



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT
COMMISSIONER YILMAZ**

AM2022/28

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

**Application by Indigenous Education And Boarding Australia
(AM2022/28)**

Educational Services (Schools) General Staff Award 2020

Melbourne

10.10 AM, WEDNESDAY, 16 AUGUST 2023

Continued from 19/12/2022

PN108

DEPUTY PRESIDENT CLANCY: Good morning. I'll just confirm appearances, please, before we get underway. Mr Franks, can you hear and see the expert panel?

PN109

MR FRANKS: Yes, I can. Thank you.

PN110

DEPUTY PRESIDENT CLANCY: Thank you. Mr Kenchington-Evans.

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MR KENCHINGTON-EVANS: Yes. Thank you, Vice President.

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DEPUTY PRESIDENT CLANCY: Thank you. Thanks for the promotion.

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MR KENCHINGTON-EVANS: My apologies.

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DEPUTY PRESIDENT CLANCY: Mr Malone.

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MR MALONE: Yes, good morning. I can see. Thank you.

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DEPUTY PRESIDENT CLANCY: Thank you. Mr Pefanis.

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MR PEFANIS: Yes. Thank you, Deputy President.

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DEPUTY PRESIDENT CLANCY: Thank you. And Ms Wills.

PN119

MS WILLS: Yes, good morning, Deputy President and panel.

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DEPUTY PRESIDENT CLANCY: Thank you. Thank you very much. The matter's been brought on following a statement delivered by the expert panel on 30 May, and there were directions in that statement and a program outlined. The expert panel thought we ought hear from the parties, hence the listing today, and we note that the parties filed material in response to those directions.

PN121

So the way we'll proceed this morning is, Mr Franks, we'll give you an opportunity first to speak to any matters that are raised in the material that you filed, and there may be some questions from members of the experts' panel, and then we'll hear from, I'm expecting, Mr Kenchington-Evans.

PN122

I don't know whether any of the other union representatives on the line are also intending to speak, but if so, we'll hear from each in turn, and then, Mr Franks, you'll have an opportunity to make any comments in response. So, Mr Franks, if you'd like to add anything to the material that you've filed, we'll give you that opportunity now. Thank you.

PN123

MR FRANKS: Thank you, Deputy President. I think context is really important in introducing this matter. Indigenous Education and Boarding Australia is an advocacy organisation. We're not an employer association, as such. So we don't exist in the industrial environment. We have no staff. We have member organisations, and we have individual members as well.

PN124

So we are in a space that exists to really promote what is in the best interest of Indigenous students obtaining educational outcomes. That's our real focus, and previously, I was the CEO of the organisation and naively listening to long-term frustration of members in the sector, or, as I travelled around the country, heard of a frustration around a difference between whether a boarding school, the residences of a boarding school or a residence that existed outside the boarding school doing exactly the same thing had different award coverages.

PN125

In fact, there's no specific award coverage for those that are outside of the boarding school. Thought it was a simple request. Having heard this, and before I sort of finished up, I decided it was probably worth putting in a submission to see what would happen to get that alignment with the Educational Services General Staff Award which does provide the appropriate cover for the same jobs that exist when - in the school and the same job that exists in a boarding residence where the kids go to many schools, not just a single school.

PN126

So it was nave. There was nothing tricky about it. We were looking for a simple alignment of occupations that served the same students. The only difference is where that's operated is part of a school or operates outside of school. Those that are outside the school are continually frustrated that they're referred to awards, the SACS Award, the Hospitality Award. They're lost in terms of how they manage it. They operate for the 40 weeks of the year that schools operate.

PN127

They're not there as a full-time - they're not operating as hotels, hostels that have people coming and going. They have the same group of students there for those 40 weeks of every year. They operate around rosters of the same for those that operate inside schools and those that operate outside schools. The request is a simple one, to create a rope-in clause that would allow those - there's not a large number of them, a small number of residences that exist to do the same work to look after students to have the same award coverage as their colleagues who do that withinside a boarding school. Simple request.

