



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2023/28

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

**Application by Australian Industry Group, The (163V)
(AM2023/28)**

**Application by Parkerville Children and Youth Care Inc.
(AM2024/16)**

Social, Community, Home Care and Disability Services Industry Award 2010

Sydney

9.00 AM, FRIDAY, 22 MARCH 2024

Continued from 06/03/2024

PN1

JUSTICE HATCHER: I will take the appearances, please. Mr Ferguson and Mr Chang, you appear for AiG as the applicant in the matter AM2023/28; is that right?

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MR B FERGUSON: Yes.

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MR C CHANG: Yes, your Honour.

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JUSTICE HATCHER: Mr Crocker and Mr Billing, you appear for Austcorp Parkerville as applicant in the matter 2024/16?

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MR A CROCKER: Yes, your Honour.

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JUSTICE HATCHER: Mr Scott and Mr Roper, you appear for Australian Business Industrial and the New South Wales Business Chamber?

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MR K SCOTT: Yes, your Honour, thank you.

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MR L ROPER: That's correct, your Honour.

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JUSTICE HATCHER: Mr Rabaut, you appear for the Australian Services Union?

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MR C RABAUT: Yes, your Honour.

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JUSTICE HATCHER: Ms Taylor, you appear for the Australian Workers' Union?

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MS C TAYLOR: That's correct, your Honour.

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JUSTICE HATCHER: Ms van Gent, you appear for the United Workers Union?

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MS A VAN GENT: Yes, your Honour.

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JUSTICE HATCHER: Mr Eddington and Ms Carter, you appear for the HSU?

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MR J EDDINGTON: Yes, your Honour.

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MS A CARTER: Yes, your Honour.

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JUSTICE HATCHER: All right. I will come back to the Australian Industry Group's application in a second.

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Mr Crocker, do you want to briefly touch upon the aspect of your application which deals with coverage of therapeutic workers, that is, I'm struggling to understand why there might be any doubt as to whether they are covered by this award? Has something given rise to that particular issue, or some dispute?

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MR CROCKER: Yes, your Honour. By way of background, coverage of this particular sort of worker prior to the introduction of the modern award system has been, incredibly, on our understanding, limited to some resi care awards that operated in Victoria.

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The nature of the work that the therapeutic carers perform is quite different to a number of other workers that are covered by the SCHADS award. Looking at the particular duties that are performed by these therapeutic carers, there are some categories which appear to expressly exempt the type of work performed. They are limited to disability care workers who perform in-care services for residents at their homes.

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In our view, there is an ambiguity as to whether or not, in circumstances where similar types of duties are not expressly covered or extended to therapeutic carers, whether there was an intention to cover these workers under the modern award.

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JUSTICE HATCHER: But this doesn't arise from some dispute or pay claim, or something, does it?

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MR CROCKER: No, your Honour.

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JUSTICE HATCHER: Right. And I take it your client has been paying these workers under this award since it was established, that is, is that what it's doing now?

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MR CROCKER: What it's doing now, your Honour, is paying at the high income threshold. It is paying in accordance with this award, but as to whether or not there's coverage, that's a matter that's not conceded.

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JUSTICE HATCHER: I've just got to say I don't understand that answer. You say it's not conceded that this award covers them?

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MR CROCKER: Yes, your Honour. There's ambiguity, we say, and we say that they ought be covered, your Honour, but, as the award stands, we say that the coverage is ambiguous.

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JUSTICE HATCHER: All right. Does any party, particularly the union parties, contest that these workers are already covered by this award, that is, is this an issue really in dispute? Yes, Mr Rabaut, what do you say about it?

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MR RABAUT: Thank you, your Honour. The ASU's position is that these workers are covered by the award, so we would be contesting the application by Parkerville in this particular instance.

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JUSTICE HATCHER: You say they are covered?

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MR RABAUT: Correct.

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JUSTICE HATCHER: What would be the difficulty in making some drafting amendment to put the question beyond doubt?

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MR RABAUT: Well, we say that, to the extent that the matter needs to be resolved right now, we say, in light of the Aged Care decision and the Annual Wage Review, it would be better to list the matter after those decisions for directions at that point in time.

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JUSTICE HATCHER: For what purpose? I mean, what are we arguing about?

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MR RABAUT: Well - - -

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JUSTICE HATCHER: If these workers are covered by the award already and there's some drafting amendment we can make to clarify that position, why would we need to wait to do that?

