



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT EASTON
COMMISSIONER MATHESON**

AG2023/1996

s.185 - Application for approval of a single-enterprise agreement

**Application by Bunnings Group Limited T/A Bunnings Warehouse
(AG2023/1996)**

Sydney

2.00 PM, FRIDAY, 7 JULY 2023

PN1

JUSTICE HATCHER: I will take the appearances. Mr Minucci, you seek permission to appear for Bunnings?

PN2

MR M MINUCCI: I do. Thank you, your Honour.

PN3

JUSTICE HATCHER: Mr Friend, you seek permission to appear for the SDA?

PN4

MR W FRIEND: I do, thank you.

PN5

JUSTICE HATCHER: Mr Minucci, can you just turn off your microphone for the time being, we are getting some feedback. Mr Marr, you appear for the AWU? Yes, you need to turn on your microphone, Mr Marr.

PN6

MR D MARR: Yes, thank you, your Honour.

PN7

JUSTICE HATCHER: Mr Cullinan, do you appear for Retail and Fast Food Workers' Union Incorporated?

PN8

MR J CULLINAN: Yes, the Retail and Fast Food Workers' Union Incorporated. Thank you, your Honour.

PN9

JUSTICE HATCHER: Yes. Are there any other appearances? All right. Is there any opposition to parties being granted professional legal representation?

PN10

MR CULLINAN: Yes, RAFFWU does oppose.

PN11

JUSTICE HATCHER: The parties are granted permission for legal representation. Mr Minucci, we are still getting feedback in your end. It may be because you have got multiple microphones working or something, I don't know, but you may need to turn - ensure that only one microphone is on.

PN12

MR MINUCCI: Thank you, your Honour, we will just attend to that. It appears from our end we have only got one, but I will make sure we have that attended to immediately.

PN13

JUSTICE HATCHER: All right, thank you. Before we start I just might clarify the AWU's position with respect to the application. Mr Marr, am I right in saying

that the AWU didn't want to express a position in support or opposition to approval of the agreement?

PN14

MR MARR: That's correct, your Honour.

PN15

JUSTICE HATCHER: As referred to in earlier correspondence that we sent to the parties unless there's any objection the course we propose to take is let Mr Cullinan as the representative of the only party as we understand it opposing approval of the agreement make his oral submissions. And then to allow Bunnings in the first instance and then the SDA if necessary to make any submissions in response to the issues raised by Mr Cullinan. Is that a convenient course?

PN16

SPEAKER: Yes, your Honour, thank you.

PN17

JUSTICE HATCHER: All right. Just give me a second. Mr Cullinan, you rely upon a witness statement of a Mr Jim Reynolds dated 5 July 2023; is that correct?

PN18

MR CULLINAN: That is correct. We have had confirmation from the SDA and the AWU and Bunnings that they didn't require Mr Reynolds for cross-examination and he is at work at the moment.

PN19

JUSTICE HATCHER: All right. We will admit that statement.

**EXHIBIT #1 WITNESS STATEMENT OF JIM REYNOLDS DATED
05/07/2023**

PN20

Mr Cullinan, obviously we have read the written submissions. Within the limited time available you can make whatever points you want to make about those, but can I just commence by asking you two questions. The first question is how many employees was your association bargaining representative for?

PN21

MR CULLINAN: I will just confirm. We did attach all of the documents to our F18A.

PN22

JUSTICE HATCHER: I see.

PN23

MR CULLINAN: I think there is 35.

PN24

JUSTICE HATCHER: Thirty-five, thank you. And the second question is, and this relates to your submission about the better off overall test, at the outset of

your written submissions you say we should apply the test as if the (indistinct) 1 July award rates are the reference point. Is that correct?

PN25

MR CULLINAN: Your Honour, if the Commission pleases we don't suggest that there is a different test. We acknowledge the test time is the time of the application. What we say is that greater, much greater weighting should be given in your consideration as to the value of future award increases because they are known, they are being paid to award workers this week. And therefore in your weighting when you're considering the better off overall test you should apply greater weighting to the future wages that will be paid to award workers. We recognise the test time is June.

PN26

JUSTICE HATCHER: All right. I just want to follow that up with you. First of all if, and I say if, if the requirement of the section 193(1) is that we only have regard to the award rates as they were at the date Bunnings filed its application, on that assumption do you still say that employees are not better off overall?