PN128

DEPUTY PRESIDENT CLANCY: All right. If I may, the material addresses, conceivably, some of the work and some of the classification and some of the potential award coverage that might be already applicable to employees of the hostels, and the expert panel doesn't have material before it that gives a sort of definitive view of the sort of employee profile that one may find in a hostel.

PN129

So we can accept that there is, you know, boarding supervision, and there might be house parents or whatever the term might be in the particular facility, but there are musings in the material that, for example, there might be conceivably a nurse onsite of these hostels, there might be cleaners engaged, there might be cooks engaged, there may be administrative staff engaged.

PN130

So to the extent you're able to, and are you able to give some detail around that or some indication around that sort of staff profile that one would find, or is it the case that some of these facilities will have a small number of staff who are akin to a jack of all trades?

PN131

MR FRANKS: Thank you, Deputy President. It's - the question raised, they do - they vary. So some of the larger hostels will have a range of other occupations. In this application, we weren't actually proposing to rope in those other occupations. It is just those boarding supervisory occupations that were looking to be included. So the expectations around a cleaner, for example, having anything other than the appropriate award coverage that relates to cleaners wasn't there. It was there to be able to cover the specific roles around boarding supervision and their managers.

PN132

DEPUTY PRESIDENT CLANCY: All right. So there may be some facilities that would have a range of employees or a range of classifications conceivably covered, and you're not seeking to cover those.

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MR FRANKS: No.

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DEPUTY PRESIDENT CLANCY: It's just in the boarding supervisory element. All right.

PN135

MR FRANKS: Yes.

PN136

COMMISSIONER YILMAZ: Can I just ask if those are the boarding supervisors, I take it that their roles vary as well.

PN137

MR FRANKS: Can I just - vary between - - -

PN138

COMMISSIONER YILMAZ: Vary according to your membership. The - as you mentioned earlier, your members do vary from smaller operations to larger operations and how they may conduct their work might be different and the range of duties might be different. Do I take it, then, that the supervisor's duties will also vary across the different type of establishments?

PN139

MR FRANKS: Not very much at all. The arrangement of the work may vary in terms of the number of staff and who shares up which roles, but the classifications within the Educations Services General Staff Award does cover those different ranges. So there isn't variability between the functions. The functions remain the same, and the classification allow for that variability depending on what range of activity people are doing.

PN140

COMMISSIONER YILMAZ: Do you know what the number of potential employees are likely to be affected by your application?

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MR FRANKS: No, not specifically. The - it's - some of the questions that have been asked by the unions about specific details - we've got limited resources, but we've actually put some feelers out there to get some sense of how many that might be because there was a - and we haven't gotten enough information to actually provide that back as a definitive document in response to some of the questions the unions raised.

PN142

There are a number of residences that are operated through education departments. So out of the 41 separate stand-alone bodies, there are, I think identified, 11 that are run through state or territory governments. There are also eight that are run by the Commonwealth, through Aboriginal Hostels Limited. So we're actually looking at a number of employers, probably, that don't have this Award coverage. We've probably only around 20.

PN143

And in that case, we're looking - and we're just doing an estimate - sorry, that's the best we can do - if each of these houses has approximately 15 staff, that's not a lot of staff overall. So that's where we're sitting at the moment.

PN144

I've got the Australian Boarding Schools Association have agreed to undertake this work but it hasn't been completed by the time of this hearing. So my apologies for not having definitive data regarding the total numbers.

PN145

COMMISSIONER YILMAZ: Do you know whether there might be any enterprise agreements that cover any of these organisations?

PN146

MR FRANKS: We've not identified any enterprise agreements at all in any of the independent boarding facilities. These are the ones who are always making noises around the fact they've got the lack of Award coverage.

PN147

DEPUTY PRESIDENT CLANCY: Thank you, Mr Franks. We'll hear from Mr Kenchington-Evans now. And, as I mentioned at the outset, you'll be able to make some comments in reply once we've heard from him and any of the other union representatives. Thank you. Yes, Mr Kenchington-Evans.

