



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE HATCHER, PRESIDENT**

**AM2023/20**

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

**Application by Pollock  
(AM2023/20)**

**Educational Services (Post-Secondary Education) Award 2020**

**Sydney**

**9.40 AM, FRIDAY, 1 DECEMBER 2023**

**Continued from 25/10/2023**

PN1

JUSTICE HATCHER: Good morning. I'll take the appearances. Ms Pollock, you appear on your own behalf as the applicant in the matter?

PN2

MS V POLLOCK: Yes.

PN3

JUSTICE HATCHER: Mr Odgers, you continue your appearance for the IEU?

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MR A ODGERS: I do, your Honour.

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JUSTICE HATCHER: Ms Pugsley, you appear for the AHEIA, correct?

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MS C PUGSLEY: Yes. That is correct, your Honour.

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JUSTICE HATCHER: All right. So Mr Pollock you've, as directed, filed your amended application and I also understand you've had some discussions with the parties that appeared on the last occasion. I should indicate we received an email from you, but we've had difficulty opening the attachments. So we are not quite sure what the content of it is. But in any event, can you report on the outcome of your discussions please?

PN8

MS POLLOCK: I've had conversations with all parties that have had questions, and everyone is in agreement.

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JUSTICE HATCHER: Can you just clarify who you have had discussions with?

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MS POLLOCK: I think Ms Pugsley.

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JUSTICE HATCHER: Yes.

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MS POLLOCK: Have I had a conversation with you?

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MS PUGSLEY: We've had email correspondence, and I can come to that position in due course, your Honour.

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JUSTICE HATCHER: Thank you. Yes?

PN15

MS POLLOCK: Yes. And also Mariel, who is Mariel O'Sullivan. Sorry about that. I should know who everybody is by now.

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JUSTICE HATCHER: Where is she from?

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MS POLLOCK: TAFE.

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JUSTICE HATCHER: TAFE, yes.

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MS POLLOCK: And also Jack Kenchington-Evans of the AEU.

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JUSTICE HATCHER: And have you had discussion with Mr Odgers from the IEU?

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MS POLLOCK: No. Though he's been included in all of the correspondence and if there was any questions, I could answer them.

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JUSTICE HATCHER: So what do you understand the position to be?

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MS POLLOCK: That everyone is in agreement.

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JUSTICE HATCHER: I can indicate for the record; we've received an email from Mr Kenchington-Evans from the AEU who has informed the Commission that his organisation does not oppose the application in its current form. So I will hear from the other parties. Mr Odgers?

PN25

MR ODGERS: Our position is the same as that of the AUE, your Honour. We don't oppose the application in its current form.

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JUSTICE HATCHER: All right. Ms Pugsley?

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MS PUGSLEY: Thank you, your Honour. We are not in a position to consent to the application, and I will set our reason why. Just by way of background, our interest in this matter, we are the university sector of course, but we have interest in the Post-Secondary Award because it's the BOOT award for a number of university staff amongst our membership engaged in a number of types of post-secondary teaching, including ELICOS teaching - including but not limited to ELICOS teaching, but of course it's the ELICOS provisions that are subject to this application and not, for example, the TAFE teachers. So I know the VTA has been involved, but obviously ELICOS is not the same as TAFE.

PN28

As the applicant has indicated, we have corresponded with her and the other parties and she did helpfully provide us with the documents setting out her position, but we really require more in the way of rationale with - I understand that the particular provision of the modern awards objective - I'm sorry, I haven't got it right in my head at the moment, but that provision which talks about awards being clear and easy to understand, I imagine that that the reason for making the application.

PN29

So we understand the change that the applicant is seeking, but we don't really understand why it's necessary. Since the previous conference, we have reviewed the history of this clause, and can trace them all the way back to the pre-reform award, which is the Teachers (English Language Centres of Australian Universities) Conditions of Employment Award 1996. There was also a private sector ELICOS award that also was considered when the modern award was made. I don't have a copy of that, so I don't know what the descriptors looked like in that award, but we do note that the Universities ELICOS Award as it was called was reviewed in the 1998 awards (indistinct) process and then became one of the pre-reform awards of the many pre-reform awards that were relevant in the making of the post-secondary award in 2008 to 2010. And then that award was then, of course, reviewed in the four year review between 2016 and 2020 and the descriptors have remained unchanged in all of that time.

PN30

I haven't done extensive research of enterprise agreements, but I have looked at a very recent enterprise agreement covering university ELICOS teachers which is at Queensland University of Technology and that was, I think, March this year and they have included this particular provision unchanged. So obviously it's possible to alter them at a enterprise level, but that particular university and it's an agreement that was made with a union with the National Tertiary Education Union, so a very recent enterprise agreement has included them unchanged.

