



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

1053634

**VICE PRESIDENT CATANZARITI  
DEPUTY PRESIDENT KOVACIC  
COMMISSIONER JOHNS**

**AM2016/12**

**s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective**

**Application by  
(AM2016/12)**

**Canberra**

**1.18 PM, MONDAY, 20 JUNE 2016**

PN1

VICE PRESIDENT CATANZARITI: I will have the appearances in Canberra first.

PN2

MR P GAHAN: May it please the Commission, Gahan, P for the Australian Public Service Commission.

PN3

VICE PRESIDENT CATANZARITI: Are you seeking leave to appear?

PN4

MR GAHAN: I am, yes.

PN5

VICE PRESIDENT CATANZARITI: Any other appearances in Canberra?

PN6

MR A ANASTASI: Anastasi, A for the Civil Aviation Safety Authority.

PN7

MR L BENFELL: Benfell, L for the CPSU and we do not oppose legal representation.

PN8

VICE PRESIDENT CATANZARITI: Present in Sydney?

PN9

MR W ESCOTT: If the Commission please, Wayne Escott, Australian Prudential Regulation Authority.

PN10

MS R BUYUN: May it please the Commission, Buyun, R and I appear on behalf of SBS. I also have here with me Ms Page from SBS.

PN11

MS BAXTER: If it please the Commission, I seek permission to appear on behalf of (indistinct).

PN12

VICE PRESIDENT CATANZARITI: Mr Benfell, Ms Baxter is also seeking permission to appear.

PN13

MR BENFELL: We don't oppose that, Your Honour.

PN14

VICE PRESIDENT CATANZARITI: Thank you, Ms Baxter.

PN15

MS S McSWEENEY: If it please the Commission, McSweeney, S for the Australian Film Television and Radio School.

PN16

MS J BUTLER: If it please the Commission, Butler, J for the (indistinct).

PN17

VICE PRESIDENT CATANZARITI: Thank you, Ms Butler.

PN18

MR MURPHY: If it please the Commission, Murphy (indistinct).

PN19

VICE PRESIDENT CATANZARITI: Thank you, Mr Murphy. And then we go to Melbourne.

PN20

MR M NICOLAIDIS: Thank you, Your Honour, Nicolaidis, M for the Australian Manufacturing Workers Union.

PN21

MS S GHELLER: May it please the Commission, Gheller, S for APESMA.

PN22

VICE PRESIDENT CATANZARITI: Thank you. And, Ms Gheller, Mr Nicolaidis, you don't oppose permission to appear with the legally represented parties?

PN23

MS GHELLER: No, Your Honour.

PN24

MR NICOLAIDIS: No, Your Honour.

PN25

VICE PRESIDENT CATANZARITI: Mr Gahan, there are a number of questions we wish to ask, so we might ask those questions first.

PN26

MR GAHAN: Yes.

PN27

DEPUTY PRESIDENT KOVACIC: Welcome, Mr Gahan. I have got probably about a dozen or so issues that I will raise and I will work through them progressively. Most of them relate to the schedule. The first relates to clause 5.1 of the draft award which is the award flexibility provision and the model for the award flexibility clause that was determined by the Full Bench as part of the award organisation process also included annual leaving loading. I notice that is not referred to here and there is an issue that I will come to in respect of Schedule J which relates to APRA but I just wanted to - I presume that it is not included here because annual leave loading has been rolled into the rates of pay that are incorporated in the award.

PN28

MR GAHAN: That's correct.

PN29

DEPUTY PRESIDENT KOVACIC: The next issue relates to clause 19.4 of the agreement which relates to time off in lieu and this is more by way of a heads-up. This is part of the four-yearly review, there is a Full Bench that is dealing with a number of issues relating to award flexibility of which time off in lieu is one of those issues. It is likely to issue a model clause at some stage in the not too distant future, so a bit of a heads-up that there might be some issues flowing from that decision for this particular award as well.