PN148

MR KENCHINGTON-EVANS: Thank you, Deputy President. If I may, I might make some comments in response to Mr Franks' submissions this morning. In addition, I provided to the expert panel this morning, a Full Bench decision from last week in Application by Woolworths, which I hope you have a copy of. And I apologise for providing it at late notice. But otherwise we'll rely on our written submissions.

PN149

So I think, comments in response to Mr Franks, the opening comments by IEBA actually, I think, raise the question of standing. Which we hadn't intended to raise. But if it assists the expert panel, this is an application per section 1571 of the Fair Work Act, which may only be made by an employee, employer or an organisation covered by a modern Award, at subsection 1. My apologies, that's subsection 158. There's a table there, regarding which entities might make this application.

PN150

My understanding is that, from comments made this morning, that the IEBA doesn't fall under the category of entities at subparagraph (a) of that table. But it may fall under the category of subparagraph (b), an organisation entitled to represent the industrial interests of the employers, employees that are covered by the Award.

PN151

We have previously performed some inconclusive research regarding the objects and practices of the IEBA. However, in the context of this matter, we do note that there appears to be some cooperation by a number of relevant employers with the IEBA, who, it would appear, consider the IEBA entitled to or capable of representing its industrial interests in this matter. We otherwise don't make submissions on this. It's a matter for the expert panel to satisfy itself on.

PN152

Regarding the applicant's construction of the proposed variation in its application, we reject the submission that the proposed variation is only for category of boarding supervisor employees. It's very clear in the application that it will apply to employees beyond that classification. And we've raised our significant concerns in our written paragraph – written submissions, paragraph 19(b)(ii), about the effect of that variation.

PN153

If the applicant, as it may be the case - it wasn't clear from submissions this morning – now seeks an alternative variation, we would seek a further opportunity to appropriately respond to that variation.

PN154

Those are our comments and responses to the applicant's comments this morning. I wasn't sure if there was a question from the expert panel, otherwise I'll move on to some comments that we wanted to make regarding the decision provided this morning. An application by Woolworths, that decision was issued on 11 August. And I note that the Deputy President was a member of the Full Bench in that decision.

PN155

So in that matter the applicant similarly applied per section 158(1) of the Fair Work Act, to vary the General Retail Industry Award 2020 by expanding the coverage of the Award by way of three proposed Award variations. Variations which are not dissimilar to the variations sought in this matter.

PN156

There the applicant provided some evidence of its own operations but not of the broader industry's practices. The Full Bench refused the application, providing four grounds for its refusal at paragraphs 38 to 41. And I'll just refer to some of the reasoning and analogise to the current matter as I go through.

PN157

So first, at paragraph 38, the Full Bench found that despite the applicant's assertion that the variations are necessary to clarify the Awards coverage provisions, there was no pre-existing disputes regarding coverage. Here we submit there's little to no evidence of pre-existing disputes. We submit – and that's due to the paucity of material provided by the applicant, and we've discussed that at length in our written submissions. So we submit that the findings by the Full Bench in that matter are likewise in this case. The applicants filed limited material of any disputes regarding the lack of clarity in this Award.

PN158

At paragraph 39, the Full Bench found that the applicant's provision of evidence regarding the practices of a single employer meant that there was only – and I quote:

PN159

Simply an insufficient fact for basis for making a variation with industry-wide implications.

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We submit that here, the applicant similarly failed to provide sufficient information regarding industry-wide practices for the variations sought.

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Third, at paragraph 40, the Full Bench referred to the sector's changing industry practices as raising:

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Potentially complex questions concerning Award coverage that are not addressed in the evidence or submissions.

PN163

Here, due to the applicant's lack of material filed regarding the industry practices, the expert panel, we say, is simply not in a position to assess whether or not similarly complex questions of future Award coverage may arise due to the variations sought.

PN164

Fourth, at paragraph 41 - - -

PN165

DEPUTY PRESIDENT CLANCY: How do you put that? Are you saying there's going to be changes in the way in which boarding accommodation's going to be provided in the future?