PN31

What we say is unless convinced otherwise is that the award is not ambiguous. I can understand that at level A, we have the word 'either': and at level B we have the word 'plus' and then go on to the second part of the descriptor, but we don't see that anything really turns on that. We think it's clear that category A is a four-year trained and qualified teacher who has then extended with further post graduate specialisation in relevant areas and category B is a four-year trained teacher who also has a TESOL certificate or who has studied a degree or a diploma that incorporates low to TESOL method of teaching. Presumably, this could be part of their four-year teaching degree if they chose those specific electives.

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Or another way of putting it is that at level A, you have first - I think the two options are equal in that the first is lower. It's a diploma, but it's more specific and the second is higher, which is a post graduate diploma but more general and at level B, likewise I can see some equivalents, but option 1 is a specific education and degree diploma, but the TESOL qualification is at the lower level, which is

certificate level and option 2 is a broader degree, but the (indistinct) TESOL must be at a diploma level.

PN33

So the way that I - and we have consulted with our member, and we had some feedback, the way that we read the award is that it is clear and unambiguous, and it's doesn't require any alteration to make it unambiguous.

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JUSTICE HATCHER: Do you want to respond to that, Ms Pollock?

PN35

MS POLLOCK: Yes, I would. I've just sent you through an email. I sent through emails to your associate this morning, which is the email I sent through to all of the participants, which outlines that I would like to bring your attention to category B and category C, which is where option 1 for category B is teacher who has a degree of education, plus a TESOL certificate. Then we have option B, a degree and diploma that includes a TESOL. Category C is you don't have a teacher education, you just have someone who has a degree, plus a TESOL certificate. Then in option 2 of category C you have a degree that includes TESOL. So what we're looking at is that both option 2 for category B and category C are exactly the same. There is no difference. So when I have a teacher come in, and one has a degree plus a TESOL certificate, do I put them at category B or do I put them at category C, option 2? That is where option 2 for category B and C are exactly the same. What I am proposing is that for category B, option A stipulates that this is a teacher who has a degree of education. Also equal to that, as a secondary option is that a teacher who has an education degree, they have a stream of TESOL in that degree.

PN36

What this whole award is that you have two options. You have - as I've written this in the email and Ms Pugsley, could you please read with me, the email that I sent through - - -

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JUSTICE HATCHER: No, you don't need. I just want you to - - -

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MS POLLOCK: It says that the first qualifications require two separate - - -

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JUSTICE HATCHER: Mr Pollock - - -

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MS POLLOCK: No, but this is what you - - -

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JUSTICE HATCHER: Ms Pollock, just calm down please. I just want to understand this for myself. So just take it very slowly please. We don't need to start an argument. Thank you.

PN42

MS POLLOCK: No, but what I'm saying is that there are two options for a teacher who comes in. The first option is where you have a teacher who has two documents, a bachelor of some sort, plus a separate certificate or a diploma or something of a TESOL stream. The second option when a teacher comes in is they have one document. The document will either be a bachelor or a teaching education degree with a TESOL stream within it. So they will have a unit as part of their degree that is agreed upon as accredited as a TESOL teaching English second language.

PN43

So that is for category B and C, and also for category A. Category A though is for our post graduate teachers. At the moment, it doesn't make sense because again we need first option, a teacher who has one piece of paper and another one who has two pieces of paper. One who has the first option, they will have a teaching degree and in addition to that, they will have gone off and done a post graduate. So maybe a masters or a diploma, a post-graduate certificate. So they have two documents.

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The second option is where another teacher will come in, but they're only got one piece of paper. One document and that is where they've done their post graduate degree and that covers, because that also has the TESOL in it. So if you - - -

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JUSTICE HATCHER: Ms Pollock, I'm just looking at your immediate application. So you say you set out what the second qualification category B should state.

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MS POLLOCK: Yes.

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JUSTICE HATCHER: So I'm just struggling to understand how that's different to what it is now?

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MS POLLOCK: Because in category B, option 1 is a teacher with a degree of education and a recognised TESOL. At the moment, the second option is a teacher that does not have an education degree, just has a normal bachelor of some sort that has an ESL component in it.

PN49

JUSTICE HATCHER: Yes.

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MS POLLOCK: At category C, we have a teacher - -

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JUSTICE HATCHER: Just slow down. The question I asked you was I am struggling to understand how the change you propose to the second category - the

second qualification, category B is different to what it is now. Can you just explain that to me?

