



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2023/21

s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective

Modern Awards Review 2023-24 'Making awards easier to use' stream

Sydney

10.04 AM, WEDNESDAY, 7 FEBRUARY 2024

Continued from 06/02/2024

PN1

JUSTICE HATCHER: Good morning, everyone. I will take the appearances. Mr Clarke and Mr Kempfi, you appear for the ACTU?

PN2

MR T CLARKE: Yes, your Honour.

PN3

JUSTICE HATCHER: Mr Robson, you appear for the ASU?

PN4

MR M ROBSON: May it please your Honour.

PN5

JUSTICE HATCHER: Mr van Rensburg and Ms Burnley, you appear for the SDA?

PN6

MS S BURNLEY: Yes, that's correct, your Honour.

PN7

MR G VAN RENSBURG: Yes, your Honour.

PN8

JUSTICE HATCHER: Ms van Gent, you appear for the UWU?

PN9

MS VAN GENT: Yes, your Honour.

PN10

JUSTICE HATCHER: Mr Izzo and Mr Song, you appear for ABI and Business NSW?

PN11

MR L IZZO: Yes, your Honour.

PN12

JUSTICE HATCHER: Ms Bhatt and Ms Beasley, you appear for the Australian Industry Group?

PN13

MS BHATT: Yes, your Honour.

PN14

JUSTICE HATCHER: Ms Swan and Ms Butters, you appear for the Australian Hotels Association?

PN15

MS S SWAN: Yes, your Honour.

PN16

JUSTICE HATCHER: Mr Strachan, Ms Windsor and Ms McKennariey, you appear for the Australian Workforce Compliance Council?

PN17

MR C STRACHAN: Yes, your Honour.

PN18

MS D WINDSOR: Yes.

PN19

MS J MCKENNARIEY: Yes, your Honour.

PN20

JUSTICE HATCHER: Ms Leoncio and Ms Johnston, you appear for the Australian Retailers Association?

PN21

MS F LEONCIO: Yes, your Honour.

PN22

JUSTICE HATCHER: Ms Carroll, you appear for the National Retail Association?

PN23

MS L CARROLL: Yes, your Honour.

PN24

JUSTICE HATCHER: Ms Thomas, you appear for the Young Workers Centre?

PN25

MS K THOMAS: Yes, your Honour, thank you.

PN26

JUSTICE HATCHER: And Mr Stirling and Ms Lyons, you appear for Master Grocers Australia?

PN27

MR M STIRLING: Yes, thank you, your Honour.

PN28

JUSTICE HATCHER: And I am told that belatedly ACCI may make an appearance, but they're not here yet. All right. Well, the purpose of today is to program the consultation sessions for this aspect of the review within the data span contemplated in the timetable; that is the period from 26 February to 5 April. Unless any other party has a different view what I propose to do is set up a series of conferences. Ms Tinsley, are you now here? Yes, Ms Tinsley, you appear for ACCI?

PN29

MS J TINSLEY: Yes, President. My sincere apologies for missing the beginning.

PN30

JUSTICE HATCHER: All right. I will start again. So what I propose to do is set up a series of conferences. I anticipate there would be eight conferences. The first conference would deal with proposals which are common either to all the awards, or a substantial number of awards, and it seems to me that proposals fall into that category are the general proposals advanced by ACCI, are those proposed by the Australian Industry Group, and perhaps those proposed by Australian Business Industrial. And then I propose there would be a separate conference for each of the seven awards to deal with the award specific proposals. So does any party wish to put any view contrary to that course of action?

PN31

MS BHATT: Nothing contrary to that proposition, but if I can raise a few associated issues if now is a convenient time. One relates to the Retail Award and the Fast Food Award. It appears to us that there is a significant amount of commonality in relation to the issues raised in respect of those two awards, and also I anticipate the parties that have an interest in that award. There may be some benefit in those awards perhaps being listed together, subject to your Honour's views and that of the other interested parties.

