



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE HATCHER, PRESIDENT**

**AM2020/99, AM2021/63, AM2021/65**

**s.158—Application to vary or revoke a modern award**

**Applications by Health Services Union & Others  
(AM2020/99, AM2021/65)**

**Application by Australian Nursing and Midwifery Federation  
(AM2021/63)**

**Sydney**

**10.16 AM, TUESDAY, 21 MAY 2024**

**Continued from 04/04/2024**

PN1

JUSTICE HATCHER: I'll take appearances. Ms Doust, you appear for the HSU.

PN2

MS DOUST: Yes, I do, your Honour.

PN3

JUSTICE HATCHER: Ms Gray-Starcevic, you appear for the United Workers Union.

PN4

MS GRAY-STARCEVIC: Yes, thank you, your Honour.

PN5

JUSTICE HATCHER: Mr McKenna and Ms Jones, you appear for the ANMF.

PN6

MR MCKENNA: Yes, thank you, your Honour.

PN7

JUSTICE HATCHER: Mr Ward and Ms Rafter, you appear for ABI and the ACCPA.

PN8

MR WARD: If the Commission pleases, yes.

PN9

JUSTICE HATCHER: Ms Eastman and Mr Fuller, you appear for the Commonwealth.

PN10

MS EASTMAN: Yes, thank you, your Honour.

PN11

JUSTICE HATCHER: And Mr O'Grady, you appear for various private health care entities.

PN12

MR O'GRADY: Yes.

PN13

JUSTICE HATCHER: I just wanted to use this day to - - -

PN14

SPEAKER: (Indistinct) headphones.

PN15

JUSTICE HATCHER: Sorry, what was that? Did someone speak then?

PN16

SPEAKER: Yes.

PN17

JUSTICE HATCHER: All right. Well, I want to use today to program the matter to finalisation, which will include dealing with the objection by your clients, Mr Ward, to the evidence filed by the HSU and the UWU, and how we need to go about finalising the issues of operative date and the classification issues, particularly as they relate to the nurses.

PN18

Mr Ward, can I deal with the objection. I understand the basis of the objection, that is, you say the evidence was filed without, as it were, leave being permitted by the directions, but at the end of the day, is the evidence of a nature that is likely to be unsurprising or affect the outcome? That is, I'm not myself surprised to hear that the affected workers want their wage increases sooner rather than later.

PN19

MR WARD: Your Honour, I don't think the Commission requires the evidence to make that finding. The evidence is of limited probative value in its form.

PN20

JUSTICE HATCHER: Yes.

PN21

MR WARD: The directions didn't provide for the filing of evidence, so we maintain the objection, but as to the proposition that employees are keen to receive a pay increase, that is an unremarkable proposition that I don't think the Commission requires any further evidence to make a finding on.

PN22

JUSTICE HATCHER: Well, Mr Ward, unless you want to be heard further, what I would be inclined to do is allow the evidence to be admitted but subject to anything that you and any other party wants to say about its probative value. I note that, in effect, they're surveys which simply record other people's opinions and that it's material of a qualitative survey type nature and not quantitation.

PN23

Ms Doust, can I turn to you now. In respect of the operative date issues, do you see the need for a further hearing or would you be content for the matter to be heard on the pleadings? Sorry, your microphone's not on, Ms Doust.

PN24

MS DOUST: I think we've set out our position at length in writing, and it's really just a matter of whether or not the Commission has any questions for us on our submissions.

PN25

JUSTICE HATCHER: All right. On the issue of operative date, does any party consider that we should have a further open court hearing? I take that as a universal no. And would I take it that the same would apply to the classification issues as they pertain to the Aged Care Award and the SCHADS Award?

PN26

MS DOUST: If your Honour's asking me, I think we'd be content to rely upon our written submissions, and that's subject to the Commission having any questions about those matters.

PN27

JUSTICE HATCHER: Yes, all right. Does any other party consider that the Aged Care and SCHADS Award classification issues require a hearing? No. All right. If we now turn back to the ANMF and Nurses Award issues, I'm just trying to reconcile the timing of the operative date issue, Mr McKenna, with the classification issues. How do you see that playing out? I note that I think there's been a request for a hearing about those issues, which I think in terms of scope was rather ambitious, but how do you see the issues playing out in terms of order and timing?

