



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2022/35

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

**Application by Woolworths Group Limited
(AM2022/35)**

General Retail Industry Award 2020

Sydney

9.33 AM, WEDNESDAY, 19 APRIL 2023

Continued from 27/02/2023

PN1

JUSTICE HATCHER: I will take the appearances. Mr Gotting, you continue appearance for Woolworths?

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MR A GOTTING: I do, thank you, your Honour.

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JUSTICE HATCHER: Mr Guy, you appear for the SDA?

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MR A GUY: I do, your Honour.

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JUSTICE HATCHER: Mr Boncardo for the Transport Workers' Union?

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MR P BONCARDI: Yes, your Honour.

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JUSTICE HATCHER: Mr Saunders for the United Workers' Union?

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MR L SAUNDERS: Yes, your Honour.

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JUSTICE HATCHER: Ms Bhatt for Australian Industry Group?

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MS R BHATT: Yes, your Honour.

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JUSTICE HATCHER: And Mr Izzo for ABI and the New South Wales Business Chamber?

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MR L IZZO: Yes, your Honour.

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JUSTICE HATCHER: Is that all the appearances? All right. Mr Gotting, the first thing is the amended application. Can you just talk me through that, please?

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MR GOTTING: Yes. It's contained in a document that's headed 'Annexure A, Amended Schedule to GRI, Variation Application'. Does your Honour have a copy of that?

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JUSTICE HATCHER: Yes.

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MR GOTTING: It amends, in paragraph 1, the definition so as to be confined to a supermarket rather than the previous version, which was a retail store, and that reflects the discussions that have occurred on a without prejudice basis between some of the parties in the course of these proceedings. That's the substantive change that's contained in the amended schedule.

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JUSTICE HATCHER: All right. Does anyone oppose permission being granted to amend the application in the terms of the amended schedule, annexure A? No? All right. I just want to clarify the parties' position. What's the SDA's position first, Mr Guy, in respect of the amended version of the application?

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MR GUY: We have no objection to that, no.

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JUSTICE HATCHER: Mr Boncardo, what's the TWU's position?

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MR BONCARDO: It still remains opposed, your Honour, to the application for variation.

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JUSTICE HATCHER: All right. Having regard to the work delineated in the amended application, that is employees, as I understand it, engaged in an online supermarket sales fulfilment facility as defined, what does the TWU say about which award, if any, currently covers that work?

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MR BONCARDO: It would be covered by the Road Transport and Distribution Award. Our primary contention, your Honour, is that what, in substance, is occurring is work in a warehouse or distribution facility. We don't accept the premise of the application that there is something unique or distinct about the kind of work that is occurring at these facilities just because they have been labelled supermarket-style facilities.

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JUSTICE HATCHER: I'm sorry, can you just tell me how that falls within the coverage of the Road Transport Award?

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MR BONCARDO: Your Honour is familiar with clause 4.2 of the award which, in (c), refers to:

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The storage and distribution of goods, wares, merchandise, materials, or anything whatsoever.'

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Our principal contention is that the Road Transport and Distribution Industry, as elaborated by clause 4.2, captures the work the subject of the application.

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JUSTICE HATCHER: Is there a definition of distribution facility?

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MR BONCARDO: There is, your Honour, in clause 2. Well, there's a definition of distribution facility and distribution facility employee. A distribution facility is:

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A facility from which goods are distributed by road operated by an employer as part of, or in connection with, a road transport business of that employer.

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JUSTICE HATCHER: Do you say Woolworths operates a road transport business?

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MR BONCARDO: It does, yes, and, indeed, the *Coles v TWU* Full Court decision did find that a component of Coles' business was in the transport industry.

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JUSTICE HATCHER: All right, thank you. Mr Saunders, what's the UWU's position?

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MR SAUNDERS: The application remains opposed. At least some of the work that would be caught by the variation is currently covered by the Storage Services Award.

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JUSTICE HATCHER: What is that work?

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MR SAUNDERS: That is work done in distribution facilities that involves handling, packing, loading, dispatch and preparation for delivery. These are facilities that are caught by the amended annexure A. They include facilities that have no customer-facing aspect, its solely functioned to pack and prepare for distribution of goods.

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JUSTICE HATCHER: Does the exclusion of 4.3(b) apply?

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MR SAUNDERS: Of the Storage Services Award or General Retail?

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JUSTICE HATCHER: Yes, the Storage Services Award.

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MR SAUNDERS: It's possible that there are some workers within Woolworths' businesses that are covered by the Road Transport and Distribution Award - I

would assume truck drivers fall within that - but not exclusively. It's not clear to me whether the TWU contends that every single worker in these facilities is covered by the Road Transport Award.

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JUSTICE HATCHER: I don't understand we're talking about the drivers, we're talking about those who actually work in the facility. Is that encompassed by 4.3(b) or not?

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MR SAUNDERS: We say not.

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JUSTICE HATCHER: Why not?

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MR SAUNDERS: Because they are not predominantly engaged in the work covered by that award. The classification within the Storage Services Award captures what they do.

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JUSTICE HATCHER: All right. Ms Bhatt or Mr Izzo, do you want to express any views about the amended application?

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MS BHATT: Your Honour, I'll just say this. We support the intention of the application. We might still have some concerns about unintended consequences that might flow from the manner in which the variations have been proposed and any submissions we make in this matter are likely to be directed primarily to that issue.