PN32

One other proposition we seek to put to you today is that in determining which award is dealt with when that some priority is given to the General Retail Industry Award, and that's for two reasons. The first is that in our written submissions from page 125 we have raised an issue concerning clause 15.2(c) of that award. It relates to the span of hours. It's an issue that we have raised previously in another context with the Commission too. It's our understanding that that issue is particularly time sensitive for some of our members, and we are hopeful that through discussions between the parties before the Commission there might be some resolution that can be reached in respect of it.

PN33

The second is that as I understand it an application to vary the Retail Award has been filed by the ARA yesterday. Although we haven't seen the final form of that application we apprehend that there will be a significant amount of overlap between issues we have raised in this review and claims being advanced in the context of that application, and for the purposes of (indistinct) the progress of that application is not unduly delayed. But also for the purposes of ensuring that this process is not undermined we would seek to have some conferencing schedule sooner rather than later in respect of that award. May it please.

PN34

JUSTICE HATCHER: All right. I haven't seen the application, but you can assume that unless the ARA indicates otherwise that application will be dealt with in the normal, and if the ARA seeks expedition that will be considered. Does any other party oppose the prospect, or the proposition, I'm sorry, that the Retail and Fast Food Awards should be dealt with together and given priority?

PN35

MS CARROLL: Your Honour, the National Retail Association has no objection to that course of action.

PN36

JUSTICE HATCHER: All right. Does the SDA have any view about that?

PN37

MS BURNLEY: Your Honour, we are not opposed to that being prioritised as such. As to whether we can conduct both awards at the same time would need to be balanced, because there are some issues which are different in the two awards, and then there's also some overlaps with the Restaurant Award and the Hospitality Award as well. So it is something that will just need to be worked through as the conferences progress at some stage. So if there's some variability available in the timetable, which I assume there will be, as per the other streams are having that issue to confront at the times, that should be accommodated.

PN38

JUSTICE HATCHER: All right. Does anyone else have a view about the AiG's position?

PN39

MR IZZO: Your Honour, it's Mr Izzo here. We have no opposition to what's being proposed. There are some matters that are common, as you've described them, that might also affect the Retail Award. Ms Bhatt has identified one particular issue she's indicated has a level of urgency, but there are other common matters that have been raised, whether it would be with respect to annual leave or other issues that might also affect the Retail Award. So we assume they would remain in the common stream, and it's the retail specific matters that would be in the Retail and Fast Food stream. I assume that's Ms Bhatt's intention.

PN40

JUSTICE HATCHER: Yes, she's nodding. Mr Izzo, so what matters in your proposals do you see has fallen within the common stream?

PN41

MR IZZO: Yes, your Honour. I think we would see - we have got five categories of proposals - we would see four of them being common. So that is the working of hours continuously. The second one being the variation to part-time working hours. The third being classification of employees, and the fifth being annual leave. They would be common. The fourth one is an exemption rate for all clerical employees on particular salaries above the minimum wage of the award. That proposal is only sought with respect to the Clerks Award of the seven that are listed. So that could remain in the clerical award stream, subject to the Commission's convenience.

PN42

JUSTICE HATCHER: All right. I will turn to you, Ms Tinsley. Am I right in saying that except for one specific matter your proposals are common to the seven awards?

PN43

MS TINSLEY: Yes, that's correct, your Honour.

PN44

JUSTICE HATCHER: Can I just check, in light of the state of play with the superannuation clauses review are you still pressing the proposal about the superannuation clause?

PN45

MS TINSLEY: Can I come back to you on that one, President?

PN46

JUSTICE HATCHER: Certainly. As I understand it the (indistinct) as you know the Full Bench in that matter published a provisional view for comment late last year, and I understand the position to be that apart from one technical matter that no party has chosen to make any comment or any adverse view about that, so I am just wondering where your proposal stands in light of that.

PN47

MS TINSLEY: That's correct, President. We wrote to your chambers to confirm that we have no further comments on that provision. I will just need to confirm on that particular point in terms of what we have got in our division.

