



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

10.00 AM, FRIDAY, 26 APRIL 2024

Continued from 05/04/2024

PN89

JUSTICE HATCHER: All right. I'll take the appearances. Mr Wilding, you appear for the applicant, the Australian Retail Association?

PN90

MR WILDING: Yes, your Honour. And Ms Morris is also here with me in the room. Thank you.

PN91

JUSTICE HATCHER: Yes. Ms Bhatt, are you still there? Right. We'll try to find Ms Bhatt. Ms Carroll, you appear for the National Retailers Association?

PN92

MS CARROLL: That's correct. Thank you, your Honour.

PN93

JUSTICE HATCHER: Mr Song, you appear for Australian Business Industrial and Business New South Wales?

PN94

MR SONG: Yes, your Honour. I should note that we only wish to be heard in relation to proposals H and I.

PN95

JUSTICE HATCHER: All right. Ms Bhatt, do you appear for Australian Industry Group?

PN96

MS BHATT: I do. I apologise. There seems to have been some trouble with our connection.

PN97

JUSTICE HATCHER: Ms Burnley, you appear for the SDA?

PN98

MS BURNLEY: Yes, that's correct, your Honour.

PN99

JUSTICE HATCHER: Mr Taylor, you appear for the AWU?

PN100

MR TAYLOR: Yes, your Honour.

PN101

JUSTICE HATCHER: Mr Cullinan, you appear for RFFWU, I think.

PN102

MR CULLINAN: Yes, your Honour.

PN103

JUSTICE HATCHER: All right. The purpose of today is simply to get a summary of the parties' positions with respect to the matters that were canvassed in the statement I issued on the 10 April, the associated document which was sent to the parties with some suggestions for drafting and the correspondence we have received from parties in relation to proposals M and N.

PN104

So I don't want to hear from the parties as to the merits of their positions but simply to understand where we're up to and whether there's any point in terms of all items, or specific items to continue trying to deal with this through a conference process.

PN105

So, Mr Wilding, I'll start with you. Do you want to address the matters in the order they appear at the statement?

PN106

MR WILDING: Yes, thank you, your Honour and we're certainly grateful for the Commission's effort in putting together the proposed drafting. In respect of proposed variation A, your Honour, we're content with – we're largely content with this. In terms of clause 2.2 we're happy with that. And we are content with, I think, the intent of clause 2.3. But I do want to raise, your Honour, an issue we have with the reference to the words, 'And accessible', in the last line.

PN107

Our concern about the inclusion of those words is that it might be seen to create a positive obligation to maintain those records in an accessible format at all times. I think we accept, your Honour, that the records need to be retrievable and that they need to be provided upon request, but we wouldn't want to, I guess, create a situation where there is a requirement on employers to at all times have these records be accessible, and I am not sure that that's necessarily what was intended but I think on one reading there may be that.

PN108

So our position, your Honour, is that we agree to clause 2.3 if the words 'and accessible' were removed such that it is said that the record is in the readily retrievable form.

PN109

JUSTICE HATCHER: So 'accessible' means capable of being accessed. There's some difficulty with that?

PN110

MR WILDING: I think, your Honour, if that's all that is intended to mean that it's capable of being accessed at some point we don't have a problem with that but we wouldn't want to create an obligation that there is at all times a requirement to have, for example, an electronic portal that – in which employees can access these records.

PN111

JUSTICE HATCHER: Well, I don't think that's what the word means, Mr Wilding. I mean in the same way as people kept pay for pay records it was never suggested that employees have a right to simply walk in at any time and look at them. They had to be capable of being accessed if there was some need to see them.

PN112

MR WILDING: Well, I think, your Honour, if that's all that's intended and - - -

PN113

JUSTICE HATCHER: Anyway - - -

PN114

MR WILDING: I think then we don't sort of cavil with that. We just wanted to be clear that there's not an expectation that somehow these records are available at any given moment. Yes, they'll be available upon request and should be able to be retrieved but that's our only concern with that, your Honour.

PN115

JUSTICE HATCHER: Yes. All right. H and I?