PN27

MR CULLINAN: We still say that, yes, your Honour. We don't believe that is the test. We believe that there's precedent which supports that the Fair Work Commission can certainly take into account future award increases in considering the test, as distinct from the test time. But even if the Commission was not to take into account the fact that today workers are paid 5.75 per cent more under the award we say it still fails the better off overall test.

PN28

JUSTICE HATCHER: All right. Do I understand that you will submit that under 193(1) we are required to take into account post 1 July award rates; is that the submission?

PN29

MR CULLINAN: Yes, it's one of the factors, one of the matrix (indistinct).

PN30

JUSTICE HATCHER: All right. You will explain in due course how that's the case no doubt. I take it there is no dispute that because of the timing of this application the relevant provisions of the Act to be applied are those provisions which are operative immediately before 6 June?

PN31

MR CULLINAN: There is no dispute from RAFFWU. That's in our submission I understand.

PN32

JUSTICE HATCHER: Yes. Does anyone else dispute that?

PN33

SPEAKERS: No, your Honour.

PN34

JUSTICE HATCHER: All right. Well, that's all I have, Mr Cullinan, so you go ahead, you say what you want to say.

PN35

MR CULLINAN: Thank you, Full Bench. Your Honour, I should start by just confirming, just because we have the audio difficulties, that you did hear that we objected to representation being granted.

PN36

JUSTICE HATCHER: I thought you said we didn't object.

PN37

MR CULLINAN: No, we did object.

PN38

JUSTICE HATCHER: I will revoke that ruling and then we will hear you about that. So why do you object?

PN39

MR CULLINAN: We say this is a simple matter, this is a simple better off overall test matter that Bunnings is more than capable, as is SDA, of representing itself. It has dedicated legal staff, dedicated HR and employee relations professionals that are able to undertake a hearing like this, especially without any witnesses. This is a matter of submissions and we say that both Bunnings and SDA are more than capable of representing themselves on a simple better off overall test consideration.

PN40

JUSTICE HATCHER: All right, thank you. We have heard your submission, Mr Cullinan. We grant the parties permission for legal representation; that is Bunnings, the SDA and the AWU, and we consider that section 596(2)(a) applies. We will give full reasons for that ruling in our ultimate decision. All right, go ahead, Mr Cullinan.

PN41

MR CULLINAN: Thank you, your Honour. I think at the outset we need to just make a submission to alter our outline of submissions, and that is we recognise what has been put against us in relation to paragraphs 47 and 48, and we are sorry that there was error in our original submission. There are provisions in the agreement which do protect workers from working six days a week, week after week after week, without them agreeing some other arrangement. So we recognise that, and that would alter our submission at 47 and 48.

PN42

JUSTICE HATCHER: Can we take it those paragraphs are not pressed. Is that the way we should - - -

PN43

MR CULLINAN: Yes.

PN44

JUSTICE HATCHER: All right, thank you.

PN45

MR CULLINAN: Thank you, your Honour. We otherwise rely on our outline of submissions and the statement that has now been tendered. There is three short points that we wanted to make in addition to that. The fourth point is any questions, which I think now includes how we argue that the different rates can be taken into account, but if I start with the first point. It's an issue that's not raised in our outline of submissions. It's an issue that's raised in JR1 or in the exhibit 1 at paragraph 33, and it relates to a concern that Mr Reynolds raised relating to whether Bunnings can increase the hours of work of an employee.

PN46

We have a concern in relation to that, and this seems to be the only opportunity to deal with it. So when we look at clause 8.2(d)(ii) and 9.3(a) of the agreement they refer to roster changes.

PN47

JUSTICE HATCHER: Just let me turn that up, Mr Cullinan.

PN48

MR CULLINAN: Yes. So 8.2(d)(ii).

PN49

JUSTICE HATCHER: Yes, I see. Yes.

PN50

MR CULLINAN: And there's specific reference there made to not reducing the team members' minimum contracted hours. Similarly at 9.3(a) a similar phrase of words is used:

PN51

Any loss to variation under this clause must not reduce the team members' minimum contracted hours.

PN52

The minimum contracted hours are not defined, and we hold a concern that those provisions may permit Bunnings to increase the hours that are rostered on a worker without their consent or without their agreement, and it's unclear if they were to do that whether that would change the minimum contracted hours or whether they're a separate thing. So we wanted to raise that because it's not something we have discussed with the employer before, but it was a concern that came from the preparation of that evidence.

PN53

JUSTICE HATCHER: Thank you.

