

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

26057-1

COMMISSIONER LEWIN

AM2010/14

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

**Application by AustSafe Super Pty Ltd (as Trustee of AustSafe Super)
(AM2010/14)**

Aquaculture Industry Award 2010

(ODN AM2008/65)

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Brisbane

2.48PM, THURSDAY, 29 APRIL 2010

PN1

THE COMMISSIONER: Good afternoon. I'll take the appearance, please.

PN2

MR A. HERBERT: Good afternoon, Commissioner. My name is Herbert, initials A.K., I am counsel directly instructed by - I seek leave to appear directly instructed by AustSafe Super. Mr Hulen who had conduct of the matter in-house with my client is somewhere in Sydney giving a paper at some conference and asked me to step in to - - -

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THE COMMISSIONER: Yes, very well. Leave is granted, Mr Herbert.

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MR HERBERT: Thank you, Commissioner.

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THE COMMISSIONER: We shouldn't detain you too long.

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MR HERBERT: No.

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THE COMMISSIONER: The real issue is there are some letters on the file that indicate that I think the relevant principle that might see this application succeed can be satisfied, which is that there are employers making contributions on behalf of employees in the aquaculture industry.

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MR HERBERT: Yes.

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THE COMMISSIONER: But it doesn't really do more than allude to that letter. It doesn't actually give us some relevant information as to who these people are.

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MR HERBERT: I sought to - when I was asked to step into the breach, I asked Mr Hulen to provide a short statement to the commission to assist in remedying that situation. We rely partly on that, but also on the second criterion announced by the full bench in the superannuation decision in December last year. I have a copy of the decision I can hand up for your assistance. I've marked the paragraph. It's paragraph 67 of the award modernisation decision by the court. Sorry, it's 2 September 2009. Paragraph 67 of that decision seems to announce two criteria. One is the fund was nominated as a default fund and an award based transitional instrument relevant to coverage of the modern award, or on the basis that the representatives of the main parties covered by the award consent.

PN11

Those appear to be the two bases announced by the full bench and the basis on which a number of these matters have been decided. My client relies on their connection with the industry and also there is correspondence on the file, as we understand, from the Australian Workers Union.

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THE COMMISSIONER: There's no question of that they're - - -

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MR HERBERT: Very strongly - - -

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THE COMMISSIONER: - - - supportive.

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MR HERBERT: Yes. That seems, on the basis of the full bench decision, that if there is unqualified consent from the relevant parties who have an interest in the award, and the AWU of course undoubtedly has great interest in the award having the relevant coverage, particularly in the state of Queensland, but also elsewhere, that they have consented and there are no dissenting voices. That appears to be, on the basis of the full bench decision, sufficient. But the purpose of the very short statement that I requested Mr Hulen provide to the commission was to make clear that there in fact two types of fish farming activities and aquaculture activities.

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THE COMMISSIONER: Yes, I don't think the first one is actually covered by the award.

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MR HERBERT: It may depend upon the question as to whether the activity could be described as a stand alone activity in the sense that a farmer is conducting two businesses. If it's a separate business it may well be, but - - -

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THE COMMISSIONER: For what it's worth, his statement seems to indicate that in his travels throughout Queensland he's met farmers who are running some sort of mixed enterprise.

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MR HERBERT: Yes, there are some of those.

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THE COMMISSIONER: We have a fish farm down in one of the paddocks somewhere - - -

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MR HERBERT: In the bottom paddock, yes.

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THE COMMISSIONER: - - - and I'm not sure the award applies to that.

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MR HERBERT: But that there are also employers in addition to those who are registered as prawn or fish farms.

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THE COMMISSIONER: Yes, I think that's the issue.

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MR HERBERT: Yes.

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THE COMMISSIONER: That they are now - are they covered?

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MR HERBERT: Yes, and they are - - -

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THE COMMISSIONER: Prawn fishermen?

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MR HERBERT: They're not fishermen. They are fish farms.

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THE COMMISSIONER: Fish farms?

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MR HERBERT: Fully enclosed by land.

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THE COMMISSIONER: Sorry, I'm just (indistinct) prawn fish farms, hatcheries.

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MR HERBERT: Prawn fishermen (indistinct)

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THE COMMISSIONER: Does the award cover hatcheries? All right.

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MR HERBERT: But certainly fish farms - the purpose of the coverage of the award as I apprehend it is it covers fish farms, and that he in his travels has indicated that he's aware of employers engaged in that form of business. One of the difficulties - - -

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THE COMMISSIONER: Well, that's interesting, but I would have thought that he would have been more easily aware of who was paying contributions by reference to the funds records.

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MR HERBERT: I've spoken to him about that, and the response is that their records don't break down - - -

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THE COMMISSIONER: Their records just identify the name of the employing entity and the individual employees.

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MR HERBERT: Yes, and some of them are fish farms, pure and simple, and some of them are farmers who have a mixed enterprise but they also have a fish farm. But he's aware of both types and he has spoke to both types who are contributing. Employees in some cases divide their time between the two and some cases are devoted to that kind of work. The difficulty in nailing this down though, Commissioner, appears to be that, on my researches, I've been unable to determine that there actually as a NAPSA in the former Queensland state award which specifically covered the fish farming activity as a stand alone activity.

