

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

26059-1

VICE PRESIDENT WATSON

AM2010/34

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

**Application by Australian Federation of Employers and Industries
(AM2010/34)**

Higher Education Industry-General Staff-Award 2010

(ODN AM2008/3)

[MA000007 Print PR985117]]

Sydney

9.30AM, FRIDAY, 30 APRIL 2010

PN1

THE VICE PRESIDENT: Can I have the appearances?

PN2

MR D. MAKINS: If it please the commission, my name is Makins, initial D, from the Australian Federation of Employers and Industries.

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THE VICE PRESIDENT: Thank you, Mr Makins. Very lonely at the bar table there.

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MR MAKINS: Indeed.

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THE VICE PRESIDENT: Yes, I note the written submissions you have filed and also I note for the record the written submission by the Australian Higher Education Industrial Association and correspondence from that organisation indicating that they would not be able to be present at the proceedings today. There don't appear to be any other submissions filed in relation to this matter.

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MR MAKINS: No, there don't, your Honour. In respect to that, if I could hand up to you a transmission report indicating that all parties were served in accordance with directions set down by you on 16 March.

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THE VICE PRESIDENT: Yes.

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MR MAKINS: If it assists.

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THE VICE PRESIDENT: Thank you.

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MR MAKINS: Thank you.

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THE VICE PRESIDENT: Do you have anything to add to the written submission you have filed in this matter, Mr Makins?

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MR MAKINS: Nothing to add, your Honour, other than to possibly take you through the history in respect of creation of this modern award; also the transitional arrangements and how it came it to be that university unions, fairly late in the piece, found themselves to be covered by this award, or potentially covered by this award, thereby creating that concern in respect of compliance with wage rates and associated classification structures. Would that assist your Honour?

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THE VICE PRESIDENT: Yes, thank you.

PN14

MR MAKINS: Your Honour, prior to the most recent amendment to this award where a reference to university unions and student unions was incorporated, the award only applied to employers within the higher education industry. Appropriately that was defined within the award to be those tertiary institutions providing undergraduate and postgraduate teaching. Whilst the most recent amendments had not varied the definition of "higher education institution", the amendment has varied the definition of "general staff" to incorporate a reference to university unions and student unions.

PN15

Now, given the variety of university unions and student unions models that are in existence in Australia, this new definition has created uncertainty for university unions' employers as to their modern award coverage. Focusing on the model transitional provisions, they were created by the full bench of the AIRC in their decision of 2 September 2009. In their decision, the full bench observed that while the model provisions can be departed from to meet circumstances of a particular case, they did note that departure should be limited. The full bench added that the adoption of model transitional provisions will reduce the amounts regulation that might otherwise apply to the transition to modern awards.

PN16

When deciding whether to adopt the model transitional provisions for this particular award, the Higher Education Award, in that same decision of September, the only submission that were given real consideration by the full bench were those made by the universities, which in their submissions they appropriately submitted that they were not practically affected by the modern award for various reasons. Accordingly and appropriately, the full bench limited the transitional arrangements to loadings and penalties.

PN17

The full bench, in their decision, didn't give any consideration that the impact of the modern award would have on university unions or student union employers. This was primarily due to a lack of clarity at the time as to the appropriate award coverage for those particular employers. When the modern award was made by the full bench during the award modernisation process, the full bench observed in a later statement of 22 May 2009, which I believe was stage 3 when the educational services was considered. The full bench observed that:

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We have decided that coverage of university unions and student unions can most appropriately be dealt with by amendment to the Higher Education General Staff Award 2010, rather than by the creation of an award specific to those organisations. In relation to non-teaching staff and university controlled entities generally, some may be covered by the draft Education Services (Post Secondary Education) Award. Others will be covered by a classification in another industry award or an occupational award.

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Given the statement at the time and given the uncertainty surrounding the fact that the higher education award hadn't been amended to include these employers, the university union employers quite rightly adopted the appropriate industry award or the occupational award given the similarities of their functions to employers in

similar industries outside of the sphere of the university. However, as we know, on 26 February of this year the full bench granted an application by the NTEU to insert a reference to "university unions and student unions" into the award and to amend the definition of "general staff" in the higher education award.