PN116

MR WILDING: In respect of H and I, whilst our substantive application sought the removal of the requirement that these be initiated at the employee request, in the spirit of the last, your Honour, we are prepared to agree to those proposals in H and I as drafted. Noting obviously the other aspects of variations those clauses will be dealt with at a later point.

PN117

JUSTICE HATCHER: Yes, all right. So in relation to M, you've received orders from the parties. So where are we up to with that, do you consider?

PN118

MR WILDING: Your Honour, so in relation to M, it certainly wasn't the intention of our proposal to affect substantive entitlements. Our proposal is more in the nature of a drafting change to try and make it easier to understand and put into a table format.

PN119

In respect of the SDA's position on the full time employees, if I can start with that row? We don't have an issue with the change to (iii), which is to, I think, add on the last few words of the clause 15 title.

PN120

And in respect of proposal (ii), the reference to subject to clause 15.2 in the span of hours, we had proposed that that be included for clarity. I think it's accepted by all parties that overtime doesn't apply where that exception to the span of hours applies. I think we're really in your Honour's hands about whether you think that adds clarity or not. And so that's full time employees, your Honour.

PN121

Part time employees (i) we had proposed that the reference to clause 10.5 specifying that it's only clause 5(a), and that's because the guaranteed hours in clause 10.5(a) are contained in 10.5(a), not 10.5.

PN122

(ii), it's the same position about whether there's a need to reference the changes to the span of hours or not. We don't have a strong position on that, your Honour.

PN123

And (iii), which is the SDA's proposal to add reference to outside the roster conditions in clause 15. We do have an issue with that, your Honour, and that's because as you're aware a number of clauses – a number of aspects of clause 15 are to be the subject of determination as to whether they apply to part time employees or not.

PN124

Our view is that given that those issues need to be dealt with there shouldn't be an addition to the part time employees column – row – is the word for that – at this point in time until the Commission has decided the substantive issue as to whether, or as to which parts of clause 15 apply to part time employees. I think we accept that - - -

PN125

JUSTICE HATCHER: All right. Well, I'll see what the other parties say but it may turn out to be the case that this redraft can't be severed from the other issues. But anyway we'll explore that – N?

PN126

MR WILDING: I think that that may be. And sorry, your Honour, just on the casuals.

PN127

JUSTICE HATCHER: Yes.

PN128

MR WILDING: I think the casual changes proposed by the SDA I don't think are significant substantive changes between us. Our proposal refers to sort of cross references to clauses to deal with the daily hours limit. The SDA has proposed – just reference to what those hours are.

PN129

We say that cross reference is preferable because we've actually proposed other changes to those hours and limits and there are - and there's an exception for one day a week of 11 hours of work or two days if we're successful in our other proposal. I think that's probably more in the nature of a drafting change, rather than being an issue of significant substance.

PN130

JUSTICE HATCHER: Right. N?

PN131

MR WILDING: Proposal N - - -

PN132

JUSTICE HATCHER: This is the alternate SDA draft.

PN133

MR WILDING: Yes. Your Honour, we think that in combination with the existing maximum six consecutive days rule that our proposal to have 10 days over a two-week cycle was clear and is preferable. If there is a desire, though, to maintain a reference to six days in one week and four in the other, we don't think the SDA drafting completely addresses the issue of whether there's rolling or fixed cycles. So we would be willing to put forward another form of words which I might if you're happy, your Honour, I'll just read out very quickly. Which I think is more similar to the SDA's proposal. And that is that an employer may roster an employee to work ordinary hours on six days in one week, per two-week cycle, provided that in the other week in that cycle the employee is rostered to work ordinary hours on no more than four days.

PN134

So it's, I think, closer to the language that's in the award as it is today and closer to what the SDA has proposed. And we think it addresses more clearly, and provides more certainty about there being a fixed, rather than rolling cycle.

PN135

JUSTICE HATCHER: Yes. All right. And O?

PN136

MR WILDING: We're content with the proposal in respect of O, your Honour.

PN137

JUSTICE HATCHER: All right. So what do you say, at least, as to these matters the next step should be? Is it worthwhile having another conference or what should happen?

