



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
(AM2023/21)**

Making awards easier to use stream – Consultation 6 – Children's Services Award 2010

Sydney

10.00 AM, WEDNESDAY, 20 MARCH 2024

Continued from 19/03/2024

PN1

JUSTICE HATCHER: I'll take the appearances. Mr Redford and Ms Van Gent, you appear for the United Workers Union?

PN2

MS A. VAN GENT: Yes, your Honour.

PN3

MR B. REDFORD: Yes, your Honour.

PN4

JUSTICE HATCHER: Ms Rafter, you appear for ABI and Business New South Wales?

PN5

MS A. RAFTER: Yes, your Honour.

PN6

JUSTICE HATCHER: And Ms Cruden, you appear for the Australian Industry Group?

PN7

MS L. CRUDEN: Yes, your Honour.

PN8

JUSTICE HATCHER: All right. For the benefit of you who haven't participated in one of these sessions before, what I intend to do is to go through the summary of the award variation proposals which has been published on the Commission's website which I hope you have access to.

PN9

In respect of the proposals I'm just going to ask the move of the proposal to explain its rationale including what problem it's intended to address and how it will resolve the identified problem. Then I'll ask other parties to respond to that. The key purpose of the consultation is to identify any proposals which might be the subject of a consensus or might lead to agreement being reached if there had been a bit of further discussions.

PN10

I can indicate that you'll see from the summary that the large majority of proposals have been advanced by the Australian Workforce Compliance Council. They participated in the initial consultations but have since informed me that they don't intend to participate in any further consultations and don't intend to elaborate on any of their proposals.

PN11

Accordingly, I'm not going to ask any party to talk about those today, so I'll go straight to the first one after that which is the Ai Group's proposal to vary the provisions of the award relating to notice of roster changes. So, Ms Cruden, what do you want to say about that?

PN12

MS CRUDEN: Thank you, your Honour. The item in the table number 44 concerns our proposed variation to clauses 10.4 and 21.7 of the award. The problem we are essentially attempting to address here is that the award requires agreement to be reached on a regular pattern of work for employees. So, for part-time employees, a time of engagement with seven days' notice to change the days of work where it's not done by agreement.

PN13

And whilst there is an exemption to the seven day notice requirement currently, our submission is that that operates in extremely limited circumstances and it's expressed to apply where there is an emergency outside the employer's control, that being defined, or emergency being defined as a situation or event that imposes an imminent or severe risk to the person at an education and care service premises.

PN14

For example, a fire at the education and care services premises or a situation that requires the education and care services premises to be locked down. For example, an emergency government direction. And your Honour, one may envisage that such circumstances are going to be quite rare and therefore that exemption has very limited work to do in a practical sense.

PN15

We would propose that an additional situation or circumstance in which an employer would be exempt from having to provide the seven day notice requirement for the change of the roster involving agreed hours of work for a part-time employee.

PN16

If I could just briefly respond to some of the reply submissions received in respect of this proposal. We disagree with the provision expressed by the UWU that the current clause as drafted in the Act strikes an appropriate balance.

PN17

In our submission the exemption should also permit an employer to treat as an urgent situation, one where there is an unexpected staff absence and where that has potential, in particular, to jeopardise the child and educator ratios in centres, which of course is a regulatory requirement of these operators. We also note the basis of the ACTU's objection that this would involve a reduction of employee entitlements.

PN18

Your Honour, we would disagree with the characterisation of our proposal in that respect. Since this involves a change of the employees' ordinary working hours they would still work those hours and therefore there is no erosion of monetary entitlements attached to the proposal that we have put forward.

PN19

JUSTICE HATCHER: So, with part-time employees the roster could put them on a roster then on a day they'd never agreed to work?

PN20

MS CRUDEN: Yes. That would be a change to a roster that is not quite fair, usually agreed hours.

PN21

JUSTICE HATCHER: I'm just (indistinct) hours on the days of work. Would that allow them to be called in on a day on which they never agreed to work?

PN22

MS CRUDEN: Yes, your Honour. Our proposal would extend to that.