PN40

There are two notices which have relevance and which could be, depending on the nature of the activity, could cover and the list of NAPSA's that may have some

relevance to the matter or certainly those which AustSafe was a named default fund under the state system are attached to the letter of 15 October 2009 submitted by my client. But there are - there is a Fishery Employees Award State 2003 and a Prawn and Other Seafood Processing Award State 2003. It does appear on - and AustSafe is named in both of those. It does appear that those awards, the application clauses of those NAPSAs appear to relate to the handling and the processing of prawns and fish which of course would go on in a fish farming operation.

PN41

But it doesn't appear to specifically refer to the activity of the breeding and farming. Now, it appears as a pragmatic matter that those were the state awards which were applied to the activity and AustSafe is named in both of them although as a default fund. Although there is some residual doubt as to the equivalence of coverage between those NAPSAs and the aquaculture award. But notwithstanding that, there is no doubt that the relevant parties who have any interest in the award, particularly the union party, is very much in support of - there doesn't appear to be an employer organisation to which we can have recourse, but certainly the AWU is very much in support. That satisfies the second of the two disjunctive criteria referred to in paragraph 67 of the full bench decision of September last year.

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THE COMMISSIONER: There's a full bench decision in December isn't there?

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MR HERBERT: There is one in December. I have that as well, but the one in December - sorry, no, I have the January decision.

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THE COMMISSIONER: Well, unfortunately for some reason I actually don't have the December decision on file. I've got some extracts and notes, but I think there's a bit of a difference between the two, isn't there? I think - you know, there seems to be some slippage if my reading of them was correct. I don't know why, but that December decision is actually not still on the file. But it seems to me that between September and December the position moves to you're either in the NAPSA or someone's contributing.

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MR HERBERT: Yes.

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THE COMMISSIONER: It moves away from the idea that, you know, if everybody agrees then the fund can come in.

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MR HERBERT: Yes.

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THE COMMISSIONER: It moves to two different criteria which are you're either in a NAPSA, in which case you're in, and if you're not in a NAPSA if you can establish that contributions are being made, then you're in.

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MR HERBERT: Yes.

PN50

THE COMMISSIONER: Now, I happened to prepare the exposure draft for the modern award, the modern aquaculture award.

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MR HERBERT: Yes.

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THE COMMISSIONER: In the course of the researches that I conducted for that purpose, what you said about Queensland rings true.

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MR HERBERT: Yes.

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THE COMMISSIONER: That there was historically something that might have fallen within what you might call the scope of the modern award in its very broad terms. But it is defunct, and it was defunct at time the exposure draft was produced. Those other instruments that you referred to in Queensland didn't fall, properly speaking, within the aquaculture industry, but they were either seafood processing instruments or they were marine fishing.

PN55

MR HERBERT: Yes. Fish and prawn handling, processing and cleaning I think were the words, from recollection, that were used.

PN56

THE COMMISSIONER: I think the scope of them was - it was a seafood manufacturing type of instrument. Manufacturing and processing.

PN57

MR HERBERT: Yes, and to the extent to which aquaculture suppliers also do handling and processing, that's the information I have from - I made some inquiries with the AWU in relation to that matter. The extent to which they do that, these awards - the state awards did have application to that aspect of the work. There's a question of whether the actual farming activity was ancillary to all of that.

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THE COMMISSIONER: Yes, but it has to be a NAPSA that the scope of which has some sort of reflection in the modern award.

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MR HERBERT: Yes.

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THE COMMISSIONER: Not just any NAPSA that's got a name that gets you somewhere near the creatures involved.

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MR HERBERT: Yes. I understand that and, Commissioner, I can't - I've endeavoured to explain things the best I can, but I can't shy away from that difficulty but the - Mr Hulen's statement was an attempt to deal with the other

aspect of the matter, and that is that there are employers who are making contributions who are engaged in the two types of activities to which he refers in his statement.

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THE COMMISSIONER: Well, that's hearsay on his part, isn't it?

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MR HERBERT: Well, technically - - -

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THE COMMISSIONER: Somebody has told him.

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MR HERBERT: Well, the employers have told him that's what they do in the context of speaking to the superannuation fund in respect of which they are making contributions on behalf of employees. It's part of his business to know and understand that, and it's part of his business as a business development manager, to get out there and understand the nature of his constituency and he's done that. We could take the matter further, Commissioner.

PN66

THE COMMISSIONER: See, the difficulty is that - I think I've got to say that one or the other is true. Either - yes, for the application to succeed I've got to find that there was a NAPSA in respect of which I'll say if it was named as a default fund.

PN67

MR HERBERT: Yes.

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THE COMMISSIONER: I've just lost track of whether or not you're saying that any of those instruments in Queensland actually included AustSafe.

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MR HERBERT: Yes, they both did.