PN28

MR McKENNA: Yes, thank you, your Honour. I accept that the proposal for timing is ambitious. There's obviously a number of different availabilities that have to accommodate that. From the ANMF's perspective, we proposed a hearing to resolve the matters, including the EN and RN outstanding issues, in part because of something Mr Ward said last week about a hearing. We would not oppose those matters also being determined on the papers, but I anticipate that there will be other parties who may wish to be heard on that, and so that is why we have proposed a hearing.

PN29

As your Honour would be aware, the ANMF, as with the other unions, have sought an operative date of 30 June, and so that is why such a tight timetable's been proposed.

PN30

JUSTICE HATCHER: All right. While you're there, Mr McKenna, can I raise one other issue with you. I saw that other members of the panel, having read your submissions - I must confess, we weren't alive to the proposition that there might be assistants in nursing engaged in home care work.

PN31

MR McKENNA: Yes, your Honour.

PN32

JUSTICE HATCHER: I note your submission about that. I think we would want to be addressed or receive written submissions about the question as to whether any such employees should be transferred to the SCHADS Award in the same way as we've determined in respect of aged care employees.

PN33

MR McKENNA: Certainly. That's understood, your Honour, and notwithstanding what your Honour has said about those matters being determined on the papers, we'd be happy to address the expert panel orally about that or to file further submissions as would assist.

PN34

JUSTICE HATCHER: All right. Before I turn to Mr O'Grady, does any other party wish to be heard about that proposition, that is, that to the extent that there may be assistants in nursing involved in home care work, the coverage of that should be transferred to the SCHADS Award in the same way as we have determined with respect to the Aged Care Award?

PN35

MR WARD: Your Honour, we might seek an opportunity to be heard on that. I haven't taken instructions on it, but I think it's a matter which we should take instructions on, and we would seek an opportunity to. Happy to do it by way of written submission.

PN36

JUSTICE HATCHER: All right.

PN37

MR WARD: I imagine it's a very discrete issue.

PN38

JUSTICE HATCHER: Ms Doust, are you content with that course?

PN39

MS DOUST: Yes, your Honour. My client may wish to be heard on that question.

PN40

JUSTICE HATCHER: Yes, all right. So, Mr O'Grady, we're trying to obviously juggle the issue of operative date in the light of the unions seeking a fairly imminent operative date with your wish to be heard in relation to the nurses classifications. If we were to accede to an early operative date, I'm not sure how we could put that into effect without determining the classification issues at the same time. In the light of all that, do you wish to say anything about the program (indistinct)?

PN41

MR O'GRADY: Not beyond what we said in the submissions that we filed previously, your Honour, in that if we are dealing with an operative date of, at earliest, 1 January 2025, there would be scope for us to be heard in respect of the classification structures in the aged care sector. If we're not, then there is clearly limited scope, and as Mr McKenna flagged last time, it may well be that we have to have an argument, in the context of the hospitals sector, as to the appropriateness of it, whatever classification structure is fixed upon in aged care, in that other sector.

PN42

JUSTICE HATCHER: All right. Thank you. I'll note that. For more abundant caution, Ms Eastman, do you wish to add anything to what's been said?

PN43

MS EASTMAN: No, not on that issue, thank you, your Honour.

PN44

JUSTICE HATCHER: Or about any issue?

PN45

MS EASTMAN: The only issue I would like to be heard on is that the Commonwealth is likely to need an eight-week period in terms of considering the implementation, so the phasing in relation to the nurses. So once the quantum is known, the Commonwealth would need an additional eight weeks.

PN46

JUSTICE HATCHER: I had sort of assumed that the Commonwealth would be advancing the same proposition about timing for the nurses as it has with respect to everything else. Is that possibly not correct?

PN47

MS EASTMAN: I don't have those instructions presently, your Honour. We can certainly communicate that back, but as presently instructed, we just need that additional time of eight weeks to work through those questions concerning the implementation in the timing and the phasing.

PN48

JUSTICE HATCHER: Would that require us to determine the classification structure and the proposed wage rates at each level before you could then usefully seek instructions about timing? Is that the (indistinct)?

PN49

MS EASTMAN: I think, ideally, yes, but again, I'm happy to take further instructions so that we can ensure that there's no significant delay.

PN50

JUSTICE HATCHER: All right. Is there anything else that any other party wishes to add to all of that? No. All right. I thank the parties for their attendance. I'll endeavour to work out this Rubik's cube and issue some directions in fairly short order. Thank you for your attendance. We'll now adjourn.

PN51

MR McKENNA: If the Commission please.

**ADJOURNED INDEFINITELY**

**[10.27 AM]**