PN166

MR KENCHINGTON-EVANS: We say that the Full Bench concern in the Woolworths matter was that due to the evidence provided, there appeared – which, you know, included the automation of key parts of that sector – that gave rise to complex questions of Award coverage that were not addressed in the material filed in that matter. Here, more concerningly, we don't know what we don't know. There hasn't been sufficient material provided about, you know, disruption or diversification or automation in the sector, to know whether there is going – whether there are complex questions. So we're in fact more – there's more concern than in the analogous Woolworths case.

PN167

COMMISSIONER BISSETT: Do you have some sense of changes in the sector that might be occurring? Putting aside, not quite sure that automation is going to do much, but are there any other changes that you see arising in the sector?

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MR KENCHINGTON-EVANS: Well, I'm mindful that some of the applicant's material filed referred to the reliance of the sector on government funding. Particularly grants, scholarships, and I believe, the NDIS. And I'm mindful that, particularly in NDIS sector, there's significant changes in funding that is affecting work practices through subcontracting - independent contracting that affects Award coverage. And that the sort of gig economy, moving into that care and community sector. That would be – and I'm speculating – but that may apply in the boarding, hostel sector. That breakdown of traditional employer, employee models of provision of services and reliance on government funding. But otherwise I'd be speculating.

PN169

COMMISSIONER BISSETT: I mean, the reason I ask is that in the Woolworths case, the issues in the warehousing sector and the picking and packing sector – in picking and packing – are well known. They're notorious, really, for anyone who's looked at the warehousing sector in the last five years, there's massive

change. And the change just continues. So it was quite obvious, I would have thought, in the Woolworths decision, as to what they were referring to. I'm just not quite sure it as obvious or as big an issue in this case.

PN170

MR KENCHINGTON-EVANS: Thank you, Commissioner. Yes, I think I would just say that in this matter we don't know what we don't know.

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COMMISSIONER BISSETT: We never know what we don't know.

PN172

MR KENCHINGTON-EVANS: Had more material been provided we might be able to cogently assess whether this is a sector in flux and I accept that there are sectors that are notoriously changing – say, in the face of automation – and I'm not aware that this is one of those sectors. However, I think it's relevant that we say the expert panel is not in a position to answer whether there are potentially complex questions regarding award coverage arising from this application, due to lack of material.

PN173

COMMISSIONER BISSETT: I mean, it's perhaps particular germane to this issue but it seems to me that in any award variation that comes before the Commission, we're always confronted by a sector in flux. That's the nature of work, to some extent, and we need to be careful not to, just because there is flux in a sector, say, 'Well, we can't do anything'. We'd be frozen still with awards that were made 50 years ago if that was the case.

PN174

MR KENCHINGTON-EVANS: Thank you, Commissioner.

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COMMISSIONER BISSETT: Yes – I understand what you're saying though, thank you.

PN176

MR KENCHINGTON-EVANS: The last point that I'll just draw from the Woolworths decision is at paragraph 41, where the Full Bench noted that the variations would have wider implications than were addressed by the applicant and cited some possible examples there of that those implications may be. I've briefly spoken to this matter at the start of my oral submissions, that in this matter the unions have a similarly raised concern that the wide range of variations to coverage sought would have unknown and broad-ranging effect and I've spoken to that at our submissions – our written submissions – paragraph 19(b)(ii), regarding the expansion of award coverage to other categories – we actually don't know quite how many categories of employees there are employed by the relevant employers. That concludes my oral submissions, thank you.

PN177

DEPUTY PRESIDENT CLANCY: Thank you. We'll move through the other union parties. For the UWU, does either Mr Pefanis or Mr Malone wish to make any oral submissions?

PN178

MR PEFANIS: No, thank you, Deputy President.

PN179

DEPUTY PRESIDENT CLANCY: Thank you. Mr Wills for the CASU?

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MS WILLS: No, thank you, Deputy President.

