



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2024/9

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

**Application by The Australian Retailers Association
(AM2024/9)**

General Retail Industry Award 2020

Sydney

9.49 AM, THURSDAY, 29 FEBRUARY 2024

PN1

THE PRESIDENT: All right. I'll take the appearances.

PN2

Mr Kirkwood, you appear for the applicant, the Australian Retailers Association?

PN3

MR J KIRKWOOD: (No audible reply.)

PN4

THE PRESIDENT: Ms Bhatt, you appear for the Australian Industry Group with Ms Beasley?

PN5

MS R BHATT: Yes, your Honour.

PN6

THE PRESIDENT: Ms Carroll, you appear for the National Retail Association?

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MS L CARROLL: Yes, your Honour.

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THE PRESIDENT: Ms Burnley, you appear for the SDA?

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MS S BURNLEY: Yes, your Honour.

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THE PRESIDENT: Mr Taylor, you appear for the AWU?

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MR G TAYLOR: Yes, your Honour.

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THE PRESIDENT: Mr Cullinan, you appear for Retail and Fast Food Workers Union Incorporated?

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MR J CULLINAN: Yes, your Honour.

PN14

THE PRESIDENT: All right. Mr Kirkwood, go ahead. So, you've sent us some correspondence and as I understand it you seek two things. First of all, an expedited hearing in relation to variation E in your application in relation to clause 15.2(c), and otherwise a conference of parties in relation to the other variations. Is that correct?

PN15

MR KIRKWOOD: I'm sorry, your Honour, can you hear me now? Sorry, your Honour, I can't hear you.

PN16

THE PRESIDENT: Can you hear me now?

PN17

MR KIRKWOOD: Yes. Thank you, your Honour. I'm sorry. We didn't seem to be able to unmute ourselves on the other connection. But again, I apologise for that. Your Honour has correctly identified what we seek. Did your Honour wish me to address either of those matters now?

PN18

THE PRESIDENT: There's a couple of things. Firstly, in relation to the conference, do you see that being done separate to, or as part of the review of the modern awards as currently being conducted? So, as your client would be aware there's been a series of consultation meetings set up to discuss proposals that have been made for former various awards, including the Retail Award.

PN19

And as I understand it I think the same proposals are being advanced in the context of them. Do you see those overlapping or as being separate matters?

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MR KIRKWOOD: We had contemplated that this consultation would occur separately and we would be content for it to occur after the consultation is listed as part of the review.

PN21

THE PRESIDENT: All right. So, are these variations being raised in the context of the review, at all, or not? Because otherwise it seems to me there'll be unnecessary overlap.

PN22

MR KIRKWOOD: I anticipate that some of them may be raised by other parties in the review. In particular, I think the retail an issue. I don't have full visibility over everything that's proposed to be raised there. But as Ms Leoncio may have mentioned on the last occasion the ARA is ultimately pursuing this application separately, and in any event.

PN23

THE PRESIDENT: Right. And in terms of the expedited hearing how do you see that unfolding? That is, what direction should be made in the first instance as to any material that your client and those supporting the application might file? And do you see a need for a hearing or can it be determined on the papers?

PN24

MR KIRKWOOD: We would anticipate it hopefully being able to be dealt with on the papers. Did your Honour receive a set of proposed directions by chance, late yesterday?

PN25

THE PRESIDENT: Just hold on. Yes. I understood those directions relate to the whole of the application. I'm really just talking about the expedited aspect.

PN26

MR KIRKWOOD: I'm sorry, your Honour. The Commission's own motion matter?

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THE PRESIDENT: Correct, as it overlaps with variation E in your application.

PN28

MR KIRKWOOD: Yes. I'm sorry. Yes, as your Honour would have seen from the correspondence my client sent yesterday, my client would support the making of such a variation urgently and in advance of its application on the balance of the matters if the Commission were minded to take that course, essentially on the basis that as I'm instructed, the issues are creating uncertainty in enterprise agreement making processes.

PN29

At present as I understand it there has been some engagement with relevant stakeholders about that variation. I am not able to say today to your Honour whether it's supported by others and it may be that others on this hearing are able to speak to that. But certainly given the nature of the proposed amendment being really just a restoration of two aspects of the language that appeared in the 2010 GRIA my client would certainly be very hopeful that some agreement could be reached about that variation.

PN30

THE PRESIDENT: All right. Leaving aside the prospect of agreement, if I gave you – how long do you need to file any other material that you would rely upon in support of that expedited aspect of the application?

PN31

MR ROBERTSON: One week, your Honour.

PN32

THE PRESIDENT: One week. All right, thank you. Ms Bhatt?

PN33

MS BHATT: Yes, your Honour, thank you. In relation to the ARA's application in a general sense and the proposals that have been advanced we are broadly supportive of them and their intent. Many of those proposals do overlap with proposals that we have advanced in the context of the award review. If it assist your Honour I can briefly identify what they are but I'm not sure if that's necessary for today's purposes.

PN34

THE PRESIDENT: Not at this stage, Ms Bhatt but it's sufficient that you raised the issue that there is an overlap, which I thought was the case, so - - -

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MS BHATT: Yes, your Honour.

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THE PRESIDENT: So, the applicant says we should have the modern award - leaving aside the aspect it wants expedited, it says we should have the modern awards review conference first and then have a conference in relation to the application. Does that, in effect, resolve the overlap matter?

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MS BHATT: Yes. And we would support that proposition.