PN138

MR WILDING: Yes. Well, we're certainly, your Honour, prepared to engage in further discussions on those. I'm open, of course, to hearing from the other parties today. I'm not sure of their position, your Honour, but we're certainly prepared to engage in further conferencing in respect of these matters. We think there is real potential to reach agreement on them. I think, as I have just expressed, I don't think we're far apart on a number of these proposals.

PN139

JUSTICE HATCHER: All right. Well, I'll now to turn to the other employer parties and perhaps they can simply indicate if, in respect to any matter, they have a substantially different position to the ARA. So, Ms Bhatt?

PN140

MS BHATT: Yes, your Honour. In relation to proposed variation A we're comfortable with the wording that's been proposed, noting in particular the comments that your Honour has made this morning about its intended

operation. And in respect of the remaining proposals our position is the same as what has been articulated by Mr Wilding.

PN141

JUSTICE HATCHER: Ms Carroll?

PN142

MS CARROLL: The NRA doesn't have anything further to add beyond Mr Wilding's and Ms Bhatt's comments and we are comfortable to engage in further conferencing in relation to these matters.

PN143

JUSTICE HATCHER: All right. Mr Song?

PN144

MR SONG: We understand that the condition has not yet contemplated whether clauses 15.7 and 8 apply to permanent part time and casual employees. We otherwise don't have a strong position or any objection to the Commission's proposals in variations H and I.

PN145

JUSTICE HATCHER: All right. Ms Burnley?

PN146

MS BURNLEY: Thank you, your Honour. With respect to variation A we have been looking at that and do have some extra words we think should be added to that clause. And at the moment we haven't finalised the words as such but it would be along the line of in 2.2 the extra words at the end would be, 'provided that the record is readily retrievable and in an accessible form', and that there's also an acknowledgement of receipt if a notice is made by the other party.

PN147

JUSTICE HATCHER: Sorry. The 2.2 is drafted and doesn't require a record to be kept of the notice. Does the award currently provide for records to be kept of notices, as distinct from agreements?

PN148

MS BURNLEY: I need to double-check but I think it does, your Honour.

PN149

JUSTICE HATCHER: Right. Because that - - -

PN150

MS BURNLEY: Because some of these - - -

PN151

JUSTICE HATCHER: That was the purpose of separating the two provisions. But if you say that there is a requirement to keep records of notices then there's no point drafting it the way it has been.

PN152

MS BURNLEY: Yes. I think, your Honour, it might be in the issues such as redundancy and termination where you are issuing a notice that somebody has been made redundant. That's got to be made part of the time and wages record but I can double-check as to what other provisions would need to be picked up and covered, or would be covered by issues and to the notice.

PN153

JUSTICE HATCHER: Okay. So when you will be in a position to provide your alternative draft?

PN154

MS BURNLEY: Your Honour, I would think I'd be able to provide an alternative draft Tuesday week. I'm not too sure what date that is – or Wednesday that week.

PN155

JUSTICE HATCHER: Okay. Yes?

PN156

MS BURNLEY: Yes. And then with regard to 2.3, at the end of that proposed wording and we would propose wording, such as, 'And the record evidences agreement by all parties'.

PN157

JUSTICE HATCHER: Why do you need to add that? The whole point – the agreement is to record it in writing. What work do those words add?

PN158

MS BURNLEY: It's just to emphasise that it has to be received and acknowledged and that it's been received and they've agreed to it.

PN159

JUSTICE HATCHER: I think with respect you've got this the wrong way around. You make the agreement and then you record it. That is, it's not – if record of both parties' agreement hasn't been obtained then it's not an agreement but as it assumes that an agreement has been made and then there's a record. If there's no - - -

PN160

MS BURNLEY: I'll take that - - -

PN161

JUSTICE HATCHER: I mean if the employee – there's no signs the employee has agreed to it then it's not an agreement in the first place.

PN162

MS BURNLEY: Yes. I guess we're getting stuck on how do you acknowledge the agreement so it's not just something that's been written and the employee has never seen it.