PN23

JUSTICE HATCHER: And that in effect would operate as a direction to attend to work?

PN24

MS CRUDEN: Yes, your Honour.

PN25

JUSTICE HATCHER: So, I'm just wondering how that would work if a part-time employer has entered into an arrangement to work particular days based upon their other commitments and available hours.

PN26

MS CRUDEN: I understand, your Honour. It may be that consideration needs to be given to how it may interact with expressed availability, for example, of a part-time employee. But the situation remains that an employee may be faced with very short notice. Absence of another employee who forms part of the minimum and mandatory education child ratios and has a pressing need to be able to address that absence, in particular, in the context of its regulatory obligations.

PN27

We submit that the award and the rostering provisions should factor that in with respect to the circumstances in which an employer may be exempt from that seven day requirement.

PN28

JUSTICE HATCHER: That would effectively be any situation where another employee calls in sick.

PN29

MS CRUDEN: If the effect of that employee calling in sick was to place in jeopardy the maintenance of the educator child ratios. Yes, your Honour.

PN30

JUSTICE HATCHER: That's not what your proposal says. That is, your draft clause doesn't invoke any issue of child educator ratios. It just says, 'any unexpected absence', which to me basically means, anybody calling in sick. That is, it's broader than – the way you've drafted it is broader than the purpose which you say is underlying this.

PN31

MS CRUDEN: I understand, your Honour. But that is the intended purpose for which it's directed at, is to allow any employer to address circumstances where it's necessary to vary the roster to make provision for an employee's unexpected absence.

PN32

JUSTICE HATCHER: In clause 21.7(b)(I) it talks about changing an employee's rostered hours. Does that include days?

PN33

MS CRUDEN: We would envision, your Honour, that to address the issue that we are opposing there would be a need to be able to vary the roster in respect of both days, and hours in order for the problem that we would seek to address to be properly rectified through the award variation.

PN34

JUSTICE HATCHER: I mean, I'm just trying to think this through. If this occurred you may end up changing the rostered hours which would then constitute a direction for an employee to attend for work on a day they've never agreed to attend for work. Now, if they're simply unavailable because, for example, they've got study commitments or their own child care commitments, what's the consequence?

PN35

MS CRUDEN: The consequence, your Honour, would be presumably the employee is unavailable to discharge the roster as varied in a practical sense. So, I mean, to the extent that our proposal requires further consideration in that regard we're happy to consider that, your Honour.

PN36

JUSTICE HATCHER: All right. Does anyone want to respond to this? Ms Rafter?

PN37

MS RAFTER: We would just say we reiterate our support for the proposal. And we note your Honour's observations regarding how it would operate with part-time but we'd simply highlight that in the SCHADS award, and this isn't for the part-time part of the award but at clause 25.5 paragraph (d), Roman numeral - - -

PN38

JUSTICE HATCHER: Could you just hold on while I look that up?

PN39

MS RAFTER: Yes, apologies. So, it's clause 25.5, paragraph (d), Roman numeral (II), paragraph (b). We just highlight its - - -

PN40

JUSTICE HATCHER: Sorry, just a moment. 25 point 5 - - -

PN41

MS RAFTER: Point 5.

PN42

JUSTICE HATCHER: Yes.

PN43

MS RAFTER: Paragraph (d).

PN44

JUSTICE HATCHER: Yes.

PN45

MS RAFTER: Roman numeral (II).

PN46

JUSTICE HATCHER: Yes.

PN47

MS RAFTER: And then paragraph (b). We just wanted to highlight that this is also a service industry that has a similar clause. It's not in similar terms to the one – it's not precisely the same as what the Ai Group has proposed, knowing that it lends it to an employee's absence from duty on account of illness. It's not just unexpected. But we do note that this is a similar clause that does appear in the service industry.

PN48

JUSTICE HATCHER: So, this is a provision only applicable to full-time employees, is it, in the - - -

PN49

MS RAFTER: I may need to take that on notice, your Honour, as I quickly was rechecking the award to note that there is any similar provision in the part-time section of clause (10) but I would need to take that on notice to consider it a bit further.