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MR RABAUT: No, apologies, your Honour. Clarifying the award to include or to ensure that it's - to clarify that these workers are covered by the award, I don't think we would necessarily oppose - well, we wouldn't oppose that.

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JUSTICE HATCHER: So we can deal with - what I'm really trying to inquire is whether we can deal with that as a discrete issue separately from the other, more contested, issues in the matter?

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MR RABAUT: Yes, we would say that the matters should be treated separately.

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JUSTICE HATCHER: All right. Just going back to you, Mr Crocker, am I right in saying you seek a retrospective variation?

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MR CROCKER: No, it's sought prospectively, your Honour.

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JUSTICE HATCHER: All right. I'm just wondering whether, in respect of the coverage issue, the appropriate course might be for the Commission simply to publish a draft variation determination, allow the parties an opportunity to raise any issue about the terms of that and, if there is no issue, just deal with that issue immediately by making a variation. Does anyone oppose that course of action?

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MR CROCKER: No.

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JUSTICE HATCHER: No? All right, well, that's what we will do then.

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So then we will go to the more substantive issues concerning sleepovers. I understand, Mr Crocker, the primary aspect of your client's application overlaps with the Ai Group's application, but, in addition, you advance an alternative variation in the event that the primary position wasn't accepted?

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MR CROCKER: That is correct, your Honour.

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JUSTICE HATCHER: All right. The Ai Group has, which I hope you have seen, proposed some draft directions. Would your client - it might require some adjustment - but would your client, broadly speaking, be happy to fit into that timetable so that it would align with the Ai Group as to filing a draft determination, submissions and evidence, et cetera?

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MR CROCKER: Yes, your Honour. We would seek a slight extension on some of those dates, but, substantively, we are happy to fit in with that structure.

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JUSTICE HATCHER: All right. What would those extensions be?

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MR CROCKER: It would be moving the dates by one fortnight, so that proposed order (2), instead of 17 May, becomes 31 May.

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JUSTICE HATCHER: Yes.

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MR CROCKER: As does proposed order (3); proposed orders (4) and (5) become 12 July; proposed order (6) would become 19 August, and we would be seeking a hearing on, or after, 21 October.

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JUSTICE HATCHER: What do you say about that, Mr Ferguson?

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MR FERGUSON: Our preference is to have the more expedited timetable, merely because we know that this issue is giving rise to significant confusion in industry and active disputation with a number of employers, but we recognise the utility in the two matters being dealt with concurrently and, as such, it's a matter for the Commission as to whether or not those accommodations should be made.

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JUSTICE HATCHER: All right. Does any other party wish to say anything about the proposed directions?

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MR SCOTT: Your Honour, it's Mr Scott here for ABI and Business New South Wales. Just in terms of the directions, and this might be a slight variation on what Mr Crocker has put, but my clients will likely be supportive of the AiG application, but what we would like to do, if it can be accommodated, is have a deadline whereby parties who support Ai Group's application file their materials about a fortnight after the Ai Group material is filed so that we can have the benefit of seeing those submissions and why they say the award should be varied, and that can inform our position in terms of supporting it and what we want to say.

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JUSTICE HATCHER: All right. Does any other party want to say anything about that? No? What about the respondents, that is, those who anticipate opposing the applications?

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MR RABAUT: Your Honour, if I may, the ASU just seeks parity with the length of time that AiG is provided to provide their written submissions. As it stands, if it's not amended, AiG is provided eight weeks, but the ASU is provided six weeks for response, and so our position will just be, depending on what your Honour's amendments may be, that parity is provided for the ASU to consider the employers' submissions in total.

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JUSTICE HATCHER: Yes, all right.

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MS VAN GENT: Your Honour, if I may, the UWU's position is the same as the ASU. We are content with the directions; however, we would be seeking parity in the time that we have to prepare our evidence and submissions in reply as well.

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JUSTICE HATCHER: All right. Anybody else?

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MR EDDINGTON: Your Honour, the HSU is in the same position as the ASU.

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JUSTICE HATCHER: Well, if there's nothing further, I will consider what has been put and issue directions, hopefully later today, or, at the latest, on Monday.

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Just to cap up, in respect of the coverage issue raised by Mr Crocker's client, I will arrange for a draft determination to be published, I will allow parties, say, 21 days to raise any issues in response and, if there's no response, that determination can simply be made, and I will be issuing directions for the hearing and determination of the sleepover aspect of the applications based on what has been put today.

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All right, if there is nothing further, thank you for your attendance and we will now adjourn.

ADJOURNED INDEFINITELY

[9.16 AM]