PN163

JUSTICE HATCHER: Well, if they've never seen it it's not an agreement. I mean it's got to be an agreement in writing which means that the consent of both

parties to whatever it is, is part of the writing. So if there's no – if there's nothing in writing that the employee has agreed to it's not an agreement at all.

PN164

MS BURNLEY: I think this is coming from experience of organisers where they've had this debate with employers as to whether something was agreed or not and it hasn't been. There is no record that evidences how it's been agreed.

PN165

JUSTICE HATCHER: Well, it's not an agreement in writing then is it?

PN166

MS BURNLEY: No.

PN167

JUSTICE HATCHER: But this is to be read in connection with other provisions which require an agreement in writing, and they're not being changed. This is just about how you record it. But it seems to me that if the requirement is for an agreement in writing, if there's nothing in writing that the employees agreed to, it's not an agreement in writing.

PN168

MS BURNLEY: I'll take that back and consider it, your Honour.

PN169

JUSTICE HATCHER: I mean perhaps the answer to your concern, Ms Burnley, is we should have a separate definition or provision as to what an agreement in writing is.

PN170

MS BURNLEY: That possibly would be a good suggestion. It is - - -

PN171

JUSTICE HATCHER: If that's – all right – anyway, if you got an alternate draft by Tuesday week. Is that right?

PN172

MS BURNLEY: Yes.

PN173

JUSTICE HATCHER: All right. H and I?

PN174

MS BURNLEY: H and I, our position at the moment is that we prefer in both the clauses the current (ii) or (b) in the second provision. And then we just want the note there that with regard to the single document or record of separate documents that they need to be placed in the time and wages record.

PN175

JUSTICE HATCHER: So you want the same provision - - -

PN176

MS BURNLEY: Yes. Yes, your Honour.

PN177

JUSTICE HATCHER: So that's a 'no'. You've stated your position with respect to M and N, and what about O?

PN178

MS BURNLEY: And O, we note, your Honour, that O – it picked up, basically the fast food in its entirety, whereas currently the GRIA you get penalties for the evening on your annual leave. That hasn't been reflected in the wording that's been proposed.

PN179

JUSTICE HATCHER: Say that again?

PN180

MS BURNLEY: That currently, under the GRIA, you get all penalties whereas – such as evening penalties and shift penalties. Whereas the wording which has come through this draft variation O it just talks about the relevant weekend penalty amount, which is the wording out of the Fast Food Award. So the issue was that we were agreeing that we would have the same form as what was in the fast food, the wording, which I think was also discussed in the make awards easier about the headings of whether it was called 'additional rates' or 'annual leave loading'. But this drafting has removed the evening penalties which are found currently in GRIA and you take annual leave.

PN181

JUSTICE HATCHER: All right. I understand.

PN182

MS BURNLEY: And the other thing was – that there is just one other bit.

PN183

JUSTICE HATCHER: Yes.

PN184

MS BURNLEY: It is – which I'm not sure whether it's required but the GRIA does have a provision in there about shift work. Just calling up the attention currently at 28.2 about the additional week of leave for a shift worker, if it's required, which is at 28.2 which has been removed. The Fast Food Award doesn't have that reference in it.

PN185

JUSTICE HATCHER: Yes. But this only replaces 28.3. It's not proposed there be any change to - - -

PN186

MS BURNLEY: Okay. Yes. Yes, your Honour.

PN187

JUSTICE HATCHER: So what do you think should happen next? Should we bother to proceed with this or - - -

PN188

MS BURNLEY: I think we should have another conference. I've heard what the ARA has put regarding the six and four day proposal of N. I'm not too sure what happens if you're on a four-week cycle. I'm assuming that that would cover it but we probably need to check that through and if they can provide the words for that one that would be appreciated. But I think maybe a few more – another conference to see if we can settle. Especially if we're going to put the words regarding in writing to the parties we probably do need another conference or some mechanism for report back or exchange of views.

PN189

JUSTICE HATCHER: Well, if we have another conference is the SDA in a position to finalise these matters or not? I mean there comes to a point where this process uses its utility and it's just easier to set the matter down for hearing, Ms Burnley. But - - -

PN190

MS BURNLEY: Your Honour, I think that given that we'll be putting in some words regarding the in writing issue and there's the six and four day proposition, they might be the two that may be able to be settled.