PN50

JUSTICE HATCHER: I mean, the SCHADS Award provision is more (indistinct). As I said, it appears, I think, only to apply to full-time employees. And it would only occur when it's necessary to enable the service to be actually delivered.

PN51

MS RAFTER: I would accept that observation where it does appear to operate in much more limited circumstances than the proposal put to you in the Services Award by the Ai Group. But as an alternative, not to adopt the proposal regarding clause 10.4 put by the Ai Group we would submit that there does seem to be a basis to consider this amendment in the context of clause 21.7 in the Children's Services Award.

PN52

JUSTICE HATCHER: All right. Ms van Gent or Mr Redford, do you want to say anything about this?

PN53

MS VAN GENT: Yes. Thank you, your Honour. We'd like to reiterate our opposition to this proposed change. We support the ACTU's submission previously put that this does constitute a reduction in entitlements for the reasons that your Honour has alluded to. So, it does create the capacity for a part-time employee to be directed to attend work on a day when they haven't agreed to. And there would be consequences for that employee, potentially, in not following that direction.

PN54

We would say further, your Honour, that the amendment is actually not required to achieve the purpose that's been expressed by the Ai Group. We say that the award already allows for agreement to be reached with a part-time employee to vary their hours on an ad-hoc basis. That's at clause 10.4(d)(I), so, changes can be agreed between employer and employee. So, that could be applied in circumstances where somebody was required to cover another worker who was absent due to illness, for example.

PN55

We also say in a practical sense there are other options that are available to employers in circumstances where they need to cover for an absent employee. For example, they can engage a casual employee. They can engage agency personnel. They do have other practical options to be able to work through these issues and therefore the scenario that's been outlined to us doesn't necessitate a change to the award.

PN56

JUSTICE HATCHER: All right. Ms Cruden, could I simply invite you to consider the issues that have been raised and perhaps think about whether you want to advance a more nuanced proposal which takes into account those matters? Again, unless there's a clear indication of availability on the part of a part-time employee I don't know how you can just simply have an award provision which requires a part-time employee to be called in a day they're simply not available.

PN57

I mean, people are part-time employees for a reason. And I don't think it's within the notion of part-time employee that people can be called in on days they never contemplated working.

PN58

MS CRUDEN: Your Honour, if I can further address you on that point. I've had the benefit of reviewing the award provision while my colleagues were making further submissions. I do note that there is a difference in the wording of the award with respect to the provisions in clause 10.4 and in the provisions in clause 21.7. And clause 10.4(d)(II) does expressly currently refer to an employee's ability to change the days the employee is required to work. And that would appear to be a point of difference to the wording in 21.7 which refers to the hours.

PN59

So, if I could revisit my earlier submission, your Honour, there is the current capacity for an employer to call an employee in on a days that are not a part of

their agreed regular pattern of work, with less than seven days' notice where there is an emergency as defined. Your Honour, our contention would be that the situation that we were proposing should be considered a further urgent situation.

PN60

And whilst the UWU note that there is the ability to call someone in or have someone change their roster by agreement, in the absence of agreement the change in the roster would necessitate payment of overtime which we submit is unduly onerous in the context of, particularly an employee's requirement to maintain those ratios.

PN61

And our proposal would seek to strike a balance between the employer's regulatory obligations and flexibility within the manner in which part-time employment may be utilised. Whilst the UWU did refer to alternatives of casual employees or labour hire agency staff being engaged, our proposal is directed at the utility of the part-time employment being a permanent option.

PN62

JUSTICE HATCHER: But presumably your provision would only apply if nobody agreed. So, by definition we're talking about people who do not agree to work on the day in question.

PN63

MS CRUDEN: Yes, your Honour. I'd envision that if in the event that there was agreement that it would not need to be enlivened. The current wording of clause 10.4(d)(II) is 'where agreement cannot be reached it is (indistinct).

PN64

JUSTICE HATCHER: No, that's the point.

PN65

MS CRUDEN: Yes.

PN66

JUSTICE HATCHER: That is, this is someone who indicates, a part-timer, who does not agree to come into work.