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JUSTICE HATCHER: Mr Izzo?

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MR IZZO: Your Honour, we support the amended application. Yes, we support it and we have no opposition to the award being amended in the way sought by Woolworths.

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JUSTICE HATCHER: All right. I think we have crystallised the disagreement, Mr Gotting, so what's your proposal as to the way forward?

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MR GOTTING: My understanding is that the evidence to be relied on in chief by the applicant has been filed and that no other party supporting the applicant wishes to file evidence-in-chief. In those circumstances, as we set out in some proposed draft directions we sent to your Honour's associate on 13 April, we seek an order that any party opposing the application file evidence upon which it intends to rely by 4 pm on a date to be specified. It seems to us the date should be within 21 to 28 days from today. We then propose that the applicant and any

party supporting the application file any evidence in reply by a further 21 to 28 days' time.

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JUSTICE HATCHER: It might be useful for your client to file some submissions outlining the basis of the application. I mean the preliminary question is, is this work covered by any of the three awards and, if it's not the Retail Award, are we changing coverage, are we confirming coverage - addressing those sort of issues.

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MR GOTTING: Just to be clear, the position of the applicant is three-fold.

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The primary position is that the employees that work at one of the relevant facilities are covered by the General Retail Industry Award and only that award and, for the avoidance of doubt, the primary position is that those employees are not covered by the Storage Services and Warehouse Award or the Road Transport and Distribution Award.

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The second position of the applicant, which is really an alternative to that primary position, is that if there is more than one award that applies to the employees, then the most appropriate classification that should apply to those employees is the classification contained in the General Retail Industry Award and, in that sense, we rely upon clause 4.5 of the General Retail Industry Award, which is replicated, I might add, in the other two awards.

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The third position, which is an alternative to the primary and the secondary position, is that if the employees are not covered by the General Retail Industry Award then this Commission should amend the General Retail Industry Award so that coverage does apply. That's our position.

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JUSTICE HATCHER: It might be useful if, as a first step, you file submissions explaining that position. How long might you need to do that?

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MR GOTTING: Seven days.

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JUSTICE HATCHER: Seven days. Al right. In respect of the unions opposing the application, is it then appropriate that I make directions requiring the filing of evidence and submissions?

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MR SAUNDERS: Yes, subject to one minor amendment to the first order. I appreciate that Woolworths has filed the evidence it wants to rely on in chief, but we haven't had the same confirmation that Mr Gotting apparently has in respect of all the other parties in support, the various associated employers in particular. It would also be helpful to have submissions from the AiG to identify what these

unintended consequences it's concerned about are. So, perhaps the first order is for submissions from the applicant and any material from any other party in support of the application.

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JUSTICE HATCHER: Does any other party intend to file evidentiary materials in support of the application?

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MR GUY: Not from our perspective, your Honour.

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MS BHATT: No, nothing.

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MR IZZO: No, your Honour.

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JUSTICE HATCHER: Well, to the extent that there's any issues about the draft of the amended application, Ms Bhatt, are you able to file any submissions in those regards within seven days?

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MS BHATT: I don't anticipate that we can within seven days, your Honour, but within 14 days, we can.

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JUSTICE HATCHER: All right. So, the unions, how long after that?

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MR BONCARDO: Your Honour, four weeks, if that's convenient?

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JUSTICE HATCHER: Yes, all right. Likewise, Mr Saunders?

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MR SAUNDERS: Yes, that's fine.

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JUSTICE HATCHER: Then evidence and submissions in reply?

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MR GOTTING: Yes, a period of four weeks.

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JUSTICE HATCHER: Four weeks. Then how long will the hearing take? I suppose that's a bit hard to tell at this stage.

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MR GOTTING: It's a bit hard for me to predict accurately at this point in time because I haven't seen the evidence that's intended to be relied upon by the TWU or the UWU.

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JUSTICE HATCHER: Shall I simply list the matter for directions when all the material is filed?

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MR GOTTING: Yes.

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JUSTICE HATCHER: Yes, all right. I intend to allocate the matter in due course to a Full Bench, so it may be necessary for a further inspection to be arranged, Mr Gotting.

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MR GOTTING: I understand. Is your Honour indicating at the same facility that was the subject of the first inspection?

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JUSTICE HATCHER: I think, given that all the counsel appear to be located in Sydney, we will make this a Sydney matter, so that would probably be convenient, but that's a matter for you.

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MR GOTTING: I understand. Thank you.

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MR IZZO: Your Honour, I note, because we're not filing evidentiary materials, there doesn't seem to be, in what we've just discussed, an arrangement for the filing of submissions by other interested parties in support. I suppose there's two ways that can be done. We could file in 14 days or we could file at some other point in reply, but we do intend to file submissions in support about our unique area of interest, so that will need to be addressed.

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JUSTICE HATCHER: All right. That can be encompassed by the submissions within 14 days for parties supporting the application.

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MR GOTTING: Can I just clarify whether your Honour was intending to require the TWU and the UWU to file submissions at the same time?

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JUSTICE HATCHER: Yes, evidence and submissions, yes.

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MR GOTTING: Thank you.

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JUSTICE HATCHER: All right, is there anything further we can deal with today?

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MR BONCARDO: Nothing further, your Honour.

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JUSTICE HATCHER: All right. I thank everyone for their attendance. We will now adjourn.

ADJOURNED INDEFINITELY

[9.47 AM]