal with it if they're not available.

PN150

VICE PRESIDENT HATCHER: Thank you. Mr Borenstein, do you have any availability issues we need to know about?

PN151

MR BORENSTEIN: Not if your Honour is talking about very late in November, but earlier in November I do. Yes.

PN152

VICE PRESIDENT HATCHER: I thank the parties for their attendance. If there's nothing further we'll now adjourn. We'll be issuing directions later today or tomorrow, and we may be in communication to endeavour to find a date to hear the United Voice application. We'll now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[11.59 AM]