

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

26228-1

VICE PRESIDENT WATSON

AM2010/60
AM2010/63

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

Application by Australian Newsagents Federation
(AM2010/60)

Application by VANA Ltd
(AM2010/63)

General Retail Industry Award 2010
(ODN AM2008/10)
[MA000004 Print PR985114]

Sydney

10.02AM, TUESDAY, 18 MAY 2010

PN1

THE VICE PRESIDENT: Can I have the appearances please.

PN2

MR R. CLARKE: Yes. Please the commission, Ross Clarke seeking the permission of Fair Work Australia to appear this morning on behalf of VANA Ltd and on the ANF application.

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THE VICE PRESIDENT: Mr Clarke.

PN4

MS S. BURNLEY: If your Honour pleases, my name is Burnley, initial S, appearing on behalf of the Shop Distributive and Allied Employees Association.

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THE VICE PRESIDENT: Thank you, Ms Burnley. Permission is granted, Mr Clarke. Yes,

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MR CLARKE: Thank you, your Honour. Just firstly with regards to AM2010/60, we'd seek to discontinue that application this morning and just rely on AM2010/63 as VANA, the Victorian Association of Newsagents is an organisation for the purposes of the act. So the two applications are in identical terms save for a change of names between VANA - - -

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THE VICE PRESIDENT: Yes.

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MR CLARKE: - - - and ANF and we just think it's more appropriate and easier to rely on the AM2010/63 - - -

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THE VICE PRESIDENT: Yes.

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MR CLARKE: - - - for this morning's hearing. I just note for the record that the Queensland Newsagents Federation, who can't be here this morning, are in support of the application and the Australian Newsagents Federation, who are able to be here this morning, are in support of the application as filed by VANA. In advance of filing the variation applications discussions were held with the SDA and in these discussions the SDA indicated their support for the proposed application as filed. The application has been filed under section 160 of the Fair Work Australia as it is an application not for a variation per se but for a determination to remove an ambiguity or uncertainty within the modern retail award.

PN11

The variation sought is to include a new dot point in the definition of "general retail industry" in the modern retail award by inserting, and the wording we used in the application is, "Newsagent and newspaper delivery drivers," although in discussions this morning with the SDA we have discussed in order to ensure there is no potential conflict with the transport award and those people distributing

newspapers to the newsagents to use the definition, "Newsagent and newsagents' newspaper delivery drivers," so it's particularly clear it's only those class of employees who are employed by the newsagent and are delivering newspapers to the end consumer, be it a home or be it what's referred to within the industry as a subagency, which may involve the local school or the like, but they all fall within the realm of the newsagent.

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THE VICE PRESIDENT: What was that wording again, Mr Clarke?

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MR CLARKE: "Newsagent and a newsagent's newspaper delivery driver."

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THE VICE PRESIDENT: Where do you say that should go?

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MR CLARKE: We say to go under the definition of "general retail industry" within the definitions at clause 3 of the General Retail Industry Award.

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THE VICE PRESIDENT: There's a lot of dot points there - - -

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MR CLARKE: Sorry. Yes.

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THE VICE PRESIDENT: - - - and some places it might not be the best place to put it. Have you got a particular place in those lists of dot points you say that it should go?

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MR CLARKE: Yes. On our suggestion there's a set of dot points that cover food retailing, et cetera, that are more general and then it goes, "And includes customer information and assistance, labour hire employees." I would think, subject to the comments of the SDA, that it belongs better in the second dot points that I've referred to rather than the first more general dot points.

PN20

THE VICE PRESIDENT: The general dot points are references to the activities of the employers. What you've proposed is some wording that has a reference to the nature of the business, but then has a reference to an activity of employees.

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MR CLARKE: Yes. Your Honour - - -

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THE VICE PRESIDENT: The notion of industry awards is that describe the industry of employers and then the scope clause of the awards refers to employees of those employers falling in within the classifications listed in the classifications clause. That's a uniform approach with the drafting of every modern industry award and there's a clear distinction between industry awards and vocation awards. But you say that it's the question of the drivers which is the uncertain issue.

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MR CLARKE: Correct.

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THE VICE PRESIDENT: As I understand what you're saying, it's not so much terms of this award, it's the interaction with the transport award.

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MR CLARKE: That's the uncertainty that we're seeking to clear up, your Honour.

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THE VICE PRESIDENT: The transport award has a clause, does it not, that it doesn't apply if there is another modern award that applies?

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MR CLARKE: That's correct, your Honour.

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THE VICE PRESIDENT: Yes. So how do you say that's ambiguous.

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MR CLARKE: The reason we say it is ambiguous is for two reasons, your Honour, and one is under the definition of the transport award in clause 4 of that award, that is the Road Transport and Distribution Award, where it states the coverage is, "The transport by road of goods or anything whatsoever." So that potentially gives rise to the ambiguity and we go on to say that at clause 22.4 of the Road Transport and Distribution Award it states, when they're talking about the spread of ordinary hours, "The times within which ordinary hours of work may be performed will not apply to (a) newspaper deliveries where for the sole purpose of transport and delivery of daily newspapers." It's that clause in particular in the transport award that causes the particular - - -

PN30

THE VICE PRESIDENT: There's a lot of deliveries from a newspaper publishing operation out to various locations out to newsagents which would be presumed to be covered by that. You're not proposing that that particular activity changes, but you say that that could be interpreted as to newspaper home delivery drivers employed by a newsagent.