PN54

MR CULLINAN: In relation to our submissions we say a significant concern is described in paragraph 45, and that is where a range of the concerns - there are

some monetary concerns, there are many other concerns that are dealt with, both in the materials of the employer, but in particular our paragraph 45 also describes where a cascade of detriments may impact a worker, and they are that a worker could be compelled on 14 days notice to change their days of part-time work and to compel them to start as early as 5 am in circumstances where they may not simply be able to be there, and have a break as little as 10 hours from the shift before.

PN55

And we say that it's unclear how any amount of additional wages could compensate for that, and we deal with that - - -

PN56

JUSTICE HATCHER: Yes, Mr Cullinan. Am I right in saying that there are some protections around that first of all there's a requirement for Bunnings to take into account family responsibilities and the like?

PN57

MR CULLINAN: Yes.

PN58

JUSTICE HATCHER: Second, there's effectively a right of consultation including a right to request a meeting. And third, am I right in saying that ultimately there's a right of arbitration if the matter can't be agreed?

PN59

MR CULLINAN: Not before the change is implemented, your Honour.

PN60

JUSTICE HATCHER: So subject to that you agree with the three propositions?

PN61

MR CULLINAN: In terms of the consultation obligation I'm not quite sure I understand. There isn't a right as we understand it to request a meeting. There's an obligation to attend a meeting if there's a disagreement with it, and in that obligation also exists a requirement under the penalty provision of an agreement that a worker provide alternative availability. We see those as detriments.

PN62

JUSTICE HATCHER: I think I was referring to 9.3(f)(ii) where the two men can either accept a change or elect to meet.

PN63

MR CULLINAN: Yes, and so am I, your Honour.

PN64

JUSTICE HATCHER: Yes, all right.

PN65

MR CULLINAN: So the obligation under the award would be for - and we say that the section 205 will compel the Commission to impose the alternative roster change provisions in any event - but we say that (f)(ii) is set against an obligation

or an opportunity for a worker to consult, however they decide, by providing a written document from them or their representative, under (f)(ii) - 9.3(f)(ii), they are compelled, if they don't accept the change, to attend a meeting with their employer and at that meeting provide alternative availability, and we say that is a detriment.

PN66

JUSTICE HATCHER: All right.

PN67

MR CULLINAN: And so paragraph 45 and our other submissions explain how there are circumstances which can be imposed upon a worker which will leave them substantial detriment and lose them the fundamental characteristics of part-time work under the General Retail Award, and that is that they work on set days and the hours on those days only changing following consultation if they don't agree, and that they start no earlier than 7 am and have a 12-hour break unless they agree otherwise.

PN68

So we say all of those are substantial benefits for some workers, for some group of workers. Mr Reynolds deals with some of those things in his statement, and we say that the Commission cannot be satisfied that every employee and every prospective employee will be better off in circumstances where those things could be imposed upon a worker or future worker.

PN69

That was the short form - - -

PN70

JUSTICE HATCHER: In clause 10.10 of the Retail Award, subject to the payment of overtime penalty rates, could a part-time employee be directed on seven days' notice to commence at 5 am on one of their days of work?

PN71

MR CULLINAN: We say they cannot be, no.

PN72

JUSTICE HATCHER: Why is that?

PN73

MR CULLINAN: We say that that would be overtime, and therefore the request would be a request to work reasonable overtime.

PN74

JUSTICE HATCHER: Okay. Anything else, Mr Cullinan?

PN75

MR CULLINAN: Only that if this was a – we're not aware of another circumstance where clause 10 has been argued before a commission or a court that it could allow an employer to set overtime on a regular basis, and if that was the

case, we would certainly want the opportunity to deal with that in a different and more – a more lengthy way, and we expect the SDA and the AWU would as well.

PN76

JUSTICE HATCHER: All right.

PN77

MR CULLINAN: In relation to the issue of the test time, and the fact it's to be taken into account with the test time, would then – I'm not quite on what you're asking, your Honour. We understood it is entirely ordinary for the Commission to include in its assessment of the better off overall test a view of future award increases.

PN78

In the past it has not been a significant weighting, but our understanding is that that's ordinary for there to be some consideration, and here we are saying it should be a substantial and heavily weighted consideration because the increase is known and it's applied, and we say in those circumstances that should be a significant factor in considering the BOOT.

PN79

JUSTICE HATCHER: Well, say it's ordinarily done, can you give any example where that's ever been done?

PN80

MR CULLINAN: I'll need some time.

