



# DECISION

*Fair Work Act 2009*

s.603—Application to vary or revoke a FWC decision

## **Aged Care Award 2010**

(AM2020/99)

## **Nurses Award 2020**

(AM2021/63)

## **Social, Community, Home Care and Disability Services Industry Award 2010**

(AM2021/65)

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT ASBURY  
COMMISSIONER O'NEILL

MELBOURNE, 4 JULY 2022

*Application to vary or revoke a FWC decision – application dismissed.*

[1] On 8 May 2022, in what he described as the role of *amicus curiae*, Mr Grabovsky made an application in the Aged Care Work Value Case seeking a direction under s.590(2)(b)<sup>1</sup> of the *Fair Work Act 2009* (the Act) for:

- him to submit an '*amicus brief*' by 2 August 2022,
- the applicants in matters AM2020/99, AM2021/63 and AM2021/65 to distribute copies of the '*amicus brief*' among 'Aged Care Workers, Members and non-Members of the corresponding unions' within 30 days, and
- the Commonwealth to distribute the '*amicus brief*' among 'government structures responsible for the Health and Aged Care' by 30 August 2022.

[2] In a decision<sup>2</sup> published on 19 May 2022 (the Decision) we dismissed Mr Grabovsky's application on the basis that 'the brief would be unlikely to be of any assistance and accepting it would unnecessarily delay proceedings.'<sup>3</sup>

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<sup>1</sup> We understand that where Mr Grabovsky refers in his application to s.509(2)(b) of the Act, he means s.590(2)(b).

<sup>2</sup> [2022] FWCFB 77.

<sup>3</sup> *Ibid* [4].

[3] Mr Grabovsky has now lodged an application pursuant to s.603 of the Act seeking that the Commission revoke the Decision and issue a direction in similar terms to those set out at [1] above (the ‘review application’).

[4] The discretionary power in s.603(1), to vary or revoke a decision, has a broad and flexible operation; it is not cast in terms of a power to be exercised only in particular stated events or circumstances.<sup>4</sup>

[5] Mr Grabovsky was provided with the opportunity to file submissions in support of the review application and lodged submissions in the form of a ‘Statement of Intent’.

[6] There is nothing in Mr Grabovsky’s submissions that persuades us to conclude that the Decision should be reviewed.

[7] The Commission has a broad discretion to ‘inform itself in relation to any matter before it in such manner as it considers appropriate’ (s.590(1) of the Act). Further, s.577 provides that the Commission must perform its functions and exercise its powers quickly, in a manner that is fair and just and avoids unnecessary technicalities, and openly and transparently.

[8] As mentioned earlier, Mr Grabovsky is seeking to be heard as *amicus curiae*. The approach taken by the courts to the hearing of *amicus curiae* is instructive.

[9] An *amicus curiae* is heard if that person ‘is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would otherwise not have been assisted’.<sup>5</sup> Courts have adopted a cautious approach to considering applications to be heard by persons who would be *amicus curiae* lest the efficient operation of the court be prejudiced. Further, as Brennan CJ observed in *Kruger v The Commonwealth*:

‘where the Court has parties before it who are willing and able to provide adequate assistance to the Court it is inappropriate to grant the application’.<sup>6</sup>

[10] These observations are apposite in the present circumstances.

[11] In the Aged Care Work Value case we are considering whether to vary wage rates for aged care employees in three modern awards. The case is not a wide-ranging examination of working conditions in the aged care sector and nor is it an inquiry into the conduct of employers or unions in the sector. The parties appearing in the proceedings are competently represented and those representatives are assisting us in our consideration of the various applications. Further, as we observed in our decision of 19 May 2022, Mr Grabovsky’s involvement as *amicus curiae* would be unlikely to assist us and accepting his involvement would unnecessarily delay the proceedings. Indeed it appears from Mr Grabovsky’s ‘Statement of Intent’, filed in support of the review application, that one of his objectives in seeking to file an *amicus curiae* brief is to secure monetary compensation for himself and his wife in respect of a dispute which

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<sup>4</sup> *Minister for Industrial Relations for the State of Victoria v Esso Australia Pty Ltd* [2019] FCAFC 26 [34] and [73].

<sup>5</sup> *Levy v Victoria* (1997) 189 CLR 579, 604 (per Brennan CJ).

<sup>6</sup> Transcript of 12 February 1996 at 12 cited in *Levy v Victoria* (1997) 189 CLR 579, 604.

has already been heard and determined by the Commission. It would be entirely inappropriate to grant Mr Grabovsky's application in such circumstances.

[12] For the reasons given, we do not consider it appropriate to exercise the discretionary power under s.603 to vary or revoke the Decision. The proper course for Mr Grabovsky, if he remains aggrieved by the Decision, is to seek judicial review of it.

[13] The review application is dismissed.

PRESIDENT

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