PN30

MR GAHAN: Thank you.

PN31

DEPUTY PRESIDENT KOVACIC: The next one relates to Schedule A and it is clause 8.5. I just have a question mark as to this one. I can understand it, but in terms of the reference to - how are you going to determine who are former PC1s and PC2s and whether, given that the classification structure in the relevant schedule doesn't incorporate these particular classifications, whether the clause itself is required or whether it is redundant.

PN32

MR GAHAN: Deputy President, I believe that this deals with a number of employees who weren't considered to be covered by awards and it is designed to, in a sense, if you go to one of the provisions in the statement that is issued by the Commission on 1 April about not creating new award rights. If I am understanding you correctly, your question is going to how do you identify who those employees are.

PN33

DEPUTY PRESIDENT KOVACIC: Yes.

PN34

MR GAHAN: I don't have any specific instructions on that from this Australian Film Television and Radio School. Perhaps this is a matter which the Commission might be assisted by hearing from the Australian Film Television and Radio School on.

PN35

DEPUTY PRESIDENT KOVACIC: Yes, that would be helpful, thank you, Mr Gahan.

PN36

MS McSWEENEY: Thank you. The PC1s and PC2s are excluded from the original award. They are an old term that has been used locally or in the Australian Film Television and Radio School. They refer to PC2s were actually preparation admitted companies, I don't know why it was specifically put there, and PC1s refer to casuals.

PN37

DEPUTY PRESIDENT KOVACIC: But the other part of the question is when you will get the schedule that deals with the Film Television and Radio School, I presume that classification structure doesn't capture the equivalence of PC1s and PC2s at this stage?

PN38

MS McSWEENEY: It definitely wouldn't cover PC2s. It is possible that it would be used as (indistinct) PC1S.

PN39

DEPUTY PRESIDENT KOVACIC: What I'm asking you in a roundabout way is does the classification structure in the relevant schedule deliver the result that you got with A5 without having to have A5 there explicitly, that is the question.

PN40

MS McSWEENEY: If I'm understanding correctly, the reason that they are put there as exclusions from this award is that a large number of them are covered by the Broadcasting Recorded Entertainment Award and most of them are on separate contacts paid at that time on rates that (indistinct) PC1s and PC2s.

PN41

DEPUTY PRESIDENT KOVACIC: So the reason is more to make clear to do with the exclusion because they are covered by that broader broadcasting award.

PN42

MS McSWEENEY: Yes, most of them are. The teaching ones aren't.

PN43

DEPUTY PRESIDENT KOVACIC: So, some are and some aren't, is that what you are saying?

PN44

MS McSWEENEY: Yes.

PN45

DEPUTY PRESIDENT KOVACIC: You might just think about it.

PN46

MR GAHAN: Deputy President, if we could take that one on notice and we work through the issues, thank you.

PN47

DEPUTY PRESIDENT KOVACIC: The next issue relates to clause H8 and the schedule relates to Australian Hearing Services and it deals with district allowance and the background here is - and I will use as an example the General Retail Industry Award of 2010. When it was established it had provisions relating to district allowances and the clause in that particular award when it was made also had a provision which said clause 20.14 and 13 (which is the relevant clause) ceases to operate on 31 December 2014. In essence, that is not a transitional provision in, I suppose, the normal course but there was obviously a limited life to

provision around district allowances and I also happen to be on the Four-Yearly Review Full Bench that is dealing with district allowances as well as - it has dealt with the usual accident pay.

PN48

It begs the question as to whether district allowances should be incorporated in this award given that the issue is still under review and the approach adopted by the Commission as part of the award modernisation process was to provide a limited life or district allowance provisions. In respect of Broken Hill in terms of the Retail Industry Award, that has been retained but for areas outside and, in particular, the Northern Territory and Western Australia, that issue is yet to be resolved, so I would be interested on any views you might have around that.