PN20

The strict wording for definitions now adopted in the award has effectively left university unions uncertain as to their correct modern award coverage. More importantly, however, it has potentially exposed these employers to the onset of increased employment costs through increased wages without the benefit of transitional arrangements which are enjoyed by others in similar industries of similar occupations covered by other modern awards. This application seeks to address this in the appropriate manner.

PN21

Your Honour, it is an application made pursuant to section 157, which permits Fair Work Australia to vary an award if it is satisfied that doing so is necessary to achieve the modern awards objectives. The modern awards objectives are set out, as we know, in section 134 of the Fair Work Act. Notably, paragraph (f) of that section compels Fair Work Australia to take into consideration the impact of the modern award on the powers of business, including on productivity, employment costs, and the regulatory burden. In the event that university unions do in fact fall within the coverage provisions of the higher education award, the regulatory burden on these businesses in adapting to the new wage and classification structure in an immediate term would be extreme, to say the least. Significantly, the full bench of the AIRC said in itself:

PN22

The purpose of the transitional arrangements is to reduce the amount of regulation that might otherwise apply in the transition to modern awards. Equally significant are the employment cost increases that these businesses would be exposed to under the new modern award.

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In my submissions filed in accordance with the directions are highlighted an example of increased cost exposure to these employers moving from, in the case of New South Wales employers, the university unions NAPSA in New South Wales to the new modern award, if in fact they are covered or fall within the coverage provisions. AFEI submits that the application is just and proper in the circumstances and should be granted by Fair Work Australia. We also note, your Honour, for the record, that all parties were properly served and there were no submissions opposing our application today, and in fact there was one submission in support, which has been noted for the record today. Unless there are any further questions from the bench, those are my submissions.

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THE VICE PRESIDENT: I wonder whether you could help me the AHEIA submission?

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MR MAKINS: Yes.

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THE VICE PRESIDENT: Paragraph 6, they submit that they support the making of the order subject to clause A.2.1 being amended to read as follows. How does that differ from what you're seeking?

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MR MAKINS: Your Honour, I understand that to differ in the respect that AHEIA are inserting or seeking to insert the model transitional provisions, which are - which don't depart from the provisions set down by the full bench in their September decision of last year. The manner in which our proposal departs from the model transitional provisions is in that they were limited to university union employers only, so these will apply to any employer captured by the order.

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THE VICE PRESIDENT: Yes. Can you indicate for me the nature of the changes to the current provision that you are seeking? Your schedule 1 to the application - - -

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MR MAKINS: Yes.

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THE VICE PRESIDENT: - - - lists the replacement schedule and I note that in various respects, such as the clause 2.1 you have just mentioned, but there are a number of others, it is limited to "university union or student union employer". What other changes are involved?

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MR MAKINS: Your Honour, there are none. The extent of the changes that we have inserted from the model transitional provisions are in A.2.1 where it references "only to apply to university union or student union employer as defined". Again, at A.3.1, over the page, again, a limiting reference to "university unions and student union employers". The rest are wholly consistent with the model transitional provisions.

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THE VICE PRESIDENT: But there is no A.2.1, no A.2 or A.3 at present. Is that the case?

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MR MAKINS: There is none, no. Currently within the award it commences with the reference to loadings and penalties and there is no reference to wage rates.

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THE VICE PRESIDENT: Is there the general provision in A.1.1 and 1.2?

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MR MAKINS: I might just turn over that provision, your Honour. Your Honour, the numbering lends itself to say that there is an A.1, A.2, A.3. However, it is different to the award in the sense that A.2 deals with loadings and penalty rates and onwards.

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THE VICE PRESIDENT: But A.1 is the general provision from the standard transitional provision.

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MR MAKINS: The format is slightly different in the schedule A currently within the award, but A.1, yes, is the general provision. A.1.1 is the same. A.1.2, instead of having paragraphs numbered (b) to (d), as there are in the model transitional provisions, it is one paragraph, which reads similar, however, is slightly more succinct. If I may, I might read it to you for the record.

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THE VICE PRESIDENT: Yes.

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MR MAKINS: It reads:

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The provisions of this schedule -

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and this is A.1.2 -

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are to be applied when there is a difference in money or percentage terms between a provision and a relevant transitional minimum wage instrument, including the transition of default casual loading or award-based transitional instrument on one hand and equivalent provision in the other.

