



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2024/11

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

**Application by Australian Nursing and Midwifery Federation
(AM2024/11)**

Re Nurses Award 2020

Melbourne

10.00 AM, TUESDAY, 17 JUNE 2025

Continued from 13/02/2025

PN1

JUSTICE HATCHER: Yes, good morning. I'll take appearances. So Mr McKenna, you appear with Mr Hartley and Ms Jones for the ANMF.

PN2

MR J McKENNA: If your Honour pleases.

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JUSTICE HATCHER: Mr Dalton, you appear for Australian Private Hospitals Australia.

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MR R DALTON: Yes, your Honour.

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JUSTICE HATCHER: Ms Leoncio, you appear for Healthscope Operations and Adelaide Community Healthcare Alliance.

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MS F LEONCIO: Yes, I do.

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JUSTICE HATCHER: Ms Krauss, you appear for the Commonwealth.

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MS S KRAUSS: (No audible response.)

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JUSTICE HATCHER: And on Teams, Mr Ward and Ms Rafter, you appear for Australian Business and New South Wales Business Chamber and Catholic Health Australia.

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MR N WARD: Yes, your Honour. Thank you.

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JUSTICE HATCHER: All right. Look, so the matter has been effectively, stood over to allow the parties to consider what I understand was a without prejudice proposal by the ANMF and I understand that at least one party - your client, Mr Dalton, had a written response to that. That document was actually filed, so it's the only document I've seen.

PN12

What's the position, Mr McKenna?

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MR McKENNA: Your Honour, there is a Commission order. There was an exchange of without prejudice documents. It remains the applicant's position that it wishes to avoid a full contested hearing. At this stage, there - I think I can say this on the record, there is no agreement as between the parties, but the ANMF

remains ready and willing to engage in discussions that might facilitate a reduction of the issues that would need to be determined in the proceeding.

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JUSTICE HATCHER: So from your client's perspective, is there any common ground to work on or are we just wasting our time?

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MR McKENNA: I believe - I don't want to speak for any other parties, but I believe there is some scope with some parties. Other parties it's more difficult to ascertain the gap.

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JUSTICE HATCHER: Right.

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Mr Dalton?

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MR DALTON: Well, look, my client's instructions are that it's open to having further discussions. You know, broadly, there's sort of four main issues and there seems to be some scope for the parties to better understand their respective positions. So from our perspective, it would be appropriate for a few weeks to allow that to occur so that there's more focussed discussions following these written documents that have been exchanged between the parties.

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And then the ANMF should be in a better position to decide what it wants to do with its application and can brief the Commission on the likely issues in dispute and start to map out a program for a hearing, if that's required.

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JUSTICE HATCHER: Are you able to identify what the four issues you refer to are?

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MR DALTON: Yes. So there's work value-based considerations and obviously with previous Commission decisions, there's been a fair bit of water under the bridge on that, but - so in terms of what benchmarking, external relativities, historical, gender-based undervaluation, et cetera, et cetera. There were also 16 findings work value based in stage 1 in respect of the Aged Care Award, questions about how many of them are transposable to the private hospital setting and the extent to which they're transposable.

PN22

So there may be some work value issues in certain classifications, not necessarily in all of them. So that's the first broad issue. The second issue and this is a big one here, in a sector that's not Commonwealth funded, is capacity to pay. So the impacts that are referred to in the modern award objectives in section 134F and H, the proposed increases are very substantial and so there is a real capacity to pay issue.

PN23

So that will impact, I think, the discussions around the quantum of the increase and also, of course, any phasing in and the period of time that's necessary for that to occur. It's probably the latter where there's some scope for the parties to have some without prejudice discussions to see whether progress can be made on that, because if progress can be made on that, it may mean that some of the other issues that might otherwise be agitated can fall away.

PN24

Classifications. So internal relativities, some incremental pay point progression issues, that's also something that seems to be amenable to some further without prejudice discussions. And the fourth issue is the one that I mentioned because it is affected by the capacity to pay issue which is the phasing in of any increases. They're the four main issues as we see it.

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JUSTICE HATCHER: Has the ANMF advanced any proposal about that last matter?

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MR DALTON: The phasing in?

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JUSTICE HATCHER: Yes.

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MR DALTON: I can't recall off the top of my head. Mr McKenna might be able to confirm.

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MR McKENNA: No. Just (indistinct).

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MR DALTON: No. I don't recall.

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MR McKENNA: Bearing in mind, of course, it's all on a without prejudice basis, but I think I (indistinct).

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MR DALTON: Yes.

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JUSTICE HATCHER: Yes. Yes. All right.

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MR DALTON: If the Commission pleases.

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JUSTICE HATCHER: Ms Leoncio?