PN31

MR CLARKE: Our particular problem at the moment - yes, and I suppose there's two answers to that question, is that that is why we've suggested the revised wording, so it's clear that the retail award doesn't cover what's envisaged by the transport award. The second is that the Fair Work Ombudsmen themselves are interpreting that way at the moment, although in discussions with them, and I'll be as fair as I can to those discussions, amicable discussions, that it's marginal but that particular clause is one of the things they point to within the transport award.

PN32

THE VICE PRESIDENT: I don't have that transport award in front of me now but there is a clause, is there not, that says that it doesn't apply if employees are covered by another modern award?

PN33

MR CLARKE: Your Honour, there is a clause that says it doesn't apply if these employees are covered by another modern award. That's at clause 4.8 of the Road Transport and Distribution Award.

PN34

THE VICE PRESIDENT: Yes. You say that it's not simply sufficient to refer to a newsagent, it is necessary to refer to their newsagent newspaper delivery drivers in order to resolve this ambiguity.

PN35

MR CLARKE: Your Honour, yes. In fact we'd say that we - I mean the newsagents are clearly already covered by the retail award. So it's really the newsagents' newspaper delivery drivers that we're particularly concerned about within this application.

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THE VICE PRESIDENT: Newspaper delivery drivers employed by a newsagent. Is that - - -

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MR CLARKE: Yes. We seek the extra clarification just so that there's absolutely no suggestion that someone who's delivering to the newsagents themselves would be covered by the retail award. That's not what we're seeking to achieve.

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THE VICE PRESIDENT: Yes. The phrase, "a newsagent newspaper delivery driver" could be interpreted as someone who delivers newspapers to the newsagent. Yes, and it's not your intention to have those covered by the retail award I assume.

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MR CLARKE: It's not. Your Honour, could I just get some instructions for one minute because there is an alternative that we've - yes. I mean that's what - in our submission the clearest way is to define them as newsagents' newspaper delivery drivers. We have toyed with the idea of newspaper home delivery drivers but our specific concern is that they do at times deliver to other places other than homes in that they might deliver to the local school or to what's commonly referred to as subagents, which would be to - a classic example would be the local 7 Eleven that would sell newspapers on a commission going back to the newsagent.

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THE VICE PRESIDENT: What's wrong with saying, "Newspaper delivery drivers employed by a newsagent?"

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MR CLARKE: There's nothing wrong with saying that, your Honour.

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THE VICE PRESIDENT: Yes. As I said, the phrase, "a newsagent newspaper delivery driver" - - -

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MR CLARKE: Might cause confusion.

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THE VICE PRESIDENT: Yes. On one view that's a reference to who the employer is. On another view it might be the destination of the deliveries to the newsagent.

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MR CLARKE: Yes. "Newspaper delivery drivers employed by newsagents," would be a very specific reference to the only class of people we're seeking to cover, your Honour. Your Honour, can you just give me one second? We've got no further submissions, your Honour.

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THE VICE PRESIDENT: Thank you, Mr Clarke. Ms Burnley?

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MS BURNLEY: Yes. Thank you, your Honour. The SDA has had some discussions with the employers regarding this definition problem which arose out of their discussions they had with the Fair Work Ombudsman and the SDA when we conveyed it to the employers when we setting up the modern award it was to cover newsagencies which would in turn cover the newspaper delivery people who were clearly covered by previous awards in the past such as the Victorian Shops Award, which was one of the main vehicles because at previous times it actually had a bicycle delivery driver. So a bicycle delivery driver. Bicycle delivery of newspapers in that and the Victorian Shops Award actually subsumed one of the previous newsagency awards in the Victorian jurisdiction.

PN48

So we think that this application under section 160 should be granted and we have no difficulties with the words that your Honour has proposed about trying to specify the delivery drivers. We had raised that there might have been a bit of a conflict with the transport award if we didn't have the word "home" but then that gave another problem that not all the deliveries from the newsagency goes to the home. Some of them do turn up at the milk bars. So that was another problem. So the SDA feels that this application should be granted and it complies with section 134 of the modern award objectives, especially numbers (f) and (g). If it pleases, your Honour.

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THE VICE PRESIDENT: Is a level 1 classification the appropriate classification for these people?

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MS BURNLEY: Yes, it is a level 1 function, your Honour.

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THE VICE PRESIDENT: The delivery of goods.

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MS BURNLEY: I think there is already a driver - there are higher drivers but they're people who are employed with greater responsibilities and duties than the person who is delivering the newspapers. They're normally responsible for

handling of cash and ordering whereas a newspaper delivery driver doesn't have those responsibilities.

PN53

THE VICE PRESIDENT: Yes. Yes, thank you, Ms Burnley. Well, thank you for those submissions. The application is made in order to remove an ambiguity in the General Retail Award. The submissions before me indicate that some ambiguity has arisen in discussions with the Fair Work Ombudsman arising from the interaction of the General Retail Award and the Road Transport and Distribution Award. In my view it is clearly the intent of those covered by the General Retail Industry Award and the commission in making the award that newspaper delivery drivers would be covered by the General Retail Industry Award and not any other award. Newspaper delivery drivers, that is employed by a newsagent to deliver newspapers to readers of those newspapers either at homes or schools or other shops or other locations.

PN54

In my view the award should be varied to remove the ambiguity. I would propose to adopt the wording discussed with the parties by inserting a new dot point, being the third dot point in the definition of "general retail industry." The third dot point under the subheading And Includes, and the wording would be, "Newspaper delivery drivers employed by a newsagent," as that third dot point. I will make a determination varying the award in those terms and given that the variation is to remove an ambiguity or uncertainty, I will apply an operative date of 1 January 2010 as the operative date of that variation. These proceedings are now adjourned.

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<ADJOURNED INDEFINITELY

[10.21AM]