



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT HATCHER

AM2014/301

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/301)**

Public Holidays – common issue

Sydney

9.04 AM, FRIDAY, 31 MARCH 2017

PN1

THE VICE PRESIDENT: Can I take the appearances, starting in Sydney. Mr Nguyen, you appear for the AMWU?

PN2

MR M NGUYEN: Yes, your Honour.

PN3

THE VICE PRESIDENT: Ms Bhatt, you appear for AiG?

PN4

MS R BHATT: Yes, your Honour.

PN5

THE VICE PRESIDENT: Ms Wish, you appear for ABI and the New South Wales Business Chamber?

PN6

MS S WISH: Yes, your Honour.

PN7

THE VICE PRESIDENT: Mr McDonald, you appear with Ms Pyke for Clubs Australia Industrial?

PN8

MR T McDONALD: Yes, your Honour.

PN9

THE VICE PRESIDENT: Ms Patton, you appear for Leading Aged Care Services?

PN10

MS E PATTON: Yes, your Honour.

PN11

THE VICE PRESIDENT: And Ms Zadel, you appear for the Australian Federation of Employers and Industries?

PN12

MS J ZADEL: Yes, your Honour.

PN13

THE VICE PRESIDENT: All right. Next, we'll turn to Melbourne. So Ms Burley, you appear for the SDA with Mr Donovan?

PN14

MS S BURLEY: Yes, your Honour.

PN15

THE VICE PRESIDENT: And Ms Liebhaber, you appear for the HSU?

PN16

MS L LIEBHABER: Yes, your Honour.

PN17

THE VICE PRESIDENT: Then in Adelaide, Mr Evans, you appear for the AHA?

PN18

MR T EVANS: Yes, your Honour.

PN19

THE VICE PRESIDENT: And finally, in Canberra, Mr Harris, you appear for the Pharmacy Guild of Australia?

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MR S HARRIS: Yes, your Honour.

PN21

THE VICE PRESIDENT: All right, thank you. The purpose to today's directions hearing is to set the matter down for hearing and to deal with any other outstanding issues. The parties may address me generally as to how to deal with the matter but I'm interested in these matters. Firstly, to confirm the matters ready for hearing. Secondly, and particularly having regard to whether any of the witnesses who filed witness statement for the SDA are required for cross-examination, for how long the hearing will take, and thirdly, what is the preference for the location of the hearing. I might start with you, Ms Bhatt.

PN22

MS BHATT: Yes, thank you, Vice President. It is my understanding that the three union claims, that is, those that are mounted by the AMWU, the HSU and the SDA, are ready to be heard in the sense that all material in accordance with the directions issued, have been filed.

PN23

THE VICE PRESIDENT: Thank you.

PN24

MS BHATT: As I understand it there is one additional matter that is before this Full Bench and that is a claim that has been mounted by Clubs Australia. It's probably more appropriate that Mr McDonald addresses you on this but it is my understanding that there is potentially some commonality of issues that would arise in respect of the variation that it seeks and that's sought by the SDA, and that may colour when and how the matter is listed for hearing. It is also my understanding that that matter is not yet ready for hearing, in the sense of all the material has not yet been filed.

PN25

THE VICE PRESIDENT: Right.

PN26

MS BHATT: As for the witnesses that are required for cross-examination there are 15 statements that have been filed by the SDA. I am not in a position to

advise conclusively which of those witnesses are required for cross-examination by Ai Group but I anticipate that we would be able to do so by close of business next Wednesday. We're hopeful that in the interim we can have some discussions with the SDA which may alleviate the need to cross-examine some witnesses.

PN27

THE VICE PRESIDENT: Most of them are Victoria and that would suggest that if there is going to be cross-examination, a Melbourne hearing might be preferable.

PN28

MS BHATT: We're in the Commissioner's hands as to where the matter is listed. We have a preference for Sydney but I of course hear what your Honour has just said. Based on the material that has been filed to date, and so this relates only to the HSU, SDA and AMWU claims, it would appear to us that it would be prudent to set aside three days for the hearing. I think it's likely though that the matter could be completed in two. Any cross-examination of the witnesses we say should occur first, but should be followed by submissions from the three proponents and when they make their submissions they should also reply to the detailed written submissions that have been filed by the respondent parties over the past few days. Then of course, the respondent parties would make their submissions and then final replies from the union.

PN29

THE VICE PRESIDENT: So do you mean you want a gap between the evidence and the submissions?

PN30

MS BHATT: Given that we think it unlikely that we will need too many of the witnesses for cross-examination, and that that cross-examination would not be particularly lengthy, I don't envisage that Ai Group would require a gap as such. Unless there's anything else that I can assist you with, Vice President - - -

PN31

THE VICE PRESIDENT: All right, thank you.

PN32

MS BHATT: Thank you.