PN67

MS CRUDEN: Yes, your Honour.

PN68

JUSTICE HATCHER: And you want the right to order them in to work.

PN69

MS CRUDEN: Yes, your Honour.

PN70

JUSTICE HATCHER: All right. Well, open invitation for you to consider perhaps a more nuanced proposal. The next one is not specific. But you've advanced a general idea, some greater flexibility in managing rosters, I think in

order to maintain ratios. So, what do you want to say about that and how might that work?

PN71

MS CRUDEN: Thank you, your Honour. I table item 44 that relates to a proposed new clause in respect of which we have not advanced any drafting or written proposal at this point in time. The problem that we seek to address in advancing this proposal is in the context of the industry being one that's susceptible to the impacts of client cancellation.

PN72

The issue is one of ensuring that the award is sufficiently flexible by providing mechanisms that allow for utilisation of staff when users of the service may cancel a booked service. Requirements with the respect to the need for a written agreement to vary hours of work may be burdensome to employers if there is a frequency of changes in work patterns.

PN73

And it is our submission that greater flexibility in how the permanent workforce, in particular, the part-time permanent workforce can be utilised in the case of client cancellations would make the award easier for employers to use and administer in those circumstances, your Honour.

PN74

As we identified in our submission we are mindful that there are diverse parts of the industry covered by the Children Services Award and the issue may impact employees differently depending on which part of the industry they operate in. And for that reason we've not advanced a specific proposal. We would respectfully seek to use this consultation session as an opportunity to canvass the views of others.

PN75

I note that there is a cancellation clause within the SCHADS Award, clause 25.5(f)(i) which gives rise to some potential considerations or issues that might be canvassed amongst the parties with a view to seeking an opportunity to place before the Commission a specific proposal for consideration, your Honour.

PN76

JUSTICE HATCHER: My memory of childcare is getting a bit old now but as far as I can recall, the fact that your child didn't show up didn't excuse you from payment, did it? That is, you booked a place. And I can't remember if you ever got a refund or a discount if your child didn't show up. That is, you didn't have the right to just cancel on a day by day basis, did you?

PN77

MS RAFTER: Your Honour, that, I imagine, would depend on the arrangements, the commercial arrangements of the centre, itself. It may be that in the case of casual bookings, for example, as opposed to permanent bookings, maybe that particular service, there may be a difference with respect to whether or not there is any claw-back or recouping of money for a service booked but not used.

PN78

I envision it may also depend on the particular flexibility that a service may offer. For example, if a day wasn't used, if a booked service wasn't used where it may be at the service's discretion to instead offer, you know, a substitute day or a vacancy, or to address it in some way. But your Honour, the issue, and again, I'm interested to canvass the views of my friends at the table but the issue may be one of whether or not there is any financial impact on employers which could potentially be addressed through the issue.

PN79

But it's also one of whether or not, faced with less children in a service than what was provisioned for, taking into account the ratios there may be ways in which employees could simply be more productively utilised on other days, or in other ways, taking into account they may no longer be required depending on the number of cancellations, to make up a particular ratio on that day that they are rostered to work.

PN80

JUSTICE HATCHER: But this just goes back to the rostering provision though, doesn't it? I mean, are you talking about anything else? I mean, I think effectively talking about people being rostered on some substitute day - - -

PN81

MS CRUDEN: Yes. Well, the - - -

PN82

JUSTICE HATCHER: At short notice. In effect, to say, look, we've had these cancellations. Don't turn up for work today, turn up for some other day. Is that the gist of - - -

PN83

MS CRUDEN: That would be one option. For example, looking at the clause in the SCHADS Award it addresses the issue at two levels. One would be the option or expressly permitting the employee to be directed to perform other work during which the hours they were rostered; and the second level at which the SCHADS Award provision addresses the issue is to consider whether or not the employer may cancel the rostered shift or the affected part of the shift.

PN84

If the shift is cancelled, under the SCHADS Award the employer must either pay the employee the amount they would have received if not cancelled, or otherwise if the criteria is made out to utilise the make up time component of that clause then the employer may be able to elect to direct the employee to make up time instead, your Honour.