PN36

MS LEONCIO: In terms of Healthscope, we're in a very similar position to that that has already been articulated by my learned friend, Mr Dalton. We anticipate that there is some common ground and we would encourage further discussions to narrow the scope of the hearing. There's likely to be a need for a hearing and some contested issues and I agree with the list of issues that's already been identified by the APHA and I suspect that there will be the same kinds of issues for my client as well.

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JUSTICE HATCHER: All right. I'll go to you next, Mr Ward or Ms Rafter.

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MR WARD: Thank you, your Honour. Can I indicate at the outset that Mr McKenna and I have had further without prejudice discussions last week and they were quite fruitful. From my client's perspective there are only a reasonably discrete number of issues left in contest and I'm comfortable setting out for you today what they are in a little bit of detail because it might assist. As everybody else has indicated, there is going to be an issue around commencement and phasing.

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Catholic Health Australia have put a proposal to the ANMF on that for their consideration and we'll obviously await a response on that. So I won't go to that any further at this stage, but like everybody else, that's an issue. In relation to the classification structure, our issues are these; and I've shared this with Mr McKenna. We take issue with the rate of pay allocated to the enrolled nurse. The ANMF rate that they propose is not one we consent to, so there's an issue there about rate.

PN40

There's a question about whether or not there should be any increments beyond that base rate and what they should be based on. There is then a question about the introduction potentially of an advanced diploma rate and that rate seems to be aligned to the public sector. So there are a number of issues around enrolled nurses that are live.

PN41

We've raised some issues about some of the proposals around the nurse practitioner rates which we understand seem to be derived, based on a relatively simplistic internal relativity issue, but they seem to be somewhat at odds with the aged care nurse practitioner rates, noting the aged care case had very limited evidence on nurse practitioners. So our issues in relation to the care really around the EN and around nurse practitioner rates.

PN42

We are comfortable about the occupational health nurse rates; we just need to have some further conversation about the language that would go with the classification structure. Those are the only issues that I've indicated to Mr McKenna appear to be in contest now, separate, of course, to the question of implementation and phasing. If the Commission pleases, that's where we

are. We're more than happy to continue to talk to the ANMF simply to narrow those matters.

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If we can't, we would be anticipating a relatively contained and limited hearing process where the majority of the case would move by consent from my client's perspective.

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JUSTICE HATCHER: All right. Thank you.

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Ms Krauss, did you want to say anything?

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MS KRAUSS: No. Thank you.

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JUSTICE HATCHER: All right. So Mr McKenna, there's one proposal about phasing in on my read of it, and I haven't even seen the ANMF's proposal, is that perhaps the resolution of that issue might unlock the door to resolving the other issues.

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MR McKENNA: It may. It seems, at least, with Australian Private Hospitals and Healthscope that it seems a longer breached gap. At least from the ANMF's perspective, your Honour, the parties have the benefit of a number of decisions in this area including the December 2024 decision that was made in this proceeding that the parties were invited to attend and participate in.

PN49

There were two issues that we understand were left for - particularly identified for further consideration in this proceeding and that is a (indistinct) classification structure and the relativity for nurse practitioners and so that those are two of the issues that have been identified by Mr Ward.

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As to the other issues, we would be hopeful that the - again, so far it's been conducted on a without prejudice basis, but I think I can say that the Federation would be seeking an outcome that broadly involves an application of those principles, subject to those EN and MP issues requiring some further consideration and of course, the issue of phasing. And it seems that there is a sensible way forward on that basis that can avoid the need for this Commission to hear a full contested hearing, which is going to be significant.

PN51

The nurses operate in a broader area than aged care. It is potentially a huge hearing that would require a large number of sitting days. So we do embrace the opportunity to try and narrow the issues and, as I say, I think we would be seeking to proceed largely on the basis of principles as have been determined by expert panels.

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JUSTICE HATCHER: All right. So what's the best way forward in terms of facilitating these discussions? Do the parties - I mean, this matter has been on foot for a while now.

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MR McKENNA: It has.

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JUSTICE HATCHER: And as you would have seen from the most recent Wage Review decision that the remaining professional classifications in other awards are now to be addressed as part of the gender undervaluation process, so it would be a bit unsatisfactory if nurses fell behind that whole program.

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MR McKENNA: It would.

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JUSTICE HATCHER: So I'm just wondering what is the best way to, as it were, bring this to a head one way or another.

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MR McKENNA: Well, your Honour, I was going to say we're all here, but we're almost all here, and the matter is listed for conference. We remain open to have discussions today, if that would be convenient to the other parties. I'm not sure what role your Honour might have in those, but we're certainly open to have further discussions with the parties today.

