



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2023/21

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

Modern Awards Review 2023-24

Sydney

9.52 AM, TUESDAY, 3 OCTOBER 2023

PN1

JUSTICE HATCHER: I'll take the appearances. Mr Clarke, you appear for the ACTU?

PN2

MR T CLARKE: Yes, that's right, your Honour, yes.

PN3

JUSTICE HATCHER: Mr Redford, you appear for the United Workers Union?

PN4

MR B REDFORD: Yes, I do, your Honour.

PN5

JUSTICE HATCHER: Ms Bhatt and Mr Chang, you appear for the Australian Industry Group?

PN6

MS R BHATT: Yes, your Honour.

PN7

JUSTICE HATCHER: Ms Tinsley and Mr Farrow, you appear for the Australian Chamber of Commerce and Industry?

PN8

MS J TINSLEY: Yes, that's correct, your Honour.

PN9

JUSTICE HATCHER: Mr Izzo, you appear for ABI and Business NSW?

PN10

MR L IZZO: Yes, your Honour.

PN11

JUSTICE HATCHER: Ms Sostarko, you appear for Master Builders Australia?

PN12

MS R SOSTARKO: Yes, thank you, your Honour.

PN13

JUSTICE HATCHER: Ms Pugsley and Mr Miller, you appear for the Australian Higher Education Industrial Association?

PN14

MS C PUGSLEY: That's correct, your Honour.

PN15

JUSTICE HATCHER: And, Ms Wischer, you appear for the Australian Nursing and Midwifery Federation?

PN16

MS K WISCHER: Yes, your Honour.

PN17

JUSTICE HATCHER: Can I simply note that I've received correspondence from the Australian Industry Group, with some comments about the draft timetable, which I've noted and perhaps, Ms Bhatt, you'll address that in due course. Anyway, I'll just start in the order I've taken appearances so, Mr Clarke, do you want to go first?

PN18

MR CLARKE: Sure, yes. Thank you, your Honour. Look, we have consulted our affiliates about the timetable. The feedback which we've received is in relation to the last matter, which is concerning making awards simple and easy to understand and so forth. The proposal there is that we sort of extent it, at the back end, where we've been filing submissions in response and then make a corresponding extension to the consultation period. So we'd be seeking, certainly, more than a week, maybe not too much more than a week, for the submissions in response and then that would move back the consultation period as well, which probably makes sense, given that the current date to finish it is on Good Friday. Just to extend that a bit.

PN19

JUSTICE HATCHER: All right. So an additional week for submissions and then push back the consultation process by a corresponding week, is that the proposal?

PN20

MR CLARKE: Certainly at least a week, subject to what others have to say about that but, yes. Yes.

PN21

JUSTICE HATCHER: All right. Thank you. Anything else?

PN22

MR CLARKE: I've read the correspondence of Ai Group, but I can address that later, if you like.

PN23

JUSTICE HATCHER: All right. No, I'd prefer for you to address it now, Mr Clarke.

PN24

MR CLARKE: I had a discussion about that, prior to the hearing, with Ms Bhatt and I think we're on the same page insofar as we wouldn't want the process to run by where there's the submissions come in and there's a directions hearing and then nothing else programmed, we wouldn't want the thing to kind of grind to a halt. The way I sort of envisage this operating, in a practical sense, is that the first conference is going to be something of a directions hearing anyway, in the sense that there'll be some identification of where people have interests and particular issues and ascertaining their availability and thing about issues and come back and so forth.

PN25

Look, whether we call things at the start a directions hearing or a conference doesn't really bother us, but we just wouldn't like to see the conferences not proceeded with and I don't understand the AI Group's position that it's an either/or proposition.

PN26

JUSTICE HATCHER: I think if the intention is that each aspect will be conducted and require a different member of the Full Bench that's been constituted. The span of dates for the consultation is the time window, it's not suggested that it will take all that period. I think it's reasonable to assume that the member with responsibility for the particular issue will make arrangements with the parties about programming the matter and they might do that in any one of a number of ways and then conferences will be set during the time window. So I think that's broadly consistent with what we've just said.