PN85

So, it's not necessarily just about SCHADS roster provisions. It's also about more broadly how employees can be productively utilised in circumstances where the original reason for which they were rostered for work, in particular, to ensure maintenance of educator and child ratios, may no longer exist because of cancellations.

PN86

JUSTICE HATCHER: In effect, I mean, this is part of the roster clause in the SCHADS Awards, so in effect it's another way of saying you'll be rostered to work some other shift within – what's the period? Six weeks.

PN87

MS CRUDEN: Your Honour, it is part of the roster provisions of the SCHADS Awards, and yes, make up time does comprise one of the components of the way in which employees may be utilised under the SCHADS Award in circumstances where they cancelled service. However, there is also the provisions dealing with the ability to expressly direct the employees into other work. That could be productively done at the time the original service was intending to be booked.

PN88

JUSTICE HATCHER: What might that be, in the context of child care? And I can understand how that works in social work but how would that work in childcare?

PN89

MS CRUDEN: Yes. Again, your Honour, this may be one situation that would benefit from a broader discussion amongst my friends. However, one example may be if there is an employee who has multiple services, an employee is – particularly multiple services that are geographically located to one another, it may be the case that any employee could be diverted to another centre on the day which, you know, depending on how rosters were crafted it could potentially be the case that the shift they were proposing to work was expressed to be at a particular location.

PN90

So, it may be, your Honour, that the ability to expressly divert employees into other duties that the employer may have available could be one option that would address this utility of an employee.

PN91

JUSTICE HATCHER: But does the Children's Service Award say anything about working location?

PN92

MS CRUDEN: Your Honour, it does in one part refer to perhaps the provisions where an employee moves location during the course of a workday. To my recollection, your Honour, I don't believe it addresses necessarily outright a location of work, per se.

PN93

JUSTICE HATCHER: So, what is that clause?

PN94

MS CRUDEN: I may be wrong but it appears to be maybe at clause 21.7, paragraph (c) where it says, 'An employee may be transferred from one location to another.'

PN95

JUSTICE HATCHER: It seems to me that that clause other than in its current form or with some minor adaptation might cover the circumstance you have described.

PN96

MS CRUDEN: Your Honour, yes, it may be the case that if it weren't expressly limited to being movement within rostered hours, bearing in mind we're talking about potentially change that would need to occur before the commencement of the rostered hours, it may be that that may assist to accommodate one of the options that exist in the SCHADS Award which would be to redirect the employee to other work, their obviously being some other options in the provision of the SCHADS Award.

PN97

JUSTICE HATCHER: And I assume the existing provisions which allow changes in days and hours by agreement would also currently be used. That is to say that you've got the cancellation and you could ask – simply when an employer asks them to agree to work another day or - - -

PN98

MS CRUDEN: Your Honour, if that was on seven days' notice, currently.

PN99

JUSTICE HATCHER: Or by agreement.

PN100

MS CRUDEN: Or by agreement, your Honour, yes.

PN101

JUSTICE HATCHER: And again, this assumes there's no agreement.

PN102

MS CRUDEN: Yes, your Honour. This would be – yes, we envision it would be enlivened in circumstances similar to that in the SCHADS Award which is that the enlivening factor is the cancellation of a booked service, which would then trigger the potential options available to address any disutility in how staff may be utilised as a service arising from that.

PN103

JUSTICE HATCHER: All right. Ms Rafter?

PN104

MS RAFTER: We support that further flexibility be explored on this issue. As to whether the SCHADS client cancellation clause could easily be transferred over to the Children's Service Award, I would need to take that on notice and canvass it with members as we haven't either considered that, or even if we had the opportunity to see a more concrete proposal by the Ai Group to then respond to it in that way.

PN105

But generally, we are supporting of exploring this issue and are happy to participate in further discussions about it.

PN106

JUSTICE HATCHER: All right. Ms van Gent or Mr Redford?