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THE COMMISSIONER: They both did?

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MR HERBERT: Yes.

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THE COMMISSIONER: So I've got to find, in that case, that they are, for the purposes of this application, relevant NAPSA's. In which case I'll say super is in. If I reach the opposite conclusion, then I've got to say, well, there are employers who were contributing at the relevant time. For that I would have to rely on Mr Hulen's statement. I don't think the A category are covered by the award.

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MR HERBERT: Again it will - - -

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THE COMMISSIONER: I think they're covered by the Pastoral Award, aren't they?

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MR HERBERT: Well, it may well again, as I said before, Commissioner, depend upon the extent to which the employer has a hardline between the two businesses, whether he's conducting two businesses or a diversified single business, because if he's conducting two businesses, one would have thought there wouldn't be any doubt that the fish farming side - the fish farming business - - -

PN76

THE COMMISSIONER: Well, the letter itself indicates that it's supplementary, doesn't it?

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MR HERBERT: It does. They've diversified into that area, but as a matter of - it would be a matter of fact in each individual case.

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THE COMMISSIONER: That's right, but the superficial conclusion you would reach is that there's a supplementary diversification of the traditional on-farm activity, and then which case it's questionable whether the contributions of those employees are relevant to this application.

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MR HERBERT: It may be that both awards apply.

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THE COMMISSIONER: Well, they can't by definition of the coverage provisions of each award.

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MR HERBERT: Yes. I'm having that battle elsewhere, your Honour, so it's fresh in my mind.

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THE COMMISSIONER: The coverage provisions actually are mutually exclusive and they say - one will apply or the other will apply.

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MR HERBERT: Yes.

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THE COMMISSIONER: There's, allegedly at least, some sort of partition.

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MR HERBERT: Yes. Unfortunately not all modern awards are of that ilk, and I'm wrestling with some situations in other areas.

PN86

THE COMMISSIONER: Well, aquaculture and pastoral and horticultural are all in those terms because I have some familiarity with those. "Registered as prawn or fish farms, hatcheries - - -"

PN87

MR HERBERT: The statement provides that the employers, and that is the employers for whom he has been - (indistinct) has been informed that they're engaged in that industry and are paying contributions into AustSafe on behalf of their employees. One of those groups is paragraph (b).

PN88

THE COMMISSIONER: I think paragraph (b) is most likely to be the main chance in all of this.

PN89

MR HERBERT: Yes.

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THE COMMISSIONER: You recorded the names of the state instruments?

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MR HERBERT: Yes, the name of the state instruments of the fish - - -

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THE COMMISSIONER: Do you have copies of it?

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MR HERBERT: Yes. Not copies of the instruments.

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THE COMMISSIONER: The instruments, right.

PN95

MR HERBERT: The list of instruments is attached - it should be on the file. It's attached to the letter to the - - -

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THE COMMISSIONER: That list, yes.

PN97

MR HERBERT: - - - individual on 15 October 2009. The Fisheries Employees Award State 2003 and the Prawn and Other Seafood Processing Award State 2003. They're on the second page of the list of awards - all the state awards to which AustSafe was the default. Commissioner, if there be any residual doubt in relation to the matter, I can - but I ask that the matter be stood down for a period until Mr Hulen returns from Sydney, which I understand will only be another day or so, and that we - - -

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THE COMMISSIONER: Yes, that all right. I won't deal with it. I won't deal with it until next week.

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MR HERBERT: Well, if I provide the commission with some - I'll ask Mr Hulen to put together some harder evidence than the content of the present statement.

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THE COMMISSIONER: Well, if you could just identify an employer or two, that would be extremely helpful.

PN101

MR HERBERT: Yes. We'll recruit the AWU into that. I'm sure they will also be able to help.

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THE COMMISSIONER: Well, yes, exactly. My hope was, since I was in Brisbane on other matters that this might be an opportune moment for somebody to identify such persons for the tribunal's convenience.

PN103

MR HERBERT: Yes. I understand that, Commissioner. I've been thrown into the abyss at the last minute.

PN104

THE COMMISSIONER: No, I understand that too, Mr Herbert. We'll soldier on.

PN105

MR HERBERT: Yes. Well, then can I then ask that you defer making a determination in relation to the matter until we can get some material together. Sorry, Commissioner.

PN106

THE COMMISSIONER: Yes.

PN107

MR HERBERT: I'll undertake about my client to make sure that's done in the next two or three days.

PN108

THE COMMISSIONER: Yes. I'll tell you that I won't determine this matter before the close of business next Friday.

PN109

MR HERBERT: Thank you, Commissioner, for that.

PN110

THE COMMISSIONER: But I would be greatly assisted if the persons who have been mentioned in various documents could be in some way identified. It doesn't need to be a large number of them. Anyone will do.

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MR HERBERT: Yes. Well, we'll track him down. Him or her.

PN112

THE COMMISSIONER: Thank you, Mr Herbert.

PN113

MR HERBERT: Thank you, Commissioner.

<ADJOURNED INDEFINITELY

[3.07PM]