



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2024/9

s.158—Application to vary a modern award

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

Application by The Australian Retailers Association

General Retail Industry Award 2020

Melbourne

10.07 AM, FRIDAY, 5 APRIL 2024

Continued from 29/02/2024

PN1

JUSTICE HATCHER: Good morning. I will take the appearances. Mr Wilding and Ms Morris, you appear for the applicant, Australian Retailers Association?

PN2

MR S WILDING: Yes, your Honour.

PN3

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

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MS R BHATT: Yes, your Honour.

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

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MS L CARROLL: Yes, your Honour.

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JUSTICE HATCHER: Mr Song, via Teams, appears for ABI and Business New South Wales, I think?

PN8

MR SONG: Yes, your Honour. Just to note, ABI and Business New South Sales, we are simply observing the conference today.

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JUSTICE HATCHER: All right, thank you. Ms Burnley and Ms Biddlestone, you appear for the SDA?

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MS S BURNLEY: Yes, your Honour.

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MS K BIDDLESTONE: Yes, your Honour.

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JUSTICE HATCHER: Mr Taylor for the Australian Workers' Union?

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MR G TAYLOR: Yes, your Honour.

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JUSTICE HATCHER: And Mr Kakogiannis, you appear for the RAFFWU Incorporated?

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MR L KAKOGIANNIS: Yes.

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JUSTICE HATCHER: Have I pronounced your name correctly.

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MR KAKOGIANNIS: Kakogiannis, yes.

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JUSTICE HATCHER: All right. Thank you. Mr Wilding, today is a conference just for the purpose of seeing whether there's either a consensus or room for discussion in respect of any of the variations. We have dealt with the variation in E. Have you had discussions with any other party here about these matters? When I say 'you', your client.

PN19

MR WILDING: Thank you, your Honour. Only very brief discussions. We do welcome the opportunity today, your Honour, and we are grateful for the participation of all the various industry stakeholders. We do think there is value, your Honour, in trying to reach agreement on these matters where that's possible, or to at least facilitate a narrowing of the issues and to better understand the position of the parties.

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I will just say very much up front, your Honour, and we are obviously in your hands on this, but we do think there may be value in conducting those discussions off the record. That may be a more productive forum.

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JUSTICE HATCHER: I think what I will do is I'll just get some impression about what might be available for discussion. Then we can work out how to proceed from there.

PN22

I might just get the attitude of the other employer organisations first and then we will drill down to the employee bodies to see what their views are. No particular order. Ms Bhatt, what is Ai Group's attitude to the remaining items in this application?

PN23

MS BHATT: We are broadly supportive of all of what has been proposed, and a number of the proposals in fact reflect some of the matters that we had raised in the Award Review, and we have a particular interest in, you know, participating in further discussions about those matters.

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We would also support what Mr Wilding said this morning about hopefully conducting at least some of those discussions off the record. We are hopeful that that might be quite productive.

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JUSTICE HATCHER: All right. My memory is failing me, Ms Bhatt. What are the items that most closely overlap with the issues in the review that were raised by yourself?

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MS BHATT: I will work through them in chronological order: item A, which relates to written records, electronically or digitally; item D, so far as it relates to pay averaging; item H, so far as it relates to clause 15.7 applying only to full-time employees, and the same can be said of item I in respect of clause 15.8.

PN27

Item J relates to the introduction of a salaries absorption clause, which we would say overlaps, at least conceptually, with our proposal for an exemption rate in the Retail Award; Item K, relating to standing consent provisions; item L, to the extent that it relates to deleting clause 10.5(c) of the award, which relates to part-time employees and meal breaks; item O, in relation to annual leave loading; item P, which relates to meal breaks.

PN28

JUSTICE HATCHER: Sorry, just slow down. O - - -

PN29

MS BHATT: P, and the last one is Q, in relation to the first aid allowance.

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JUSTICE HATCHER: All right. Thank you. Ms Carroll.

PN31

MS CARROLL: Thank you, your Honour. Yes, I echo Ms Bhatt's comments. We are broadly supportive of the proposals put forward in the application, and we also consider it productive to perhaps have discussions off the record today, if everyone agrees.

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JUSTICE HATCHER: All right. Ms Burnley or Ms Biddlestone?

