

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

50177-1

COMMISSIONER BISSETT

AM2011/19

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

**Application by Building Services Contractors Association of Australia, New South
Wales Division & Broadlex Services Pty Ltd and Others
(AM2011/19)
Cleaning Services Award 2010**

**(ODN AM2008/20)
[MA000022 Print PR986363]]**

Melbourne

4.09PM, MONDAY, 11 APRIL 2011

PN1

THE COMMISSIONER: I'll take appearances.

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MS R. FRENZEL: If the tribunal please, Frenzel, R, seeking permission to appear for the Building Services Contractors Association of Australia, New South Wales Division, Broadlex Services Pty Ltd, ISS Facility Services Pty Ltd.

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THE COMMISSIONER: Thank you.

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MS A. DAVIS: If the tribunal please, my name is Davis, initial A, and I seek permission to appear on behalf of Spotless Services Australia Ltd.

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THE COMMISSIONER: Thank you. Permission is granted. Ms Frenzel.

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MS FRENZEL: Thank you, Commissioner. The application before the tribunal this afternoon comes with a somewhat lengthy history attached to it and I thought it might be worthwhile to briefly run through the lot of history about the events which have given rise to the application. Arising out of the minimum wage adjustment process last year with respect to the Cleaning Services Award there was a conference convened before Deputy President Ives at the time to deal with a number of matters, including mainly interpretative matters about how the transitional rights were to be varied to implement the minimum wage increase. That matter was dealt with expeditiously and, can I say, amicably between the parties with the ultimate result that consent was reached between the then LHNU and the employer parties about how the rates were to be calculated.

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Arising out of that conference, though, Deputy President Ives has invited the parties to raise other matters that they so wished about the operation of the transitional rates in particular. Certain of the employer parties had and continue to have until today concerns about the way the transitional operates in particular states with respect to there being two increases per year. The way the award was originally constructed was that there was to be a transitional increase commencing from 1 January 2010, a minimum rate adjustment from the first pay period on or after 1 July 2010 and then that would have continued for the process of the transitional period.

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Given those concerns, there were a series of conferences before his Honour and, ultimately, there was an agreement reached which is consented by, now, United Voice about amending those transitional provisions with respect to certain states to, in actual fact, speed up, if you like, the transitional process. Those states and territories are the Australian Capital Territory, New South Wales, Northern Territory and Victoria. With respect to Queensland and Tasmania the transitional rates, in actual fact, expire, if you like, as of 1 July 2011 in any event.

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THE COMMISSIONER: Sorry, that was Queensland and?

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MS FRENZEL: Tasmania. With respect to Western Australia and South Australia it is the position of the award parties that the transitional model originally inserted remains as is for reasons that firstly go to the tenders that have been let with respect to those states, the additional costs of the modern award which were much higher for employers in those two states because of the low base, if you like, that those workers were moving from state award to the federal award, and also it maintains the status quo for employees and employers alike and, therefore, there was no advantage or indeed disadvantage by leaving those states as is.

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With respect to the ACT, New South Wales, Northern Territory and Victoria the award parties have come to the agreed position that the transitional increases which are scheduled for 1 January 2012 through to 1 January 2014 should in actual fact be brought forward and they should commence on or after the first pay period of 1 July 2011, 2012 and 2013. The basis for the application, Commissioner - - -

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THE COMMISSIONER: So the effect is to bring them forward six months.

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MS FRENZEL: Correct. Now, the savings for the employers are obvious with respect to administrative savings, ease of payroll management. That has been a concern, particularly, of my friend Spotless. With respect to those companies who are the named applicants, it does them no harm at all and we are more than happy to not only make the application but also to put submissions in support of it. I might indicate that there has been broader consultation with the industry generally about this matter.

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The Building Services Contractors Association of Australia national body is not federally registered but it was the main body that dealt with the award modernisation process and requested that EMA Consulting and myself deal with that process for them. On that basis there has also been a resolution of the BSCA board nationally supporting the application, even though they're not named applicants because they're not a registered organisation.

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With respect to effect on employees, it's only all up for them, really, because the employees in those states and territories will benefit from the increased transitional rates as of the first pay period on or after 1 July. We are mindful that when employers and unions alike discuss the low paid, the low paid are in fact award-dependent workers. This industry depends very much on the award with respect to tendering, the letting of contracts and the payment, obviously, of wages.