PN48

JUSTICE HATCHER: All right. And, Ms Bhatt, what matters in your proposals do you see as falling in the common stream?

PN49

MS BHATT: Those that relate to minimum engagement and payment periods, pay averaging, pay periods, IFAs, annual leave loading, the calculation of minimum hourly and weekly rates, and what we have called electronic communications. So reference there dealt with at sections 5 to 11 of our written submission.

PN50

JUSTICE HATCHER: Thank you. All right. As far as possible the consultation sessions will be held at locations which maximise in person attendances. I will have to work that out based upon where the parties are located. So you can assume they will either be in Sydney or Melbourne. The parties located in the relevant city will be expected to attend in person, and other parties can attend by a video link. The purpose of the conferences will primarily be to ascertain whether some measure of consensus can be achieved, and to measure the degree of support for each proposal. Does any party have anything else they wish to say about the programming of these conferences?

PN51

MS BHATT: Can I raise one additional issue?

PN52

JUSTICE HATCHER: We will start with you, Ms Bhatt, and then we will go to you, Mr Clarke.

PN53

MS BHATT: Thank you, your Honour. We appeared in proceedings before Deputy President Gostencnik and Commissioner Tran yesterday in relation to the job security stream of the review. The Deputy President indicated that that matter will be listed for a further two days of conferences on dates that are yet to be confirmed. We respectfully request that to the extent possible this matter is not listed on the same dates that are yet to be confirmed.

PN54

JUSTICE HATCHER: I promise you that won't happen, Ms Bhatt.

PN55

MS BHATT: Thank you.

PN56

JUSTICE HATCHER: All right. Mr Clarke?

PN57

MR CLARKE: Yes. Thank you, your Honour. There's a significant amount of material that's been advanced here, particular by the employer interests, and it could in our view take more time to deal with the totality of that material than what we have actually got, even if we assume we use a lot of days. But in our submission the Commission shouldn't deal with a lot of that material in this review. That's not to say that the Commission ought not deal with proposals to vary modern awards, that's what it does, but in our submission the review ought to be approached with some boundaries.

PN58

It is clear in our submission from paragraph 10 of your statement, the statement on 15 September, that the review was structured with some boundaries in mind. In summary those boundaries were firstly that the review wouldn't involve an open-ended reconsideration of the terms of modern awards, yet here we are with over 150 variation proposals. Secondly, that one of the confined steps of the review was an invitation to advance proposals to make modern awards easy to use while not reducing entitlements for award covered employees.

PN59

Now, in our submission there's a multitude of proposals that extend far beyond the terms of that invitation, either because they have got nothing to do with these reviews, go beyond these reviews, or because they reduce entitlements or do all of those things. Western Australian Chamber of Commerce and Industry, paragraphs 47 and 48 of its submission, seeking the abolition of overtime payments to casuals working under the Hospitality Award. Ai Group have put forward draft determinations in their submissions to the Fast Food and Retail Awards that would allow part-time workers to be paid no overtime for hours worked outside their agreed hours. Australian Chamber of Commerce and Industry, Chapter 5, advance a proposal to remove from seven awards the right of employees to give notice of and take their excessive accrued leave. New South Wales Business Chamber in Chapter 2 of its submission propose abolishing the prohibition on split shifts in the Clerks Award and Children's Service

Awards. They're examples. That's not the totality of the material that we sort of object to on scope grounds.

PN60

But thirdly, there's also some submissions which openly quarrel with the confined nature of the review that's been articulated in that statement and seek changes to awards outside of the seven awards identified at sub-paragraph (1) of paragraph 10 of the statement, or just demand the proposals to reduce entitlements should be entertained.

PN61

Now, in our submission there ought to be some kind of a triage or a filtering process adopted preferably at the frame (indistinct) what's actually going to be dealt with in the review, within the terms of the review as articulated in your statement. Our affiliates ought not be forced to contend with this sort of boundless process when the limits were clearly prescribed at the outset. In our submission the Commission could trigger or could conduct this triage or sort of strike out process as the first step.