PN49

MR GAHAN: Deputy President, again, in terms of the maintenance of the terms of the provisions that are sitting in the schedules, this was something that was going to be the statement that was issued on 1 April. I'm not specifically aware of the basis for the inclusion of this clause in this schedule. The Australian Public Service Commission was involved in a fairly limited way in terms of the derivation of the schedules, so it may be something that Australian Hearing Services can speak to more than the Australian Public Service Commission. Maybe Ms Baxter can help.

PN50

MS BAXTER: My understanding of the inclusion of these district allowances in the schedule is that - as (indistinct) from the APFC that it was to ensure that there was no detriment to the employees in the making of the modern award. These allowances were included in the enterprise award not as a transitional arrangement as they had been in the other modern awards made in 2010. I just note that the understanding at the conclusion of the award review process into those district allowances, I can't make any comments on whether or not (indistinct), the potential decision of the Commission might be in that manner but whether these allowances continue to be appropriate but at this stage without that decision of the Commission our view is that they are included to ensure that there is no detriment to the employees.

PN51

DEPUTY PRESIDENT KOVACIC: I suppose the question I've got is whether, in essence, that sort of five-year transition period is something that needs to be incorporated in here as well, because when I look at - again referring to general retail - outside Broken Hill they have fallen out of that particular award.

PN52

MS BAXTER: Thank you, Commissioner. As I said, they were included in the enterprise award as a transitional provision but I can take instructions and take that question on notice as to whether or not (indistinct) some transitional arrangements.

PN53

MR GAHAN: We have no objection to that approach. As it might be suggested, this is I think largely a matter for the employer involved.

PN54

DEPUTY PRESIDENT KOVACIC: The next issue relates to Schedule J which relates to APRA and a number of provisions here. The first one relates to clause J.9 which is overtime and penalty rates and, in particular, J.9.1(b). The issue here is - the question I have got is the definition of "what is overtime" talks in terms of any work before 7 am or after 7 pm Monday to Friday. The span of hours' provision in the main body of the award provides for a span of hours of 8 am to 6 pm. When I looked at this particular schedule there was just a question as to whether you need a particular span of hours' provision in this schedule given, in essence, what by default appears to be a different span of hours that applies at APRA.

PN55

MR GAHAN: Deputy President, I think that might be something that we might need to work through.

PN56

DEPUTY PRESIDENT KOVACIC: Perhaps Mr Escott might be able to say something.

PN57

MR ESCOTT: If the Commission pleases, (indistinct) in the APRA 2000 Award, we are happy to discuss that. Yes, we've got an open mind about that.

PN58

DEPUTY PRESIDENT KOVACIC: It just strikes me as there is an inconsistency between the body of the award and the schedule and I understand the intent of what is in the schedule but you may just run into a technical issue. What happens between, particularly between the 7 am and 8 am, given the difference under the main body of the award, employees may be open to - entitled to potentially overtime.

PN59

The next one relates - it is the same schedule, that is clause J11 which deals with annual leave loading. I will just go back to the award flexibility provision here, given that this is the only schedule that deals with annual leave, whether there needs to be something to do with that in the context of the award flexibility provision perhaps in this schedule.

PN60

MR GAHAN: Deputy President, we have J11.2 which specifically seeks to add annual leave loading to (indistinct).

PN61

DEPUTY PRESIDENT KOVACIC: Good pick up, thank you. The next one is Schedule K and there are a couple of provisions here and it is a similar question to what I had before in terms of some other classifications of the Film Television and Radio School. Clause K3 which deals with allowances refers to allowances for gardeners who were formerly GSO level 6 and also GSO level 8, how easy it is to identify who those employees were, given that over an effluxion of time it might sort of change.

PN62

MR GAHAN: Deputy President, we do have the classification transitional information, that is Schedule C. It might be a matter of identifying whether it is appropriate to include that in Schedule C if it is not already.