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We say on the basis of the grounds and support of our application that the award modernisation objectives have been met, that to deal with this application in a four-yearly review process is perhaps – well, put it this way, it wouldn't work because the efficiencies the employers are seeking and the benefits the employees are likely to receive or will receive wouldn't happen if they waited for the four-

year review. So on that basis and for those reasons I would commend the application to the tribunal.

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I might add that the process that the parties seek going forward is that the issue of the principle of those transitional increases operating from 1 July would be put into the award as a statement for now of intent and then when the minimum rates adjustment order is done, it is then that we would put the 1 July date in to replace the 1 January. The reason for that is because if you put the rates in for 1 July this year, they're going to change anyway.

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THE COMMISSIONER: With the minimum rates adjustment.

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MS FRENZEL: With the minimum rates adjustment. So rather than having this tribunal, my friends from Spotless, myself and our clients trying to develop a 50-page order of rates, it was agreed in front of Deputy President Ives that we would settle the variation now and then, with respect to the implementation, obviously, we would deal with that at the time that we process the minimum rates adjustment. Certainly from the employers' perspective we've got no objection to that path because that is a more efficient and clearer way of expressing rates than 1 July.

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THE COMMISSIONER: Can I just be a little bit clear on what is it you want done now? You tell me again what the steps are.

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MS FRENZEL: I have drafted an order which reflects the application and I might tender that.

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THE COMMISSIONER: Yes.

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MS FRENZEL: I didn't have the opportunity because it was drafted quite quickly, but I'll take the tribunal through it. There might be some variation required but we can certainly talk through the order in any event. The draft basically reflects the application. What it does is it basically says:

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By varying schedule B transitional provisions, other than shopping trolley collection contractors, and in particular amended schedule B9 transitional arrangements with respect to B9.1 Australian Capital Territory, B9.2 New South Wales, B9.3 Northern Territory and B9.7 Victoria, to delete the dates for transitional increases under the Cleaning Services Award in the above schedules of a 1 January 2012, 2013 and 2014 and substituting the first pay period on or after 1 July 2011, 2012 and 2013.

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Now, with respect to that variation we say that for the purposes of this exercise, given that we intend to amend the transitional table for the minimum rates adjustment process, that there could be a new B9 in schedule B which would deal

with the changed transitional arrangements for those two territories and two states. Then once the order for the rates adjustment has been made, then that paragraph can either continue in the award to explain when variation occurred or, indeed, it might even be deleted. But we say that with respect to the machinery of it a new B9 in schedule B could be drafted to comprehend the intention of the parties with respect to the amendment of schedule B for those two territories and states.

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THE COMMISSIONER: When you say a new B9 - - -

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MS FRENZEL: Well, schedule B has nine provisions at the moment. Schedule B is the transitional provisions.

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THE COMMISSIONER: Yes.

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MS FRENZEL: So we could pass B8 which is dealing with the provision – falling into division 2 employers – we could put in a new B9 for now which is an explanatory comment and, in fact, varies the award to comprehend what the parties intend to do with the minimum rates adjustment.

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THE COMMISSIONER: At the moment B9 is a very extensive set of tables about the adjustments. You're not suggesting I delete those? No, not at all.

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MS FRENZEL: No.

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THE COMMISSIONER: Are you suggesting that I renumber it to be 10 or are you suggesting a new paragraph at the front of B9?

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MS FRENZEL: Under B9, Transitional Arrangements, I think that's where we'd put the paragraph.

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THE COMMISSIONER: Okay, yes. That's what I was trying to just make clear.

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MS FRENZEL: Sorry, I wasn't very clear myself.

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THE COMMISSIONER: Do you have a proposed paragraph or are you suggesting these words that you have in the draft determination are the words that go into that paragraph?

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MS FRENZEL: I think that what we can say – and certainly I can draft something fairly quickly about it, but I think with respect to B9, B2, B3 and B7 that we say as of 1 July the transitional increases that were previously going to be January each year going forward will commence from July 2012, and leave that paragraph there if we wish.

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THE COMMISSIONER: Yes, and these changes will be reflected in the schedule when the minimum wages adjustment is done.

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MS FRENZEL: That's right.

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THE COMMISSIONER: Okay.

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MS FRENZEL: For something so simple it sounds horribly complicated.

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THE COMMISSIONER: Yes. I understand what you're trying to do. So instead of having to redo the whole thing, there's a statement of intent of what is going to occur on 1 July.

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MS FRENZEL: That's right. One of the concerns that we had about actually varying the schedules, apart from the amount of work and effort and time involved, was that employers may well tender on those rates thinking they were minimum rates adjustments.