PN27

MR CLARKE: Okay. Just also in relation to what is put by the AI group, in relation to submissions versus outlines, submissions are sort of interpreted as statements that have been issued to date, along the lines of what's actually going to be filed is more like an outline rather than a detailed submission, in any event, given that it's a response to a discussion paper, it's like a policy discussion rather than actually advancing a case variation, in the ordinary sense, so I don't have a difficulty with them being described as outlines or something else.

PN28

JUSTICE HATCHER: All right. Well, I think it will be a matter for the parties as to what degree of depth they want to go in their submissions, but I think I've made it clear, in my earlier statement, that the process envisaged in this timetable does not involve any award variations being made and if that comes in then the (indistinct) parties will then have a full opportunity to make any – advance any case they want to advance with respect to any variation proposal that might arise.

PN29

All right, Mr Redford?

PN30

MR REDFORD: Your Honour, if the Commission's disposed to extend time, in relation to submissions in response, about item for making awards easier to use, by a week, that deals with our only point.

PN31

JUSTICE HATCHER: All right, thank you.

PN32

MS BHATT: Yes, your Honour, thank you. I think I need to repeat or reiterate what's set out in the correspondence. I understand that that correspondence was uploaded to the Commission's website yesterday.

PN33

JUSTICE HATCHER: Yes.

PN34

MS BHATT: So far as the comments that have fallen from Mr Clarke this morning, we don't have any difficulty with the deadline for reply submissions, in relation to the fourth aspect of the review being extended by a week and any corresponding alteration to the consultation period's commencement date. I've heard what your Honour has had to say about the programming of the various consultation processes.

PN35

Can I just raise one other issue that was not outlined in our correspondence? That is that on one view there may be some intersection between issues that are being dealt with in the closing loopholes bill and issues that might arise in the course of the review. It's, of course, a little bit difficult to assess at this stage whether or not that will occur and, of course, what the final form of the bill will be. But to the extent that it becomes necessary, we might, in due course, seek to raise any of those issues in the context of the review, but I just sought to signpost that today.

PN36

Nothing further from me.

PN37

JUSTICE HATCHER: Okay, that's noted. Ms Kinsley?

PN38

MS KINSLEY: Yes, thank you, your Honour. I similarly don't have any concerns with the propositions put forward by Mr Clarke.

PN39

I've consulted with our affiliates and our concern really is around number 4, in terms of the amount of time that parties have been provided to make the submissions in the first place. The feedback from our members has been that their resources are quite exhausted at the moment, so our preference would be to have the fourth, making awards easier to use, to have the submissions come back, or the proposals, I'm sorry, come back in the latter part of January, say 19 January or thereabouts, your Honour.

PN40

JUSTICE HATCHER: Yes.

PN41

MS KINSLEY: I think this will just allow our time, as you know, your Honour, we've got a number – we've got the State Chambers Industry Associations that will also need to consult with their direct members as well, so consultation within the ACCI network is quite broad and it will take us a little bit more time to be able to engage in the matter this substantially, your Honour.

PN42

JUSTICE HATCHER: Is that still consistent with then submissions being filed on 19 February?

PN43

MS KINSLEY: Sorry, for number 4, your Honour?

PN44

JUSTICE HATCHER: Yes.

PN45

MS KINSLEY: I think that could perhaps be consistent with that, although I'm noting that would give – perhaps give the submissions in response a little bit less time to consider that. So we would be happy to further extend the submissions in response out by a couple of weeks as well.

PN46

JUSTICE HATCHER: All right. I mean I'm anxious that this doesn't then run into the Annual Wage Review process and I'm also anxious that this whole thing is finished by the middle of next year. All right, I note that, Ms Kinsley.

PN47

MS KINSLEY: Thank you, your Honour.

PN48

JUSTICE HATCHER: Anything else?

PN49

MS KINSLEY: No, that's it, your Honour, thank you.

PN50

JUSTICE HATCHER: Ms Sostarko?