PN58

We think that that is a process that can continue and it might be that some parameters are set by the Commonwealth of some timelines for that in an attempt to get agreed positions to be commissioned by a certain date and then I think in terms of programming the matter, that needs to occur once the parties and the Commission knows what is in issue. Obviously the amount of time that will be required by the parties to provide its evidence is going to be dependent upon what is in issue. So I think that that without prejudice process needs to continue.

PN59

We need to get an outcome from that and that might involve filing an amended application and it might - hopefully will involve filing some agreed propositions.

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JUSTICE HATCHER: All right. Was any other party interested in doing something today or would you prefer to be left to your own devices knowing that - noting again that I don't think we're prepared to let this matter drift forever.

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MR DALTON: I might get some instructions privately, your Honour.

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JUSTICE HATCHER: Do you have sufficient instructing officers to allow that process to be meaningful, if - - -

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MR DALTON: That will be part of the conversation, I think.

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JUSTICE HATCHER: Yes. All right.

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MR DALTON: I do have representatives here, so I just need - if the matter could be stood down for about five minutes, I can confirm instructions, your Honour.

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JUSTICE HATCHER: All right. And can you also obtain instructions about that, Ms Leoncio?

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MS LEONCIO: I can give those instructions now. We are content to proceed to a conference today to progress the discussions.

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JUSTICE HATCHER: All right. Well, look, I'll adjourn the matter for that purpose. The parties can inform my associate when they're ready to resume and if - and you can also have a discussion about in what manner you want to resume, whether it's on the record, off the record. If you want to go into a conference room, if the parties want to see me separately, you can talk about all those matters and then tell me what you want to do.

PN69

All right. We'll adjourn on that basis.

SHORT ADJOURNMENT

[10.15 AM]

RESUMED

[11.03 AM]

PN70

JUSTICE HATCHER: What's the position?

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MR McKENNA: Your Honour, thank you for the time. It has been fruitful. If I can perhaps put a proposal and then the other parties can correct or contradict what I might say. What we would be seeking would be a further listing of the matter for a conciliation conference in the Commission differently constituted on a date not before - I think, perhaps 2 July.

PN72

JUSTICE HATCHER: Not before 2 July. Is my presence causing some offence or is it a - I should say, I haven't actually committed to sitting on this matter, if it goes to hearing, but no worries. I understand.

PN73

MR McKENNA: No. No, but - yes, anyway. I would take that (indistinct).

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JUSTICE HATCHER: Well, do you mean by that you want a member who is definitely not going to be sitting on the hearing. Is that the point of that?

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MR McKENNA: Yes. Yes, yes.

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JUSTICE HATCHER: All right. And that would occur in Melbourne?

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MR McKENNA: I think the - save for Ms Rafter and Mr Ward, the rest of us are all based in Melbourne. So that would, at least suit the parties.

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JUSTICE HATCHER: All right.

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Mr Dalton.

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MR McKENNA: Thank you, your Honour.

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MR DALTON: Yes, your Honour. That's satisfactory to us. I think 1 July would be our preferred date, if that's possible and there may be some who will need to participate via video.

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JUSTICE HATCHER: All right.

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Ms Leoncio.

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MS LEONCIO: I agree with what's already been put and we would also, respectfully request a video-link, if that can be facilitated.

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JUSTICE HATCHER: All right.

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Mr Ward?

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MR WARD: Your Honour, I'm comfortable with what's been proposed and hopefully I'll be able to get on an aeroplane by then, hopefully. I'm available on the 3rd, I think the 3rd was suggested. The 3rd would be fine for us.

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JUSTICE HATCHER: I thought it was the - the 3rd or the 1st, was it?

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MR DALTON: I said 1st, so I think 1st and 3rd. Yes, not the 2nd.

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MR McKENNA: Neither Mr Hartley nor myself are available on the 1st. Mr Hartley is available on the 3rd.

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MR WARD: Well, I had the 3rd, your Honour, if that helps.

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JUSTICE HATCHER: All right.

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MR DALTON: Okay, 3rd.

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MR WARD: The only other thing I might add, your Honour, just it might assist if there is a member allocated who's got some involvement in aged care priority awards or something so that they're not coming into this almost with a clean slate, if that might assist.

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JUSTICE HATCHER: Yes. All right.

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Ms Krauss, do you want to add anything?

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MS KRAUSS: No, thank you.

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JUSTICE HATCHER: All right. Well, look, I'll accede to that proposal. I'll go around and find a member and a date, and I'll notify the parties as soon as possible.

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MR McKENNA: Thank you, your Honour.

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JUSTICE HATCHER: All right. If there's nothing further, we'll now adjourn.

ADJOURNED INDEFINITELY

[11.06 AM]