PN63

DEPUTY PRESIDENT KOVACIC: But I don't know how many employees might be falling into either of those categories but just so there is clarity, because I presume it is a finite number and I'm not sure how many gardeners that the Sports Commission might actually engage or employ, and in terms of operation it is just a question - it just struck me as how do you apply that when at some stage down the track when people are currently being involved in the development of the award may have moved on.

PN64

MR GAHAN: Perhaps this might be something that will assist hearing from the Australian Sports Commission.

PN65

MR WORTHY: I didn't put in an appearance, Commissioner.

PN66

VICE PRESIDENT CATANZARITI: Mr Worthy, isn't it?

PN67

MR WORTHY: It is. I appear for the Australian Sports Commission and appearing with me is Amanda Chadwick. The classifications that we have on the ground in the Sports Commission are still generally referred to as gardeners although they travel under the generic classification and description that we have. The provisions here apply to gardeners who are classified as either previously as Grade 6 or Grade 8 and it was felt that the broad classification structure that is proposed for the new award, along with the list of former classifications, which could be read in conjunction with the work level standards, if you like, that are contained in the existing ASC enterprise award would be sufficient for us to identify those people.

PN68

DEPUTY PRESIDENT KOVACIC: Let me ask the question perhaps slightly differently. In terms of - and I can't recall - I think it is the GSO level 6 translated to an AGS 3 or 4, from memory, just from looking at Schedule C. In terms of those AGS employees level 3 are performing gardening work, would that be - I suppose the problem for that is that those that might come after the award comes into operation would still get paid the allowance. I'm not quite sure.

PN69

MR WORTHY: In terms of how the allowance operates through enterprise bargaining that has been absorbed entirely into the wage rate so the allowances themselves are no longer paid in practical terms.

PN70



DEPUTY PRESIDENT KOVACIC: But how many employees are you thinking about all up?

PN71

MR WORTHY: Two employees.

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DEPUTY PRESIDENT KOVACIC: Is that one at each level?

PN73

MR WORTHY: Yes.

PN74

DEPUTY PRESIDENT KOVACIC: Thank you, Mr Worthy. The next question I've got relates to Schedule L, there are two clauses here: one is clause L10 which is the study cost allowance. There is another schedule later on which also refers to study allowances. Given the nature of this payment is a discretionary payment, why it is included in the award as opposed to policy.

PN75

MR ANASTASI: Deputy President, it is really just to repeat something in the current CASA award, that's the only reason why this is here.

PN76

DEPUTY PRESIDENT KOVACIC: In comparison with the APS award study allowance is not included in there. If this specified that the employee was guaranteed to get study assistance, an entirely different kettle of fish, but it is a discretionary provision so you may wish to consider whether it is appropriate.

PN77

The second one is the next clause: telephone reimbursements allowance. I suppose it just looks a little bit odd in the day of mobile telephones that you still have a provision like this in a modern award.

PN78

MR ANASTASI: Yes, the words at the end of that paragraph, another clause would cover other type of telephone calls but nonetheless that would be that an employee that does use a non-mobile telephone in providing that advice out of hours.

PN79

DEPUTY PRESIDENT KOVACIC: It is for anyone - I would imagine it would be a rare occurrence that someone didn't have a mobile phone.

PN80

MR ANASTASI: Yes. Nonetheless, CASA would seek to maintain that wording.

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DEPUTY PRESIDENT KOVACIC: And the one last relates to

PN82

Schedule 11, it is clause NA which is National Gallery and again it relates to financial assistance to approved students. Again this is a discretionary provision and I just wonder why it is not dealt with by way of policy outside as opposed to being included in an award.

PN83

MS WARD: I haven't made an appearance either - National Gallery of Australia. I guess it's the same sort of thing, it is covered under our policy, it is just that it was something that was picked up when we were going through the award and being that we needed to - - -

PN84

DEPUTY PRESIDENT KOVACIC: Sorry, Ms Ward, we are having difficulty because you are not near a mic, do you want to come forward to a mic?

