



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2022/29

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

**Modern award superannuation clause review
(AM2022/29)**

Sydney

2.00 PM, THURSDAY, 13 JULY 2023

PN1

JUSTICE HATCHER: I will take the appearances. Ms Bhatt, you appear for the Australian Industry Group?

PN2

MS R BHATT: Yes, your Honour.

PN3

JUSTICE HATCHER: Mr Kempfi, you appear for the Australian Council of Trade Unions?

PN4

MR S KEMPII: Yes, your Honour.

PN5

JUSTICE HATCHER: Ms Memmolo, you appear for the Australian Public Service Commission?

PN6

MS L MEMMOLO: Yes, that's correct, thank you, your Honour.

PN7

JUSTICE HATCHER: And, Mr Maxwell and Ms Wiles, you appear for the CFMMEU?

PN8

MR S MAXWELL: Yes, your Honour.

PN9

MS V WILES: Yes, thank you.

PN10

JUSTICE HATCHER: All right. I think the last occasion this matter was on the parties had been engaged in discussions, but asked for an adjournment to wait legislative developments. So the Protecting Worker Entitlements Act has now passed. What's the position in light of that development?

PN11

MS BHATT: Your Honour - - -

PN12

JUSTICE HATCHER: Yes, go ahead, Ms Bhatt.

PN13

MS BHATT: Thank you. Your Honour, I have had some brief discussions with Mr Kempfi earlier today as to the position at least of the peak bodies that have been involved in discussions to date about this matter and an appropriate way forward.

PN14

It would appear that the recent legislative amendments do not touch upon the two key issues in respect of which these proceedings were initiated. It may however give rise to a separate question as to whether certain provisions of the award relating to superannuation are necessary in light of a new substantive right or obligation to certain superannuation contributions being required under the NES, but that is an issue that we, Ai Group, would seek to give further consideration to.

PN15

So far as the discussions that were taking place before we last wrote to you seeking that the proceedings be set aside, those discussions had been productive and we were able to narrow the scope of the dispute between the three peak bodies as to what variations should be made to the superannuation clauses to deal with the issue of underperforming funds and staple funds, but an agreed position had not yet been reached.

PN16

Mr Kempii, I am hopefully not mischaracterising the position that was reached between our two organisations earlier today, but it appeared to us that a sensible way forward if your Honour is so minded is to allow the peak bodies another two weeks to complete those discussions; to prepare a document that identifies matters that are agreed, or variations that are not opposed by any of the peak bodies to address those issues, and then identify those that are contested. And at the same time to prepare or to file draft directions that propose a timeframe within which parties will have an opportunity to file submissions about any of those issues.

PN17

JUSTICE HATCHER: All right. Just before you go on I note the appearance of Ms Tinsley from the Australian Chamber of Commerce and Industry. Did you want to respond to that, Mr Kempii?

PN18

MR KEMPPII: We agree with that course of allowing two weeks which would enable us to speak to affiliates about the timeline going forward and just ensure that we are clear about the matters in contention. So by the end of that two weeks we expect to be in a position to outline to the Commission, at least with respect to the threshold issues, what's agreed, what the employers seek that the unions don't agree to, and what the unions seek that the employers don't agree to, and then have the matter programmed.

PN19

JUSTICE HATCHER: Why shouldn't I allow for that step to be taken as part of a program of directions for the finalisation of this matter. I note that the matter has been dragging on the basis the parties were attempting to resolve it, which obviously they have not been able to, at least to finality, and speaking for myself I am concerned that the issues raised by the review may cause issues of award compliance to raise their ugly head as it were. So I am anxious to resolve it. Why shouldn't I allow as a first direction that the parties can file documents which allow them to identify their respective positions and the differences between them, but then make further directions for the filing of submissions and a hearing of the matter?

PN20

MR KEMPPII: We're in your hands, your Honour, but we would be grateful for the opportunity to be given some time to at least confer on a timeline that the parties could meet for submissions and then come back to you.

PN21

JUSTICE HATCHER: How long do you think the parties will need?

PN22

MR KEMPPII: For that alone ideally two weeks because it would allow us to do the whole lot, which was the originally proposed timeline. We could potentially examine, and I would have to have a conversation with Ms Bhatt and Ms Tinsley, but we could potentially examine whether we can do that a little bit more quickly.

PN23

JUSTICE HATCHER: If I allow the parties two weeks to file their respective position documents and then a further four weeks to file - I assume there won't be any evidence in this case - submissions as to their respective positions. Is that appropriate?

PN24

MS BHATT: We would be content, but with that course of action, your Honour, on the run I am trying to give consideration to precisely what it is that those submissions would be directed towards. So is it the case that the submissions we first file relate to, or are in support of the position that we have advanced, or are they also to respond to for example the ACTU's position?

PN25

JUSTICE HATCHER: I am responding to the proposition you advanced, Ms Bhatt, but as I see it the parties have two weeks just to identify an outline of their positions, including what, if any, variation should be made to superannuation clauses in awards, a simpliciter. And then to the extent that that exposes disagreements between the parties about key issues they would have another four weeks after that to file submissions advocating why one course rather than another should be taken.

PN26

MS BHATT: I understand, your Honour.

PN27

JUSTICE HATCHER: Is that suitable?

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MS BHATT: Yes, your Honour.

PN29

MR KEMPPII: From the ACTU's perspective we could meet that timeline subject to the views of any affiliates on the line.

PN30

JUSTICE HATCHER: All right. Is this a matter that the parties consider requires a hearing, or can it be decided on the papers?

PN31

MR KEMPPII: For our part we would struggle to make that call without seeing the submissions of the employer peaks.

PN32

JUSTICE HATCHER: All right. I will put a hearing in the program, and the parties can advise in due course whether they consider that's necessary or not. Ms Tinsley, did you want to say anything in addition?

PN33

MS TINSLEY: No, your Honour, and apologies for my lateness earlier. I would agree with the course of action.

PN34

JUSTICE HATCHER: All right, thank you. Mr Maxwell and Ms Wiles, do you want to say anything?

PN35

MR MAXWELL: No, your Honour, we are content with the proposal for the timeline.

PN36

JUSTICE HATCHER: Ms Wiles?

PN37

MS WILES: Similarly, your Honour, yes, we're happy with that.

PN38

JUSTICE HATCHER: All right. If there's nothing further the parties can expect that they will receive directions in writing and a listing for hearing in due course. We will grant liberty to apply in case some difficulty arises with those directions. Otherwise we will now adjourn, which means you can simply disconnect.

PN39

MS BHATT: Thank you.

PN40

MR KEMPPII: Thank you, your Honour.

ADJOURNED INDEFINITELY

[2.10 PM]