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MS POLLOCK: We need to add a degree of education to category B. The same as option 1. Both of these teachers must have a degree of education. At the moment, option 2, a teacher does not have a degree of education.

PN53

JUSTICE HATCHER: Ms Pugsley, what is being raised is that in category B and C the second alternative in each case is indistinguishable from each other. That is the person would appear to qualify simultaneously for B or C. So can you explain what the distinction is in the current form?

PN54

MS PUGSLEY: I don't think I can answer the question as directly as that, your Honour, except to say that I can't see that there is an ambiguity, which is what would be required in order for the award to be amended. But I can say that category C, and I'm interested to hear from Mr Odgers, who I imagine would have had a lot of experience with this. Certainly in the modern award review, but there is a difference between B and C, and the applicant, I think if I understood her correctly said she was struggling to know whether to put a new teacher on to B or C. The difference between B and C is that category C is essentially a three-year trained teacher, whereas A and B are really four-year trained teachers. Category C is a three year trained teacher with a TESOL certificate or who studied a degree and diploma that incorporates LOTE or TESOL method of teaching, presumably as part of their three year teaching degree if they chose specific electives.

PN55

I am wondering whether adding degree of education as the word 'degree and education' would in fact alter the award, such that there would be a greater expectation, so to speak or would mean a higher qualification would be required at level B than is currently required. It seems to me that might be an outcome if the change is made as requested

PN56

JUSTICE HATCHER: Mr Odgers, can you assist?

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MR ODGERS: I hope so. I'm sorry, your Honour, can I just start by saying that I had imagined that this matter would be relatively brief, and I've booked myself to appear somewhere else in about five minutes.

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JUSTICE HATCHER: So have I, Mr Odgers. So any assistance I require will be very brief assistance.

PN59

MR ODGERS: From our point of view, if I can go back to what Ms Pugsley raised in the first instance which is where did this formulation come from, the existing formulation comes directly with only one or two words difference from

the pre-reform award the Teaches (English Colleges) Award 1999. Directly for that award. And at the conferences that were held when the award was made, the intention was simply to transliterate. Now, there has been a couple of transcription errors, which the applicant is trying to correct and that is why we have supported the applicant and I think that I agree with everything the applicant has said for the reasons that have been put forward. That was the original intention of the award. What I would like to suggest is that perhaps the easiest way forward from my perspective at least would be for the Commission to issue some brief directions requiring the applicant to make out her case in writing within a week or two and then allowing a short period of time for response.

PN60

JUSTICE HATCHER: What I think I will do is LI will have the Commission internally do its own research into the history of this clause and how it came to be where it is. And once we've done that, I'll get a paper done and have it issued to the parties. And once that's done, I will convene a further conference with the parties to hopefully resolve this. Is that a suitable course for everybody?

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MR ODGERS: It is for us, your Honour. Thank you.

PN62

MS PUGSLEY: Thank you, your Honour. And thank you to Mr Odgers for reminding me of the name of what we call the private sector ELICOS award, which is the 1999 award. I don't have access to that award, so I wasn't able to refresh my memory as to whether the descriptors were exactly the same as they were in the universities award. So I am not aware of any transcription errors, but I'm sure that the Commission's research will uncover that if it is the case.

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JUSTICE HATCHER: Ms Pollock, is that a suitable way forward? I understand this is a bit time consuming, but I think this course will be more efficient, particularly for - - -

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MS POLLOCK: I would have - yeah - - -

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JUSTICE HATCHER: Ms Pollock, can you please not interrupt me?

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MS POLLOCK: Sorry.

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JUSTICE HATCHER: I think that course will be more efficient than requiring you to simply prove your case and have a formal arbitration. So what do you say?

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MS POLLOCK: Look, whatever needs to be done to get this through . I would like someone to explain category B and C to me, please, at another time. Whatever has to happen, that's fine. I also want to bring Ms Pugsley to



understand that there was no longer a three-year diploma for a teacher. SO that is out of date, at category C. So there is no longer to do a diploma for teaching. A teacher has to upgrade to a four-year degree.

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JUSTICE HATCHER: Ms Pugsley, I will stand the matter over generally to allow the Commission to undertake its own research, but in the meantime, can I encourage you to have further dialogue with Ms Pugsley and if in that time you come to a better understanding of each other, then that would assist. All right. Thank you for your attendance today. I will stand the matter over on that basis and I will inform the parties when the applicable research has been done.

**ADJOURNED INDEFINITELY**

**[10.02 AM]**