PN33

THE VICE PRESIDENT: Mr McDonald, I might turn to you. So what's the position with your client?

PN34

MR McDONALD: Your Honour, there was a submission filed late yesterday from our client. We'd also seek leave to file some further witness statement, or some witness statements which it would be anticipated would be done in the next two weeks. There is one particular area of overlap between what we're seeking and the other claims in that we are, in effect, seeking a reverse of what's been sought by the SDA. We have a provision which is in the award which provides

for an additional day for someone who wouldn't ordinarily work a public holiday and we're seeking the removal of that provision.

PN35

THE VICE PRESIDENT: The parties seeking variations were directed to file evidence by 10 October last year. Is there some reason why your client's only just turned its mind to this matter?

PN36

MR McDONALD: Our client obviously should have. There was some issues in relation to the public holiday matters that arose in relation to the penalty rates case and our client was interested in that, but in saying that, of course it should have done more to comply with those directions, but it could do so in fairly quick time.

PN37

THE VICE PRESIDENT: So two weeks?

PN38

MR McDONALD: Yes, your Honour.

PN39

THE VICE PRESIDENT: Just remind me, so you've filed the draft determination, or not?

PN40

MR McDONALD: Yes. So very early we filed an indication of the matters that we wanted to deal with. We haven't filed the precise variation sought.

PN41

THE VICE PRESIDENT: You haven't?

PN42

MR McDONALD: No.

PN43

THE VICE PRESIDENT: All right, and how many witness statement do you - - -

PN44

MR McDONALD: We're anticipating around about five, your Honour.

PN45

THE VICE PRESIDENT: All right. Yes, all right. Anything else, Mr McDonald?

PN46

MR McDONALD: No, thank you, your Honour.

PN47

THE VICE PRESIDENT: I'll just go around the room generally, first, in the sitting. Mr Nguyen, do you want to say anything?

PN48

MR NGUYEN: I think what Ms Bhatt said is right. In terms of the number of days, I think probably three days we could – in terms of the preference for dates, I don't know if this is the appropriate time but I've just got a period of leave coming up and it would be preferable not to have the hearings during that period, if I can just raise that.

PN49

THE VICE PRESIDENT: My general intention is to look for dates in July or August.

PN50

MR NGUYEN: Okay.

PN51

THE VICE PRESIDENT: And if Mr McDonald is allowed to proceed, that will probably be necessary.

PN52

MR NGUYEN: Okay. That's fine.

PN53

THE VICE PRESIDENT: All right. Does anybody else in Sydney wish to add anything?

PN54

MS WISH: Your Honour, just with respect to dates, otherwise I agree with the comments made by Ai Group. On 25 August there will be submissions due for the Family Friendly Work Arrangements. That date or the days preceding that date might be quite busy for some of us in this room.

PN55

THE VICE PRESIDENT: All right. In Melbourne, I might start with you, Ms Burley. What do you want to say?

PN56

MS BURLEY: Thank you, your Honour. The SDA had noted that we would with regard to the witnesses, would like to have an indication from the employers as to which ones would be required for cross-examination and also what length of time that they'd be wanting to cross-examine, an estimate as to whether it's half an hour, or 20 minutes or a full day, to do some scheduling with those employees because they'll need to take time off work for it, so we would – also, if the employers wish to approach as to seek any clarifications regarding those statements we're happy to enter into that process to try and eliminate the need for them to be formally cross-examined at the time.

PN57

The SDA did wonder whether there was any utility in reply submissions being filed which could then reduce the length of hearing that the Commission would need to deal with the matters because there are now – there's almost all the submissions in. The SDA's ones have been in since October last year. The AiG and the ARA submissions in response to our applications were filed recently, so

that given the timetable, if the Commission is looking for hearings in July and August then that would allow the SDA to have time to file a written submission in reply which could then reduce the amount of time required by the Commission if the reply submissions are taken and the full submissions are taken as being read.

PN58

THE VICE PRESIDENT: All right, thank you. Ms Liebhaber?

PN59

MS LIEBHABER: We don't have any witnesses for the hearing so those proposals seem okay to the Health Services Union.

PN60

THE VICE PRESIDENT: Thank you. Mr Evans?

PN61

MR EVANS: Your Honour, I provided some correspondence yesterday which was just confirming that the only remaining issue for the AHA in the public holidays is the part day variation sought, and as identified in the submissions of the Commission that issue is to be handled after all the other public holidays issues, so there's nothing coming from us on that perspective, and also as we identified that the Hospitality Industry Award, other than our application, is not an award subject to any other proceedings from the other parties in this matter, your Honour. So we'll be an observer but there will be no further submissions or any documentation provided by us until we receive your directions for the conduct of the part day matter.

PN62

THE VICE PRESIDENT: All right, thank you.