PN107

MS VAN GENT: Your Honour, we are opposed to this proposal. We've got similar concerns in relation to it, as with the previous proposal in that it could result in part-time employees effectively being directed to work on days when they have agreed to work, or having their hours removed on days when they were anticipating work.

PN108

Also, from a practical point we're just a bit uncertain in the absence of evidence as to how this would work in a practical sense, how it would actually be workable or feasible, specifically in the ECEC sector.

PN109

JUSTICE HATCHER: What about the issue of work location? That is, there's already some capacity to direct a change in location within working hours. So that for example, it seems to me that under paragraph (c) of 21.7 a person could turn up for work at one centre then be directed to travel to another centre because they're more needed there, they're subject to the requirement that the travel would be paid time. You can do that already.

PN110

Could that be adapted, so rather than waiting for the person so that rather than waiting for the person to turn up for work and redirecting them, you could ring them up, you know, the night before or the morning and say, look, you can just go straight to this centre, and again, there might be some issue of payment of travelling time?

PN111

MS VAN GENT: Yes. We agree, your Honour, that the award certainly doesn't have that capacity but that's an option that could be feasible in this situation. If there was a more detailed proposal on that particular point we could consider it. But we would be, I think, particularly concerned in relation to any proposal that would involve the capacity for people to be directed to work other than their agreed hours. That would be the concern for part-time employees.

PN112

JUSTICE HATCHER: Yes. All right. Ms Cruden, perhaps I'll simply invite you to develop a more detailed proposal. But I would be particularly interested in whether you could propose a modification of 21.7(c), which would at least address what I just discussed with Ms van Gent. That is, some capacity to require the employee to go straight to the alternate location rather than coming to work first and then being directed to another location.

PN113

MS CRUDEN: Thank you, your Honour.

PN114

JUSTICE HATCHER: All right. So, the next one, I think, was seen in some other awards. It's a proposal to adjust the minimum engagement for training and other remote meetings. When might that occur in the context of child care?

PN115

MS CRUDEN: The problem that we seek to address through our claim which appears at table item number 46, is to permit employees to undertake – for part-time, sorry, and casual employees to undertake work for less than a minimum of two hours where that might be of the nature, for example, of a staff meeting or online training, for example, to allow that to be undertaken at a location of their choosing and particularly where such things might be, for example, an hour or less of their time.

PN116

It's our submission, your Honour, that the proposal is particularly relevant in the context of the children services and early childhood industry, given it has a large number of casual and part-time employees. So, your Honour, if you were, for example, trying to capture everyone for a staff meeting on a particular day it may be difficult to do so unless that's done at a particular time where people may be able to dial in.

PN117

There is also, as I mentioned in respect of an earlier submission, the minimum child to educator ratios which must be maintained, which may make it difficult to divert employees away from their duties whilst at the centre for things such as training or meetings that need to take place. Our proposal would involve removing the requirement for a minimum engagement only in respect of attendance of a meeting or participation in training, and only where the employee is not required to attend a designated workplace to do that.

PN118

If I can briefly address the AWU's objections it has identified in its submission as simply, the previous consideration around the rationale for minimum engagement periods, and in particular, the disutility of employee time with very short periods of engagement in relation to things such as transport time and costs, work clothing expenses, childcare expenses and similar things of attending to work.

PN119

The UWU raised a concern about one of those things, being childcare potentially still being required even if someone's dialling in from home. Your Honour, our submissions is that it's only one of the potential disutilities that would otherwise be negated for attending at work.

PN120

And to the extent that our proposal may actually encourage employers to permit employees to engage in activities such as meetings or training from home, it would be our submission, your Honour, that that has the potential to actually assist employee carers and generally in the working care stream of this review, the ability to work from home with flexibility such as location have been generally identified as a factor that may assist employees with their caring responsibilities.

PN121

JUSTICE HATCHER: But this proposal is not confined to remote meetings. It would extend to allowing an employer on an unlimited number of occasions to call someone in to work for a meeting.

PN122

MS CRUDEN: Your Honour, the proposal that we are advancing would remove the application of the minimum engagement period in respect of attendance for the meeting or training where the employee is not required to attend a designated workplace for that purpose.