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MS BURNLEY: Yes, your Honour. As to whether this matter is conducted on the record or not, the SDA has no particular view as to how that should or shouldn't occur.

PN34

Just looking quickly at the list, we hadn't prepared exactly as to what the crossover was between all the matters and what have you, but we also note that item B is also a crossover matter - it's not from the Ai Group, but other employers - additional shifts, split shifts, breaks between shifts, extended meal break, whatever the various categorisations were of that provision, is the same outcome.

PN35

JUSTICE HATCHER: All right. You can consider whether to do this on or off the record, but is the SDA able to identify any items which it might be prepared to discuss as distinct from items which it opposes at any price?

PN36

MS BURNLEY: Yes, thank you, your Honour. There are very few that we could be prepared to enter into discussions with. The majority of them we are opposing, as per our previous submissions in other matters.

PN37

Item A we would identify as one we would be prepared to discuss in some form. However, we do note that that has been a major issue that's been raised in the awards made simple stream, usability across a majority of awards, so we don't think it's a matter which is confined just to the Retail Award. If the Commission was looking to investigate that, it should be a broader context because it needs to apply across many awards.

PN38

With item M, there's a discussion we can have about that because there seems to have been some crossover with regard to the overtime provisions in the GRIA.

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JUSTICE HATCHER: Sorry, M?

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MS BURNLEY: M for Mary.

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JUSTICE HATCHER: Yes.

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MS BURNLEY: There is some crossover which occurred at some stage in the past where two Full Bench decisions came down almost simultaneously. So there's been an issue about which one was the appropriate one to go into the award.

PN43

I'm just checking; I thought there was more. The provision regarding the six/four roster.

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JUSTICE HATCHER: N

PN45

MS BURNLEY: N. That one we would be prepared to have some discussions on in seeking some clarity about that one because we didn't there was an issue, or we have a different solution as to how that should be fixed.

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JUSTICE HATCHER: All right.

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MS BURNLEY: So they would be the only ones that we think would be worthwhile having discussions on, and the rest are matters that we would be opposing.

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JUSTICE HATCHER: All right. Thank you. Mr Taylor, do you take any different view?

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MR TAYLOR: We agree with the SDA for the reasons given by Ms Burnley. Nothing much from me further than that. Thank you.

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JUSTICE HATCHER: All right. Mr Kakogiannis, I assume you oppose everything, without being - - -

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MR KAKOGIANNIS: What was that, sorry?

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JUSTICE HATCHER: You oppose everything, I assume?

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MR KAKOGIANNIS: Item A we are prepared to have discussions about, but, otherwise, we are opposed to all the further proposals.

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JUSTICE HATCHER: All right. Thank you. Well, Mr Wilding, should we confine our discussion to see if we can reach agreement with those three matters? I mean you can try and persuade the union respondents by whatever means you see fit as to whether they would agree to anything else, but I'd rather spend time that might actually make progress as distinct from talking about things which aren't going to be very - - -

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MR WILDING: Yes, I understand that, your Honour. We had hoped that reducing the complexity and uncertainty, particularly in respect of known issues, would be a shared goal of all participants, so we are hopeful that there is perhaps still some room to discuss some other items, and perhaps an off-the-record forum may provide more of an avenue for that, but I'm happy to be guided by your Honour in focusing on those items, at least to start with, if you think that would be more productive.

PN56

JUSTICE HATCHER: Obviously reducing complexity is a desirable thing, but, without expressing any view about the merits, it seems to me a large proportion of the application does involve substantive changes to conditions, which puts them in another category.

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MR WILDING: Well, your Honour, we see that some of our proposals do involve substantive change. A number of others we see as clarifying the application.

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JUSTICE HATCHER: What are those?

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MR WILDING: We see that proposal C relates to clarification, at least in respect of the amount that is due where the minimum break period is not provided. We would also see proposals H and I, which relate to the requirement for consecutive days off, we see that as a clarification in respect of those entitlements being confined to full-time employees, as they were under the 2010 version of the award.

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JUSTICE HATCHER: All right.

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MR WILDING: Item K, availability of standing consent provisions; item M; item N as well; item O, which I think has already been discussed. This is the annual leave loading issue, your Honour - - -

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JUSTICE HATCHER: Yes.