PN191

JUSTICE HATCHER: So A, H and I only. Is that the position?

PN192

MS BURNLEY: Sorry. You just broke up a little bit there, your Honour. So it was A - - -

PN193

JUSTICE HATCHER: So what are the matters you want an additional conference about which you think might be able to be settled?

PN194

MS BURNLEY: A, N and O, and there's also the overtime provision but we can have a look at what the ARA has put back regarding what they're prepared to look at and M.

PN195

JUSTICE HATCHER: All right. Mr Taylor?

PN196

MR TAYLOR: Nothing to add to the SDA. Our position is the same on these. Thank you.

PN197

JUSTICE HATCHER: Right. Mr Cullinan?

PN198

MR CULLINAN: If I move through them quickly, your Honour? The first in relation to 2.3 we do have the view that was expressed as a concern by Mr Wilding. We've heard what you've had to say. We think people reading 2.3 and

the last few words may share our view that accessible form means accessible to the worker as they deem fair, particularly considering the workplaces and many workplaces have those portals available. So additional clarification on that might be of assistance to readers.

PN199

In relation to H and I we don't have a problem with what's proposed by the Commission. In relation to O we had the same concern as the SDA, just noting that the Fast Food Award doesn't have week night penalty rates that are in excess of 17.5 per cent. So that's one of the differences there. That's the summary of our positions. We would welcome the words in relation to N that's been referred to.

PN200

JUSTICE HATCHER: All right. Just going back to O, Mr Wilding? Would there be any opposition to the proposition that there needs to be a reference to the evening penalty?

PN201

MR WILDING: I think there would your Honour. There's - - -

PN202

JUSTICE HATCHER: There would be opposition?

PN203

MR WILDING: Yes. Yes, your Honour.

PN204

JUSTICE HATCHER: And why is that?

PN205

MR WILDING: I think your Honour there's a view that I would need further instructions on this but that those week night penalties I have to go back through the history of how we got to this clause in the Award as it is but that those week night penalties are not applicable and that it was a reference to weekend penalties only. So I think there's a different view about what – how the clause applies.

PN206

JUSTICE HATCHER: Well, it of course refers to clause 22 doesn't it, which contains the evening penalty?

PN207

MR WILDING: It does refer to clause 22, your Honour. Our proposed – I appreciate that your Honour has put forward the proposal in respect of the Fast Food Award. Our proposed clause sought clarification to make clear that the entitlement was confined to the weekend penalty rates and not other penalty rates.

PN208

JUSTICE HATCHER: So that's the substantive change?

PN209

MR WILDING: I think, your Honour there's – our position is that there is a degree of uncertainty about the clause as it is.

PN210

JUSTICE HATCHER: Well, I'm just looking to see what the uncertainty is. But -
- -

PN211

MR WILDING: I appreciate that your Honour. I think our position is though that we would oppose the inclusion of those words.

PN212

JUSTICE HATCHER: All right. Look, what I'm going to do is direct the parties to confer as to these matters. I'll set down a report back in three weeks' time. Any matter that's not agreed will simply be dealt with as part of the ultimate arbitration. If there's an agreement that the parties can reach by that time then the Commission will consider implementing it. If not they'll just be added to the matters for arbitration.

PN213

All right. Is there anything else I can deal with at this time?

PN214

MR WILDING: No, thank you, your Honour.

PN215

JUSTICE HATCHER: All right.

PN216

MR CULLINAN: We have a listing for next week, your Honour.

PN217

JUSTICE HATCHER: But that listing obviously will go ahead.

PN218

MR CULLINAN: Yes.

PN219

JUSTICE HATCHER: All right.

PN220

MR CULLINAN: But there was some discussion about whether that was – the format for that whether it be by Teams or in person.

PN221

JUSTICE HATCHER: That will be by Teams.

PN222

MR CULLINAN: Okay.

PN223

JUSTICE HATCHER: All right. Thank you for your attendance. We'll now adjourn.

ADJOURNED INDEFINITELY

[10.37 AM]