PN123

JUSTICE HATCHER: All right.

PN124

MS CRUDEN: I also have referred to work from home. Obviously the (indistinct) employee may do it. And it may not be from home, necessarily. The key parameter is that the employee is not being required to attend.

PN125

JUSTICE HATCHER: So, it's compliance with remote meetings?

PN126

MS CRUDEN: Yes, a meeting that doesn't have to attend in person at the employer's workplace.

PN127

JUSTICE HATCHER: So, it's confined to remote meetings?

PN128

MS CRUDEN: Yes, your Honour.

PN129

JUSTICE HATCHER: What about the number of times you can do this? I mean, an employer wants to have weekly staff meetings. Does mean they can do it every week?

PN130

MS CRUDEN: Our proposal does not have a restriction, your Honour, in respect of when it could be utilised. Again, we would submit there may be a benefit if there was a weekly staff meeting, for example, rather than an employee having to travel to work for two hours for a relatively confined meeting (indistinct). It may be of mutual benefit for an employee to be able to participate in a shorter amount of time where they've not been required to attend at the workplace to do so.

PN131

JUSTICE HATCHER: Okay. Ms Rafter?

PN132

MS RAFTER: We would simply reiterate our support for the proposal.

PN133

JUSTICE HATCHER: Ms van Gent?

PN134

MS VAN GENT: Yes, your Honour. We reiterate our position to this proposal. As we've, I think, discussed in previous conferences we've got a number of concerns in relation to this. Firstly, we're not sure how it applies in the ECEC sector. Most of the activities that employees are required to undertake in this sector, including meetings and training, take place on site. They don't take place remotely. They take place in the childcare centre. So, we're not sure how it would apply.

PN135

Even if it did apply, we say that there is still significant disutility that employees face when they have to engage in these activities from home and they need to be appropriately compensated for that, which is what the minimum engagement period as it's currently in the award ensures. And we would see this as a reduction in their entitlements and therefore not a matter that should be entertained as part of this process, your Honour.

PN136

JUSTICE HATCHER: All right. The next one, Ms Cruden, I might just go straight to Ms van Gent about this.

PN137

MS CRUDEN: Yes.

PN138

JUSTICE HATCHER: This is about the roster being able to be effectively posted by electronic means.

PN139

MS VAN GENT: We're supportive of that proposal. We recognise that most roster postings currently take place that way, so we think that's a practical change.

PN140

JUSTICE HATCHER: Ms Rafter?

PN141

MS RAFTER: We're also supportive of the proposal but just proposed a potential alternative wording, but otherwise supportive.

PN142

JUSTICE HATCHER: All right. Ms Cruden, this seems to me to be a provision which might actually apply to a number of awards, not just this award. So, I'm just wondering whether it should be raised in a wider context. Because actually, when I looked up some other awards about this proposal I was surprised to see how many of them still required a physical placing of a roster on a noticeboard. So, perhaps the Ai Group might consider advancing this proposal as a general award change rather than specifically for this award.

PN143

MS CRUDEN: Thank you, your Honour. I'm happy to take that on notice. If I could make just a brief response to the proposal from ABI because that's in the files, your Honour.

PN144

JUSTICE HATCHER: Yes.

PN145

MS CRUDEN: As my friend identified, an alternative wording has been proposed. We do have a preference for the wording that we have advanced and the reason being that the current obligation in the award is to post a roster. We have identified wording which we submit is more closely to the notion of a roster being posted, albeit electronically, which is to make it accessible through electronic means.

PN146

I note that the alternative wording involves a concept of distribution which perhaps suggests a slightly different concept to the notion of posting or making something accessible by electronic means.

PN147

JUSTICE HATCHER: So, that might include, for example, posting it on a website, other than emailing it. Is that the difference?

PN148

MS CRUDEN: Yes, your Honour. Or for example, updating it on an electronic app, a rostering app which we would submit is more consistent with the notion of making something accessible via electronic means, as opposed to – it's not necessarily not distributing it, but I would suggest that distribution has connotations of, as you said, your Honour, perhaps emailing it out or doing something different to the current requirement which is posting it.