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MR WILDING: - - - that has been discussed in other forums. And item Q.

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JUSTICE HATCHER: All right. Just give me a second. What I suggest we do is that we'll go off record, we'll give priority to items A, M and N, and then we will have a go at C, H, I, K, O and Q.

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MR WILDING: Thank you, your Honour.

PN66

JUSTICE HATCHER: All right, we will go off record.

OFF THE RECORD

[10.20 AM]

ON THE RECORD

[12.40 PM]

PN67

JUSTICE HATCHER: (Audio commences) - - - where we have got up to and what the next steps will be, and I will try to issue a document as soon as practicable which reflects what I am about to say so the parties have a clear understanding.

PN68

In relation to item A in the ARA's - where did Mr Wilding go?

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MS MORRIS: We are waiting for him, your Honour.

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JUSTICE HATCHER: We will just stop until Mr Wilding comes back, I think.

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MS MORRIS: Thank you, your Honour.

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MR WILDING: Apologies, your Honour.

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JUSTICE HATCHER: That's all right. We will just put on record where we have got up to and what the next steps are going to be and, as I just said, this will be put in writing in a document as soon as practicable, but it will be on the record anyway.

PN74

With item A - this is about the electronic records definition - the approach I propose is that I will produce a suggested draft of a new provision for the parties to consider which deals with some of the issues that were raised in our conference.

PN75

In respect of item M, the SDA and other employee parties will consider the ARA's proposed new draft of the overtime clause to check that it does not detrimentally affect existing entitlements and, in conference, I think the parties have agreed that if agreement can be reached about a drafting, this can proceed to variation, if necessary, without prejudice to any other party's position about any other aspect of the award, particularly the hours and rostering provisions. So the idea is that we consider this as a standalone proposal in advance of any other matters that have been raised in that connection. So that response will be provided within two weeks from today, and the response should be in writing and provided to the employer parties and my chambers.

PN76

In relation to item N - this is the six and four-day issue - the SDA is going to produce its own draft of a revision of that clause, again within a two-week period.

PN77

In item C, only in relation to the proposed variation to clause 16.6(b) - this is the issue of the penalty rate payable if an employee does not get the benefit of the 12-hour break - I am going to arrange for an expedited determination of that discrete aspect of the application, and can all parties advise my chambers by close of business on Monday whether they are content to deal with that on the papers, in which case I will make directions of a certain nature, or, alternatively, if any party requests that it be the subject of a hearing, I will organise an expedited hearing before the Commission and make directions in that respect.

PN78

I also note that I raised an issue with the applicant about how their drafted clause would interact with the public holiday penalty rate, and I invited the ARA to consider that.

PN79

In relation to clauses 15.7(d)(ii) and (iii) and 15.8 (b) and (c) - so this is the employee request issue - I am going to have my chambers produce a suggested alternative draft of a variation, and I will invite the parties to consider that.

PN80

In relation to item O - that is the annual leave loading clause - I am going to park the issue about how to calculate the loading when there's some difficulty in determining the hours that would be worked on annual leave, but, apart from that, the Commission will produce a suggested draft, a redraft of that clause, which reflects the drafting of the clause in the Fast Food Award. So we will produce that as well, provide that to the parties and then ask the parties for a response.

PN81

So the general idea is that we will endeavour to resolve the discrete items I have identified and then, if, or once, we have been able to do that, those can be put in place by way of variations.

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Then we can turn to how the other matters raised in the application might appropriately be dealt with, and I have raised with the parties whether they can continue to engage in those in a consultative process or whether we should simply list the matters for arbitration, but I propose to postpone that question until we have dealt with these items.

PN83

So that's the path forward I am intending to take. Is there anything the parties want to raise in response to that?

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MR WILDING: I think we are content with that course, your Honour, subject to having the rights of reply to have directions for the rest of the program you put in place at the appropriate time.

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JUSTICE HATCHER: Yes.

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MR WILDING: Thank you.

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JUSTICE HATCHER: All right. That's noted. Anything else any parties want to raise?

PN88

All right. I thank everyone for their attendance and cooperation today. As I have said, I will try to reduce all that to a document in writing which makes it clearer, and we will now adjourn.

ADJOURNED INDEFINITELY

[12.48 PM]