PN51

MS SOSTARKO: Thank you, your Honour. Yes, we would certainly support the position that ACCI have just advanced, particularly as she noted, that point at number 4, I think it's unknown yet to what extent those submissions to how fulsome they'll be. So perhaps even if, as the ACTU have proposed, if taking into account your Honour's expectation (audio malfunction) the middle of next year, if, even at the very least, if it could be extended, those dates could be extended by a week, we would certainly be grateful for that.

PN52

JUSTICE HATCHER: All right, thank you.

PN53

Ms Pugsley?

PN54

MS PUGSLEY: Thank you, your Honour. We have no concerns with the proposal put forward by the Ai Group. Thank you. And noting, in particular, the intersection with the closing loophole bill.

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JUSTICE HATCHER: Yes, all right, thank you.

PN56

Ms Wischer?

PN57

MS WISCHER: Thank you, your Honour, nothing further to comment on there.

PN58

JUSTICE HATCHER: All right. Does any party want to comment upon ACCI's proposal that the deadline for submissions or proposals be extended for the fourth item, to 19 January, and what consequences that might have?

PN59

MS BHATT: Your Honour, I must might raise – I understand the position that Ms Tinsley has put and, of course, we too have some concerns about the breadth of matters that our organisation is involved in, between now and the end of the year. Having said that, we think that one of the benefits of the draft timetable that the Commission has proposed is that it results in some staggering of the parties materials, in the various aspects of the review, being filed and it also provides a longer opportunity for us to consider any proposals and submissions that are advanced by the unions before having to file submissions in reply.

PN60

I mean I have to confess, we'd envisage, potentially, making some headway on that aspect of the review in early January, when we return from our Christmas closure and Ms Tinsley's proposal would, potentially, truncate that part of the timetable. Now, of course, if the Commission is minded to push it all out that might do away with that concern but I'm also mindful of the comments your Honour has just made about next years Annual Wage Review and the prospect of the various parts of the review overlapping with the timetable for the Annual Wage Review.

PN61

Perhaps one way of dealing with ACCI's concern might be for the Commission to grant the parties liberty to apply and if it becomes necessary for anyone to seek an extension then they could, of course, do so.

PN62

JUSTICE HATCHER: Sorry, Mr Izzo, did I skip over you?

PN63

MR IZZO: You did, your Honour. I wasn't offended, I was happy to watch everything play out but I'm happy to jump in. Our primary – so our position, before any of the parties came on board, was that we were generally happy with the timetable but we were concerned about submissions in reply. We do not have visibility on what – and this is in relation to making awards easier to use, of course, which seems to be everyone's focus. We have no visibility on what the unions are proposing in each of these awards. I think there's six or seven individual awards that our clients have interests in. We will need to consult - - -

PN64

JUSTICE HATCHER: They may not be proposing anything, Mr Izzo.

PN65

MR IZZO: Precisely. That may be the case.

PN66

JUSTICE HATCHER: I would have thought this is more an opportunity for employer organisations to come up with some ideas.

PN67

MR IZZO: Well, we hope to do so, but we are a little bit anxious about just ensuring we have sufficient period in reply, so I think there's probably a couple of way that that could be achieved. One is if Ms Tinsley's request is acceded to if we ensure we can still have a minimum of about five weeks in reply. If that's not possible the, alternatively, the notion of liberty to apply, for any party that needs an extension, that Ms Bhatt's proposed could achieve a similar outcome. But our primary anxiety is about submissions in reply, your Honour.

PN68

JUSTICE HATCHER: All right, thank you. Mr Clarke, did you want to respond to that proposal?

PN69

MR CLARKE: Yes. Yes, I mean, thank you, your Honour. This is still shaping to be where the action is likely to be, so it would be good to have ample time to reply with that, rather than truncate the timetable to reply. So a further extension along the lines of what Mr Izzo was contemplating I think would be appropriate from our end.

PN70

JUSTICE HATCHER: All right. Is there anything further from anybody? All right, I'll take into account what the parties have said and I'll endeavour to issue a final timetable either later today or tomorrow. All right, thank you for your attendance, we'll now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[10.09 AM]