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Slightly less detail there.

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THE VICE PRESIDENT: Yes, there are no specific references to loading or penalties.

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MR MAKINS: No, that comes later in A.2 where that reads:

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Loadings and penalty rates: for the purpose of this schedule, "loading or penalty" means casual or part-time loading Saturday, Sunday, public, evening, or other penalty shift allowance penalty.

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THE VICE PRESIDENT: Yes. But you are seeking, in relation to all employees, the standard general provisions with the paragraph numbering (a) to (d)?

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MR MAKINS: Yes.

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THE VICE PRESIDENT: Where it appears that only (a) is there at the moment.

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MR MAKINS: That is correct, yes. As to the genesis of why that has been departed from, from the model provisions, I would not know, your Honour. It appears that that has been something that the bench has inserted as a result of those discussions.

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THE VICE PRESIDENT: The only departure that you are seeking from the model provisions is the limitations on the type of employers?

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MR MAKINS: Indeed, your Honour. We thought in drafting the application that, given our membership base, obviously that is our area of concern; however, also in respect of potential opposition to the application and the fact that these provisions had been inserted following consultation of the universities. We didn't necessarily want to impinge on the arrangement that they had secured; however, we would not be opposed to the model transitional provisions being inserted without that limiting provision.

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THE VICE PRESIDENT: Yes, well, it appears at least in relation to one clause the AHEIA seeks a broader scope and there is no opposition.

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MR MAKINS: There doesn't appear to be so, no, your Honour.

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THE VICE PRESIDENT: In terms of the necessary variations, it is really the substitution of the existing general clause with the model clause and the insertion of either the model clause or the variation of it in relation to minimum wages in your numbering A2 and A3.

PN56

MR MAKINS: Yes, your Honour. In effect it would be the replacement in its entirety of the schedule 1 currently within the award with the schedule 1 that we have proposed in our draft order. The only impact would be, as you have suggested, the insertion of those paragraphs numbered (a) through to (d) and the minimum wage transitional provisions.

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THE VICE PRESIDENT: Yes. Which subsection of section 157 do you say applies?

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MR MAKINS: Your Honour, we rely on paragraph (f) of section - sorry, 134, are you referring to?

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THE VICE PRESIDENT: I was referring to section 157.

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MR MAKINS: Sorry, 157, I apologise. 157 subsection (1) allows Fair Work Australia to vary an award outside the nominal four-yearly reviews in the event that we are satisfied that it meets the award's objectives.

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THE VICE PRESIDENT: But you say it is not a variation of modern award minimum wages?

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MR MAKINS: No, your Honour. Whilst I can see how it may impact on it, we would submit that we are not seeking to vary the wages properly fixed in the award proper. It is merely allowing the movement to those for employers who have very quickly found themselves bound by the award where they were not expecting it.

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THE VICE PRESIDENT: Yes. Yes, thank you, Mr Makins.

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MR MAKINS: Thank you, your Honour.

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THE VICE PRESIDENT: The application in this matter arises from variations to this award to extend its scope to university union and student unions, it appears that a consequence of that variation is that transitional provisions that were formulated with respect to universities bound by the award do not fully contemplate the circumstances of university unions or student unions now covered by the award. The application is made under section 157 of the act. In my view, subsection (1) is the appropriate provision because the application does not in itself seek to vary the modern award minimum wages and therefore the requirements of subsection (1) need to be satisfied.

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I am satisfied that the application is consistent with section 157(1) of the Fair Work Act, in particular given the history of this matter and the nature of the variations sought. I am satisfied that making a determination in accordance with the application outside the four-yearly review of modern awards is necessary to achieve the modern award's objective. In my view it would be preferable if the standard transitional provisions reflected as close as possible in this award and the application of the clauses is not limited. Whether they do in fact apply in one case or another is another question. But that is a matter for the developing circumstances in relation to each employer.

PN67

I therefore propose to grant the application. I will make a determination which inserts the remainder of the general provisions on the standard transitional provisions and inserts clauses dealing with minimum wages. As I indicated, I do not believe it is appropriate to confine the scope of those provisions; specifically, I will make them of general application. These proceedings are now adjourned.

<ADJOURNED INDEFINITELY

[9.51AM]