PN62

Now, if you're attracted to that proposition having regard to what others might have to say about it we also have some suggestions as to how we might make some adjustments to the timetable to accommodate it, but we thought it was important to raise that issue today.

PN63

JUSTICE HATCHER: That's noted, Mr Clarke. As you say the scope of this review has specified boundaries and they're not going to change. Outside of those boundaries parties can make applications as they see fit, but the purpose of the conferences is to see whether some initial consensus can be identified as to whether any of the proposals meet the criterion would otherwise be the subject of agreement with or without changes. This process and this whole review is going to be strictly time limited, and I suspect a triage process of that nature would extend rather than truncate the review. But obviously you will be entitled to say all those things at the conferences which are going to occur. Was there anything else you wanted to say, Mr Clarke?

PN64

MR CLARKE: Just in terms of the order of proceedings. You've outlined sort of a proposal which makes - which has some support around the splitting the issues up. It's just a suggestion that maybe that common issue part of it sort of sits at the back with a little bit of extra time, because it may turn out that as you're in the stage of dealing with what you think are similar issues they turn out to be things that are in common, that then you want to bunk onto that sort of extra time common issues thing at the end. It might make sense to just sort of do it in that order, that's all.

PN65

JUSTICE HATCHER: I will consider that. I mean at the end of the day we can list an additional conference if parties think it would be of some purpose. Ms Tinsley, did you want to make a comment?

PN66

MS TINSLEY: No, no further (indistinct).

PN67

JUSTICE HATCHER: All right. Does any other party wish to say anything about the programming of the matter?

PN68

MS LEONCIO: Yes, your Honour. It's the Australian Retailers Association, Ms Leoncio here.

PN69

JUSTICE HATCHER: Yes.

PN70

MS LEONCIO: I just wish to address your Honour in respect of the application that has been made by the Australian Retailers Association and perhaps provide some context in order to address some of the matters that have been raised by Ms Bhatt. Now, that application has been made in the context of this modern awards review stream, which of course is focused on ensuring that the modern award system is easy to understand, stable and sustainable. That's provided an opportunity for the ARA to revisit the issue of award complexity, and as it's been outlined in our submission I won't go through that in a lot of detail, but that is a significant issue for both employers and employees in the retail sector, and the General Retail Industry Award is proving to be unnecessarily complex and restrictive when applied at the workplace and contemporary challenges in the retail sector.

PN71

Now, we understand that this review is intended to be limited and confined as your Honour has already mentioned this morning, and we have taken note of both the Minister and Commission's acknowledgement of the parties' abilities to make an application to vary an award, (indistinct) it is not intended to constrain parties from separately pursuing that type of application. So following extensive consideration by ARA members and consultations with other retail stakeholders the ARA has decided to make that application, but it does not seek to integrate the two processes, or if the application is compatible with the modern award review stream that is the subject of this directions hearing.

PN72

There is some overlap between the matters that are in the application that has been filed by the ARA and the work that is being undertaken in this review, but we will be seeking separate programming to deal with the application. We simply wish to bring to your Honour's attention that the application is currently on foot, and we will continue in that application to have discussions in order to determine any potential areas of agreement and proposed solutions to (indistinct) that I have identified. But as I said we don't intend to integrate the two processes.

PN73

To the extent that conferences are scheduled in the applications to deal with the matters that are raised by that application we would be open to doing that in that

stream, but we otherwise seek to be involved in this stream within the parameters that have been set by the Commission.

PN74

JUSTICE HATCHER: All right, thank you, that's noted. When I get that application it will be brought on for directions and we will program it in the normal way as you suggest.

PN75

MS LEONCIO: Thank you.

PN76

JUSTICE HATCHER: If no parties have got anything else they wish to raise I thank you all for your attendance. So what you can anticipate is that you will receive notices of listing for conferences divided up in the manner I have adverted to earlier, and parties will then either be expected to attend in person, or if they cannot they can request to be (indistinct). All right, if there's nothing further we will now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[10.26 AM]