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DEPUTY PRESIDENT CLANCY: Thank you. Mr Franks, at this point you've got an opportunity to make any submissions in reply. So we'll hear those from you now, if you'd like.

PN182

MR FRANKS: Thank you very much, Deputy President. I once again repeat that we entered this naively thinking we were actually helping create some certainty for a group of boarding school residences and their employees to be able to undertake their jobs with some award certainty. I accept that we are not an organisation that has an industrial legal representation sitting behind us with the resources that can muster that but would willingly submit that if there is need for us to make some clarity or variation to make this happen, even if it is a small number of people we're talking about – a small number of employers – it is a significant little piece of work that would bring alignment to something that already exists, as in the other two rope-in clauses that already exist within the award. So thank you very much for hearing and taking our submission all together.

PN183

DEPUTY PRESIDENT CLANCY: Thank you. I just thought you might want to respond to the questions raised about the standing of Indigenous Education and Boarding Australia. So could you just confirm, are you a membership organisation or what's the - - -

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MR FRANKS: We are a membership organisation. We have individual and organisation members. We have I think currently 32 boarding schools or residences that are members. So we are a very small association, just trying to fix a simple problem that probably should have been roped in when the award was created because it is a small rump of the sector, has never been included with any appropriate award coverage for those employees who are boarding supervisors.

PN185

DEPUTY PRESIDENT CLANCY: And as a membership organisation, what's your charter? What do you provide for your members?

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MR FRANKS: In terms of membership services, we don't provide direct services. We organise events, education and advocacy is our primary roles so opportunities for networking, sharing information – a newsletter is all they get as a benefit of – specific, direct benefit of being a member.

PN187

DEPUTY PRESIDENT CLANCY: And in terms of the advocacy, does your organisation have a constitution or a charter that talks about the sort of advocacy services that you provide for your members?

PN188

MR FRANKS: No, it is very broad. The only area that's sort of defined is more around our vision, around Indigenous students and their educational attainment to allow them to be successful in their future choices through boarding. So we've got a very generic constitution.

PN189

COMMISSIONER YILMAZ: I have one more question for you, Mr Franks: Mr Franks, what's the connection between the Australian Boarding Schools Association and the Indigenous Education and Boarding Australia?

PN190

MR FRANKS: There is historically – the Australian Boarding Schools Association only represented boarding schools. The IEBA, as it is now, used to be called Boarding Australia and before that, it was the NASA – it was an association for the residences that weren't inside that boarding school framework. So that is our historical base, going way back to 1995, when the small hostel residences were our core business. So as we have moved through and changed focus to Indigenous Education and Boarding, we've had this sitting alongside the ABSA, the Australian Boarding Schools Association. They have the boarding schools and the hostels were in our space. We now have dual membership, so the residences are now also included within ABSA's membership and our membership is open to those boarding schools who have numbers of Indigenous students.

PN191

So we have a crossover membership and we work cooperatively. We are meeting with them tomorrow. We're now continuing that, sort of how we get on together because we actually – our work around Indigenous boarders, which is around 30 per cent of boarding students, compliments their activities as more of an employer association.

PN192

COMMISSIONER YILMAZ: Do I take it then, Mr Franks, that ABSA, who you now have a connection with, they have perhaps more resources to potentially deal with this application – because you did say earlier on that they agreed to take this matter on. What do you mean by that?

PN193

MR FRANKS: Depending on the outcome of this hearing, and your future decision, they have indicated they will take it on if they need to, to actually

provide additional information or even run the case in the future, knowing they've got more resources than we have.

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COMMISSIONER YILMAZ: Okay, thank you.

PN195

MR FRANKS: Thank you, Commissioner.

PN196

DEPUTY PRESIDENT CLANCY: Thank you. We thank the parties for their attendance before the Commission this morning. The expert panel will reserve its decision and consider the material and the submissions that have been made and issue a decision in writing in due course. There being nothing further, we'll now adjourn. Thank you.

ADJOURNED INDEFINITELY

[10.44 AM]