PN85

MS WARD: It is something that we ordinarily do cover by policy, it was just that it was picked up in the award, in the previous award, so it was seen as something that we might want to continue to cover our staff with, but we can certainly look at it again and take it on notice to have a look at.

PN86

DEPUTY PRESIDENT KOVACIC: I would imagine that all the other entities that are going to be covered by this award would offer some sort of study assistance yet most of those schedules don't include study allowance. There is some provision around assistance of study. Again, I refer also to the APS award and I'm looking at it from a perspective of consistency, that is where I'm coming from.

PN87

MR GAHAN: Just on that, Deputy President, if I could take you back to L10.1. I do have instructions about that and CASA is happy for that to be removed if no other party has any objection.

PN88

DEPUTY PRESIDENT KOVACIC: Thank you, Mr Gahan, they are all of my issues.

PN89

MR BENFELL: If I could just make a comment on the Schedule L.11, the telephone expense reimbursement.

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DEPUTY PRESIDENT KOVACIC: Yes.

PN91

MR BENFELL: It doesn't appear that that reimbursement is restricted to home telephones, it is really telephone devices, so it has operation.

PN92

DEPUTY PRESIDENT KOVACIC: I suppose the question, I have got, Mr Benfell, is one that I get a sense of here is that I would imagine most people who might be required to provide advice there is a high likelihood - I'm not saying that it is universal - but they probably have a CASA-provided mobile phone and to the extent that if you don't have a - if you're using your own personal mobile phone, normally whether it is through - recouping it through the petty cash system is a way of dealing with it. It just struck me as an odd provision for a modern award to, in essence, reflect a provision that from personal experience I might have benefited from 30 years ago.

PN93

MR BENFELL: Yes, but unfortunately the telecommunication service is in Australia at different and reasonable areas from metropolitan areas.

PN94

DEPUTY PRESIDENT KOVACIC: I accept that, which is why I asked the question how often it might get exercised or utilised.

PN95

VICE PRESIDENT CATANZANTI: Mr Gahan, we have read the submissions as filed. Are there any other matters you wish to draw to our attention?

PN96

MR GAHAN: No.

PN97

VICE PRESIDENT CATANZARITI: Thank you. Mr Benfell?

PN98

MR BENFELL: Thank you, Your Honour.

PN99

VICE PRESIDENT CATANZARITI: Sorry, I am remiss, I should just mark for the record before I hear from you so it is formally point. The outline of submissions I will mark as exhibit 1; the statement of Donna Tait, director of conditions policy in the workplace relations group dated 1 June I will make exhibit 2; a copy of the proposed current enterprise award I will make exhibit 3; a table identifying changes made with the proposed award as between version 9 filed on 1 June 2016 and the further amended version filed on 16 June I will make exhibit 4; a further statement of Ms Tait dated 17 June will be exhibit 5 and the applications filed by the CPSU will be exhibit 6 and the AMWU will be exhibit 7 - submissions that have been filed in support.

**EXHIBIT #1 OUTLINE OF SUBMISSIONS**

**EXHIBIT #2 STATEMENT OF DONNA TAIT DATED 01/06/16**

**EXHIBIT #3 COPY PROPOSED CURRENT ENTERPRISE AWARD**

**EXHIBIT #4 TABLE IDENTIFYING CHANGES FILED ON  
01/06/2016 AND FURTHER AMENDED VERSION DATED 16/06/16**

**EXHIBIT #5 FURTHER STATEMENT OF DONNA TAIT DATED  
17/06/2016**

**EXHIBIT #6 APPLICATIONS FILED BY CPSU**

**EXHIBIT #7 APPLICATIONS FILED BY AMWU**

PN100

DEPUTY PRESIDENT KOVACIC: Yes, Mr Benfell?