PN149

JUSTICE HATCHER: All right. Now, the next one. Can you explain that for me, Ms Cruden? Is this confined to vacation care excursions? Is that what's it's about, or is it broader than that?

PN150

MS CRUDEN: Your Honour, in our submission, and I should note that there are related underlying problems sought to be addressed through this proposal in table item 48, as well as table item 49 which relates to rest periods. Both of these claims made by Australian Industry Group are confined to vacation care in the outside of school hours sector.

PN151

I do note, however it would appear that the proposal advanced by ABI and Business New South Wales may extend broader than that. To the extent that there is merit or a need for the provision to extend more broadly than what we have advanced it is our submission that we would endorse that concept being considered if it's to address a more expansive problem than the one we have identified. But I can confirm ours is limited.

PN152

JUSTICE HATCHER: To vocation care excursions?

PN153

MS CRUDEN: Yes, your Honour.

PN154

JUSTICE HATCHER: That's all?

PN155

MS CRUDEN: Yes.

PN156

JUSTICE HATCHER: All right. So, from the UWU's perspective how does the current clause work with respect to current breaks, that is for meals breaks and rest breaks, work when the staff are conducting a vacation care excursion?

PN157

MS VAN GENT: Sorry, your Honour. So, in terms of the meal breaks – so, we say that the award already introduces the possibility of an interrupted meal break, in which case it becomes a paid break. And so we say that that applies obviously in circumstances where somebody is working on site but it would also apply in circumstances where somebody is working on an excursion.

PN158

With respect to the rest breaks we say that the award does envisage that employees would be entitled to uninterrupted rest breaks. We acknowledge that there are some complexities around that when people are participating in excursions and other activities off site. However, we would not be comfortable agreeing to a variation to those provisions in the absence of evidence from industry about how those provisions actually work or could work.

PN159

Perhaps I haven't articulated that well. So, it's possible, for example, that you know, on an excursion there could be a multiple number of employees engaged. They could have a staggered system where they allow one another to take breaks. We don't really know in the absence of evidence about what industry practice is.

PN160

JUSTICE HATCHER: Well, I dare to say most of us have some real life experience of this which allows us to make educated guesses as to what actually happens. That is, there might be one or two teachers and they don't actually get a meal break in practice because they have to watch the children.

PN161

MS VAN GENT: Yes. But with respect, I think that that's probably what does happen, yes, because they obviously can't just abandon their duties with respect supervision of the children. What we would say would be that the current award provisions allow for that. So, they allow for circumstances where there's an interrupted meal break. And then it becomes a paid meal break.

PN162

But we're concerned about, you know, erosion of the entitlement to rest breaks throughout the course of the day because we envisage that in a practical sense those are things that could be accommodated.

PN163

JUSTICE HATCHER: All right. And I think the final one is agreed. This is simply the deletion of Schedule A.

PN164

MS CRUDEN: Yes, your Honour, table item 50.

PN165

JUSTICE HATCHER: Yes.

PN166

MS CRUDEN: I believe from the reply submissions that there is consensus on Schedule A no longer having any practical work to do as part of the award and therefore is supported by ABI, Business New South Wales and the UWU, your Honour.

PN167

JUSTICE HATCHER: All right. That's about as we can take it today. So, Ms Cruden, it's a matter for you but I've invited you to advance perhaps a more nuanced proposal in respect of roster changes. This is item 44. And in respect of 45, advance a specific proposal which might, among other things, address employees working in alternative locations. So, to the extent that you might take up that opportunity, how long might you need to do that?

PN168

MS CRUDEN: Probably a period of two weeks, your Honour, to do so.

PN169

JUSTICE HATCHER: Yes.

PN170

MS CRUDEN: Thank you.

PN171

JUSTICE HATCHER: All right. I think we'll simply await the receipt of those proposals, and then having regard to those and what was said today then I'll make a decision as to whether any further consultation on some of – I hope some of the items, at least, would be productive. All right, if there's nothing further we'll now adjourn.

ADJOURNED INDEFINITELY

[10.47 AM]