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23 February 2021

Vice President Catanzariti
Fair Work Commission
80 William Street
EAST SYDNEY 2000

Dear Vice President,

AM2020/89– Application to vary the Health Professionals and Support Services Award 2020

This relates to the above matter and to the Report Back held via telephone on Tuesday, 9th February 2021.

During the Report Back, Ai Group indicated that, for the purpose of timetabling directions, it would be beneficial for the Fair Work Commission (**Commission**) to call for a separate round of submissions prior to dealing with the substantive issues relating to the Application by the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) to vary the *Health Professionals and Support Services Award 2020* (**HPSS Award**).

Ai Group proposes that the Commission deal with the threshold issue of whether the current application should be dismissed on the grounds that the Application seeks a variation to the HPSS Award that is substantially similar to variations which APESMA unsuccessfully sought in the context of the 4 yearly review of modern awards¹, and hence would be an abuse of process. In a decision made in December 2018 responding to the union's claim, the Full Bench said that while translators and interpreters were often employed by businesses established to provide translating and interpreting services to other businesses and those employees were very often deployed in the health sector, this was not a good reason for the HPSS Award to cover those employees when they are not working in the health industry.

The Full Bench determined that the issue of award coverage for translators and interpreters would be best determined by a separate and careful consideration of the appropriate award or awards to cover these occupations and the appropriate rate of pay to be payable.² It proposed to refer this to the President for his consideration.

A subsequent decision issued by the Full Bench on 24 November 2020 confirmed that the matter of award coverage of translators and interpreters had been referred to the President. However, APESMA's Application to vary the HPSS Award overtook this process. The Full Bench said:

On 18 August 2020 an application was made by The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) to extend occupational coverage of the HPSS award to translators and interpreters. APESMA also proposed variations relating to classification and description. In this circumstance the claims in

¹ [2018] FWCFB 7350, [146].

² [2018] FWCFB 7350, [14].



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relation to coverage for translators and interpreters will be addressed pursuant to this application to vary.

Where the Commission had undertaken to consider the question of award coverage of translators and interpreters, this should not be considered an open invitation for an application to be made that is largely identical in substance to that which was not accepted by the Commission in 2018.

In its 3 April 2018 submission APESMA sought an amendment to the coverage clause in the HPSS Award to extend occupational coverage of the award to translators and interpreters. The current application made by APESMA seeks, *inter alia*, an amendment to the coverage provision of the HPSS Award to encompass employers throughout Australia engaging employees performing translating and interpreting duties.

Although the wording of the newly proposed variation is slightly altered, the effect of the amendment would be the same – to make the HPSS Award the occupational award for all translators and interpreters not covered by another Award. Where a separate variation proposal has not been accepted by the Commission, it should not be open to the union to simply reformulate its claims and run yet another application.

The Fair Work Commission has broad discretion to dismiss an application. It is not limited to the circumstances outlined at s. 587(1) of the *Fair Work Act 2009* (Cth). The Commission must perform its functions and exercise its powers in a manner that, *inter alia*:³

- Is fair and just; and
- is quick, informal and avoids unnecessary technicalities

Consistently with these objects, it is inappropriate for the resources and time of the Commission and industrial parties to be used up in repeated applications with the same substance.

The reargitation of issues that have been dealt with in former proceedings raises a question as to the application of the policy considerations which underlie the doctrine of Anshun estoppel in the present proceedings. In *Paul L Quinlivan v Norske Skog Paper Mills (Australia) Ltd*, Lawler VP sanctioned the principle under which the doctrine of estoppel is based in the Commission:⁴

Ordinarily, a court or tribunal will not permit a party to reargitate matters affirmatively decided in a written decision. There is nevertheless power to do so albeit that the discretion to do so should be exercised with extreme caution: there is a public interest at stake of the sort that informs the principle of Anshun estoppel, namely a public interest in the finality of litigation and an avoidance of unnecessary multiplicity of litigation.

We consider that the importance of finality in proceedings is relevant to the present matter and should persuade the Commission that APESMA's application should not be

³ *Fair Work Act 2009* (Cth) s. 577(a), (b).

⁴ *Paul L Quinlivan v Norske Skog Paper Mills (Australia) Ltd* [2010] FWA 1166.



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entertained. For these reasons, we propose that Directions be issued enabling formal submissions to be made on this threshold issue.

Yours sincerely,

Hamish Harrington
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