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THE PRESIDENT: And what about the application to expedite the variation of clause 15.2?

PN39

MS BHATT: We support that, too. We are also of the view that that matter should be dealt with separately and expeditiously. My learned friend has proposed a period of one week for the ARA to file any material in support of that. We would request the same period of time.

PN40

It might be, your Honour, that we don't file anything further and we simply indicate that we're content to rely on the correspondence we filed last year, which in some detail sets out the relevant history of the matter and how we say this issue has come to bear in the existing award.

PN41

If your Honour gives other parties an opportunity to file material in response to what is put on by the ARA and Ai Group it might be that we wish to put something on in response to that, particularly if the matter is to be dealt with on the papers rather than by way of a hearing. But perhaps your Honour will hear from the others as to whether they have anything to say about it first.

PN42

THE PRESIDENT: And for your part, are you content to have the matter determined on the papers?

PN43

MS BHATT: I think that might depend on the position of the other parties in respect of the matter, your Honour.

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THE PRESIDENT: All right. Thank you. Ms Carroll?

PN45

MS CARROLL: Thank you, your Honour. Yes, I concur with the earlier parties. We would support the 15.2(c) matter being dealt with expeditiously. Subject to the views of the other parties we are content for that matter to be dealt with on the papers and one week is a sufficient amount of time for us to file material in support of that matter.

PN46

In relation to the conference we agree there is some overlap between the modern award review and the ARA's application. We're in your hands in terms of how that is conferenced.

PN47

THE PRESIDENT: All right. Thank you. Ms Burnley?

PN48

MS BURNLEY: Yes, thank you, your Honour. Dealing with the expedited application that's been made on the process, we don't oppose that matter being expedited. With regard to - - -

PN49

THE PRESIDENT: Sorry, but what's the SDA's attitude towards the merit of that variation?

PN50

MS BURNLEY: We will have a look at the papers. We don't think that we'll have a strong opposition to it at this time. We would however request that we do have one week to reply to any of the submissions which are made by the employer organisations seeking that. We think that should be sufficient time because it is a confined issue that we are aware of. And I understand the history recording the PLED variation that went to that change in the award. So, I think a one week reply should be sufficient for that.

PN51

With regard to the broader application of the ARA and the timeline we'll just deal with the issued of the conference, which I think is the only matter that your Honour is examining today. We would also agree that if there is overlap of the various matters which are before the Commission now which have been programmed for the various reviews, and we think it would be wise that the conference between the parties doesn't occur until those various conferences and matters have been sorted in front of the Commission at the moment as it is an overlap of resources that the parties would be duplicating. If it pleases the Commission.

PN52

THE PRESIDENT: All right. Thank you. Mr Taylor?

PN53

MR TAYLOR: Our position is the same as the SDA's, your Honour. We're okay with the expedited timeframe in the way that Ms Burnley has just announced, and otherwise okay to go to conference on the other matters. Thank you.

PN54

THE PRESIDENT: All right. Mr Cullinan?

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MR CULLINAN: Thank you, your Honour. We understand the desire for expedition because of the impact on some bargaining agreement that are underway. We oppose the change. We think that it introduces a level of

ambiguity that was removed by the PLED. But the further week of putting on a reply is satisfactory to us. Thank you.

PN56

THE PRESIDENT: All right. I think what I'll do is, I'll make the directions as proposed. That is, one week for the application and those supporting variation E, to file any material in support of the application; one week for those who wish to oppose the application or otherwise respond to matters in the earlier submission.

PN57

What I think I'll do then, if any other party, after all those submissions then wishes to either have a hearing or have an opportunity to put on some further submissions in reply they can make contact with my chambers. Otherwise we'll just reserve our decision and decide the matter on the papers. I should indicate I will refer the matter to a Full Bench.

PN58

I just want to clarify one matter from perhaps the perspective of the applicant and also the AIG. Is the clause 15.2 variation pursued under section 160, that is an error or uncertainty or ambiguity, or is it pursued under section 158 – that is, a merit variation, or both?

PN59

MS BHATT: It's pursued by Ai Group pursuant to section 160. And as I think our correspondence articulated, we are seeking a retrospective variation by extension.

PN60

THE PRESIDENT: Yes, all right. And Mr Kirkwood, is that the basis upon which your client is advancing the application?

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MR KIRKWOOD: Yes, perhaps with the caveat that as an alternative position we may advance a submission that it could be done under section 157 as consistent with the modern awards objective.

PN62

THE PRESIDENT: Yes, all right. Thank you. So, I'll issue those directions in respect to the conference. I'll find a date and list that shortly at some stage after the modern awards review conference. Is it convenient having regard to the balance of parties, that the conference is convened physically in Melbourne with audio and video links on request?

PN63

MR KIRKWOOD: That is convenient to the ARA, your Honour, yes.

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THE PRESIDENT: Yes, all right. That's what we'll do. In respect of the other directions, what I think I'll do is, I'll have a conference first and then I think we can assess the outcome of that and then make some mentions in the light of the conference outcome.

PN65

MR KIRKWOOD: Thank you, your Honour.

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THE PRESIDENT: Thank you. Is there anything else that I need to deal with today?

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MR KIRKWOOD: Not from the ARA's perspective, your Honour.

PN68

THE PRESIDENT: All right. I thank you all for your attendance and we'll now adjourn.

ADJOURNED INDEFINITELY

[10.05 AM]