PN63

MR EVANS: Thank you.

PN64

THE VICE PRESIDENT: And Mr Harris?

PN65

MR HARRIS: Yes, your Honour, we'll follow AiG's lead on this part and we will potentially – I'll give notice to the SDA now that we would want to cross-examine their witness for the Pharmacy Award.

PN66

THE VICE PRESIDENT: All right, thank you. Mr McDonald, if I come back to you, I just noticed that United Voice is not here. Has your client had any contact with them about this matter?

PN67

MR McDONALD: No, other than the material having been filed earlier as to our intentions in the matter, but there's been no formal discussions in relation to the issue.

PN68

THE VICE PRESIDENT: Presumably they would not have been aware that you would be raising this new issue today - - -

PN69

MR McDONALD: No, they would not - - -

PN70

THE VICE PRESIDENT: You having not filed any material?

PN71

MR McDONALD: We did file material about the changes that we sought but we've not had any more recent discussions with United Voice.

PN72

THE VICE PRESIDENT: I only say that because I think they'd be entitled to assume, you not having done anything in accordance with the directions, that there was not something that would affect their interests. It seems to me that in those circumstances they need to be advised of what you propose and given a chance to respond before I make any directions of that nature. Is that reasonable?

PN73

MR McDONALD: Yes, your Honour.

PN74

THE VICE PRESIDENT: All right, thank you. Ms Bhatt, do you want to say anything in reply?

PN75

MS BHATT: If I can, just two issues. There are three sets of dates in July and August that would pose a difficulty for Ai Group. From 4 to 6 July, and 2 and 3 of August a Full Bench of this Commission is hearing a claim by Ai Group to vary the coverage of the Horticultural Award as part of the four yearly review.

PN76

THE VICE PRESIDENT: Yes.

PN77

MS BHATT: I need not raise this. I've just realised, 17 to 19 July the Full Bench is hearing the Blood & Bone Marrow Donor Leave but your Honour is on that Full Bench. The second issue, we have no difficulty with Ms Burley's proposal that the unions file reply submissions but we would seek that they be filed at least three weeks before the hearing commences so that respondent parties have adequate time to have regard to them.

PN78

THE VICE PRESIDENT: Yes, all right.

PN79

MS BURLEY: Your Honour, if I may - - -

PN80

THE VICE PRESIDENT: Yes?

PN81

MS BURLEY: It's Ms Burley in Melbourne. The SDA does have one week in July that most officials would be unavailable and that's 10 to 14 July.

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THE VICE PRESIDENT: From 10 to 14 July, all right.

PN83

MS BURLEY: Yes. Thank you.

PN84

THE VICE PRESIDENT: While we're doing this, are there any dates in June that the parties would be unable to attend?

PN85

MS BURLEY: Your Honour, the SDA's official who is dealing with this matter will be unavailable in June.

PN86

THE VICE PRESIDENT: The whole of June?

PN87

MS BURLEY: Yes. I think they're back for a day at the end of June but not for any lengthy period of time.

PN88

THE VICE PRESIDENT: All right, thank you. Is there any other issue any party wishes to raise?

PN89

MR EVANS: No, your Honour.

PN90

MR N TINLEY: Your Honour, apologies for not making an appearance earlier. Tinley, initial N, on behalf of the Australian Retailers' Association. I just wanted to confirm our position on a couple of matters. In relation to the SDA reply submissions we believe there's utility in there being directions issued in relation to that. And the second issue is, in terms of cross-examination of witnesses we don't envisage requiring cross-examination of the SDA's witnesses in relation to the General Retail Industry Award on the proviso that through discussions with the SDA we identify the scope of the propositions that will be made in relation to the witness statements that have been filed.

PN91

THE VICE PRESIDENT: All right, thank you. Mr McDonald, do you wish to add something?

PN92

MR McDONALD: Your Honour, you just asked about availability. We would prefer that it not be listed for hearing in the last week of June if that was possible.

PN93

THE VICE PRESIDENT: All right. What I propose immediately to do is this, that I'll give all parties seven days to indicate which, if any, witnesses of the SDA's witness list they wish to cross-examine. Secondly, in the next week I will conduct a telephone directions hearing involving the Clubs Australia matter, which will necessarily involve United Voice to deal with that so if any other party wishes to attend that they should notify my chambers, but in the interim, Mr McDonald, without making any promises, you should assume that if you're going to have any opportunity to file your material you should do so in the next two weeks.

PN94

MR McDONALD: Yes.

PN95

THE VICE PRESIDENT: Once those matters are clarified then I will issue a listing for the matter, taking into account the availabilities, or unavailabilities that have been indicated and I will issue a direction which will allow for reply submissions to be filed at a date well in advance of the hearing. If there's nothing else I will now adjourn.

ADJOURNED INDEFINITELY

[9.21 AM]