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THE COMMISSIONER: Yes.

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MS FRENZEL: Given that factor, we thought we'll leave the rates alone for now until the minimum rates adjustment was nigh and then we'd do it in one hit.

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THE COMMISSIONER: Could I then ask you, Ms Frenzel, to draft the words in consultation with Spotless who are here today, just draft the words that you say go there, which in effect means I – I mean, the determination is no more than the statement as opposed to having to do anything to the award itself.

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MS FRENZEL: That's correct. What we did with this award, to bring you up to speed with it, we've actually put a few explanatory statements through it in the transitional provisions to explain to perhaps newcomers to the industry and people who aren't as well acquainted with it as what I am exactly how these things work. So this one is no different.

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THE COMMISSIONER: I have to say that those explanatory statements have been very useful when I've needed to delve into the rates in the award.

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MS FRENZEL: Well, I'll leave my submissions there, if that pleases the tribunal. Thank you.

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THE COMMISSIONER: Thank you. Ms Davis.

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MS DAVIS: Thank you, Commissioner. I have nothing further to add to the submissions of my friend other than to say that Spotless Services Australia supports those submissions and believes that the variation should be made in accordance with the application.

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THE COMMISSIONER: Thank you. I should just indicate for the record that I did receive correspondence from Ms McMillan from United Voice who indicated that she were writing on United Voice's behalf to express their support for the application by Building Services Contractors Association of Australia and supports the variation. It might be worthwhile – and I'm sure you will, Ms Frenzel – consulting with United Voice about the form of the words that we actually put into schedule B. Yes, that's right, B9.

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MS FRENZEL: B9.

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THE COMMISSIONER: Now, just in terms of putting those words in, is it necessary for me to make a determination, because it is in effect a variation to the award.

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MS FRENZEL: The view of Deputy President Ives – and it was commonly held in view of the conferences – was that the variation needed to occur because it affects the transitional rates, not the – obviously it can't affect the minimum wage adjustments in timing. But the variation needed to occur prior to the minimum rates adjustment being processed, because you couldn't tangle up the transitional rates with the minimum rates adjustment. So, therefore, this exercise was to at least get the machinery or, if you like, the principle of the matter dealt with and resolved so that everybody was clear that come 1 July the rates would include the 1 January 2012 transitional rate and the minimum rates adjustment.

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THE COMMISSIONER: Yes.

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MS FRENZEL: The initial thought was perhaps we can do it in one hit but the one-hit approach fell over for the pure and simple reason that there were different rates. There were transitional rates and there were minimum rates and we had to do it as a separate application, hence us being here this afternoon in front of the tribunal. So the approach that we've taken was to say let's settle the matter on principle. Let's put it in that the tables are going to change and they will change on X date and they will operate on XY. That way everybody is clear and on notice that the rates tables will be amended in accordance with the determination of Fair Work Australia to vary the transitional rates and their timing.

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THE COMMISSIONER: My question is, I don't need to formally make a determination to insert that statement of future intent into the transitional table?

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MS FRENZEL: My understanding of it, Commissioner, is that you do. Otherwise the award is not varied.

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THE COMMISSIONER: Yes.

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MS FRENZEL: If the award is not varied then we fall over on the technical point that you can't use a minimum wage order process to vary those transitional rates.

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THE COMMISSIONER: Yes.

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MS FRENZEL: So that's the purpose of making the application now, just to sort that issue out so then we can just do the one wages table and insert that. But the award is being varied to the extent that the rates referred to as at 1 January 2012, 2013 and 2014 will become 1 July 2011, 2012 and 2013.

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THE COMMISSIONER: Yes, I understand that but the paragraph that you want to insert at the beginning of schedule B9, does that need to go into the determination as well, to insert that into the transitional table?

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MS FRENZEL: Yes, I do believe it does. So we need to work on the words then.

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THE COMMISSIONER: Then redraft the determination.

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MS FRENZEL: That's correct.

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THE COMMISSIONER: Yes, that's fine.

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MS FRENZEL: Thank you.

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THE COMMISSIONER: There being no further submissions and no-one in Sydney, I will grant the application and will settle the determination following further advice from the parties on the drafting of that. I have to congratulate the parties on the work they've done on this. I do understand that it has been extensive and is a positive step forward in getting through what I appreciate is a difficult transition period for the employers in this particular area. If there's nothing else we'll adjourn. Thank you.

<ADJOURNED INDEFINITELY

[4.28PM]