PN101

MR BENFELL: Thank you, Your Honour, we rely of course on exhibit 6 which are our submissions which are very short and to the point, that is we agree with the two put by the APSC and I just want to say two things: Firstly, I think the record should note that the assistance of Johns C in this process, I think it is fair to say that the industry had a bit of a shock in February when the matter was listed for directions and was told that by the end of June the 27 applications were to be finalised or should be finalised. But that was a very beneficial approach and the statement of 1 April by the Commission was also very beneficial because it avoided the parties from making adventurous claims and assisted the parties in reaching consent in the matter which is obviously a preferred way of doing it.

PN102

Finally, Johns C was available for conciliation which assisted the parties. Also for the record, I think the work of Donna Tait on behalf of the APSC should be noted. She had the unenviable task of organising all of the employer entities to this award and she did so in an admirable fashion and assisted the general process of this application well. And, finally, I am pleased to say that after four years of this process it is about to end, hopefully.

PN103

MR NICOLAIDIS: Thank you, Your Honour, the AMWU relies on the statement and the reply that it submitted on 8 June and otherwise, if I might indicate (indistinct) Johns C and his assistance due to the work (indistinct) from the APSC.

PN104

MS GHELLER: Thank you, Your Honour. As per the submissions by the APSC, in the submissions both the AMWU and the CPSU (indistinct) Government Industry Award. I join Mr Benfell and Mr Nicolaidis in thanking both Johns C for all his hard work and the hard work and effort of Ms Donna Tait as well.

PN105

VICE PRESIDENT CATANZARITI: Thank you, the Commission will take a short adjournment.

**SHORT ADJOURNMENT** [1.36 PM]

**RESUMED** [1.40 PM]

PN106

VICE PRESIDENT CATANZARITI: On 6 May 2016 the Fair Work Commission, as presently constituted by this Full Bench, initiated of its own

motion the making of a modern award to be known as the Australian Government Industry Award 2016 under section 157(3)(a) of the Fair Work Act 2009.

PN107

We did so because a number of Commonwealth employers had previously made applications under Item 4 of Schedule 6 to the Fair Work transitional provisions and Consequential Amendments Act 2009 for the Commission to make a modern enterprise award to replace awards that applied to them but indicated a preparedness to be part of an industry award, the development of which was overseen by the Australian Public Service Commission as the agency responsible for leading the development of workplace reforms in the Commonwealth public sector.

PN108

In support of that application the APSC filed an outline of submissions; a statement of Donna Tait; director conditions policy in the workplace relations group dated 1 June 2016; a copy of the proposed modern award to be known as the Australian Government Industry Award 2016; a table identifying changes made to the proposed award as between Version 9 filed on 1 June 2016 and the further amended version filed on 16 June 2016; a further statement of Ms Tait dated 17 June 2016. The application supported by the Community and Public Sector Union and the Australian Manufacturing Workers Union.

PN109

We commend the parties for all the work they have done to finalise the terms of the proposed industry award. It has been a significant undertaking to agree upon the body of the proposed award and the schedules which will cover 12 named employers who have previously been covered by enterprise award-based transitional instruments.

PN110

Having considered all the material which has been filed and the submissions made before us today, we are satisfied that each of the factors required by the Fair Work Act have been addressed; that they weigh in favour of making a modern award. In our view there is a compelling case for the making of a modern award for the Australian Government industry.

PN111

I would order making the Australian Government Industry Award 2016 in the terms agreed between the parties and filed on 16 June 2016 will be issued subject to the finalisation of its terms in conference with Johns C. We understand that in doing so, each of the employers who made applications under the transitional Act will now file notices of discontinuance in relation to those matters after the award is issued.

PN112

Our reasons for decision will be published, in due course.

**ADJOURNED INDEFINITELY**

**[1.43 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**EXHIBIT #1 OUTLINE OF SUBMISSIONS ..... PN99**

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