PN81

JUSTICE HATCHER: This is the hearing, Mr Cullinan. You're contending that this approach to the BOOT should be taken. Speaking for myself, this is all news to me, so can you give us some more assistance about this?

PN82

MR CULLINAN: Not without more time, your Honour.

PN83

JUSTICE HATCHER: What is it in section 193 itself that would permit ought to be taken of award increases – of award rates other than those applying at the test time?

PN84

MR CULLINAN: I'm reviewing that section in the old Act, and our submission would be bolstered with the opportunity to consider the precedence where that has actually occurred.

PN85

I think it simply follows that the consideration of the test, in and of itself, includes the consideration of the application of the relevant instrument into the future. That's what you're being asked to do with this agreement. You're being asked to consider the application of this agreement into the future.

PN86

The application of the award, as at the test time, includes the award as at the test time and into the future. So just like the Commission might consider wage increases, or additional annual leave over the following four years that might be a feature of an agreement, or wages themselves that might be a feature of the agreement.

PN87

In the same vein, application of the modern award at the test time includes that the modern award will apply into the future. The difference now is that you know exactly what the modern award looks like in the future, and we say that significant weighting should be given to that.

PN88

JUSTICE HATCHER: All right. Thank you.

PN89

MR CULLINAN: They are our submissions. We're happy to answer any further questions of the Bench.

PN90

JUSTICE HATCHER: Thank you. Mr Minucci?

PN91

MR MINUCCI: If the Commission pleases. Dealing with the last submissions put against us first in respect of 193, there is nothing as a matter of construction that will allow the Commission to take into account as at test time the prospect of future increases to pay rates in the modern award, and that submission should be rejected, particularly in circumstances where that section ties the consideration to the test time, which is the date the application's filed and talks about the relevant modern award that applies as at that date, not in circumstances where there may be some possible changes to that award in the future, and I (audio malfunction) to say anything more about that.

PN92

In terms of Mr Cullinan's ultimate deposition, it is our submission that - - -

PN93

JUSTICE HATCHER: Can you just hold on a sec, Mr Minucci? Mr Minucci, can you try and move that – I think that big black thing in the middle of the table is the microphone.

PN94

MR MINUCCI: Yes, your Honour.

PN95

JUSTICE HATCHER: See if you can move that and see if that makes a difference.

PN96

MR MINUCCI: I will try my best, but it doesn't (audio malfunction), your Honour, so I don't need to (audio malfunction).

PN97

JUSTICE HATCHER: I must say that you suddenly became clearer just then, for reasons which are unclear.

PN98

MR MINUCCI: The joys of technology, your Honour, and I apologise. I can try and keep my voice up, if that's of any assistance.

PN99

JUSTICE HATCHER: It's not the volume. It's just that it's distorting.

PN100

MR MINUCCI: Okay. Thank you, your Honour. Is it still distorting now?

PN101

JUSTICE HATCHER: That is better for some reason.

PN102

MR MINUCCI: Thank you. Please let me know, your Honour, and I'll attend to that as best I can. Before we (indistinct) position of the agreement should be approved and that it passes the better off overall test.

PN103

However, dealing with the two matters at the outset there are two undertakings that Bunnings wishes to give in respect of this application. The first undertaking is as follows, and relates to clause 6.7 of the proposed agreement and is in the following terms:

PN104

Clause 6.7 does not operate to exclude the entitlement of casual team members to compassionate leave in accordance with the National Employment Standards.

PN105

The second undertaking that Bunnings wishes to give relates to the interaction between clause 3.1 of the proposed agreement, then clause 8.2, and this is in response to a matter that has been raised by the SDA with us today, and the undertaking is in the following terms and I'll take the Commission through it in a moment. The undertaking is as follows:

PN106

Clause 3.1(a)(viii) does not operate to exclude overtime rates payable pursuant to clause 8.2(f)(iv).

PN107

JUSTICE HATCHER: Was it 8.2(f)(iv)?

PN108

MR MINUCCI: Yes, your Honour. And so that arises following discussions between Bunnings and the SDA today, and it arises purely as a matter of clarity to ensure that there is no suggestion (indistinct) when one looks at clause 8.2(f)(iv) in the proposed agreement.

PN109

It's simply to ensure that if that provision does not operate in conjunction with clause 3.1(a)(viii) to say how to carve out an entitlement to overtime for those members who are working hours at the team members' contract rate.

PN110

JUSTICE HATCHER: All right. You'll record those in writing to - - -

PN111

MR MINUCCI: We will (indistinct) - - -

PN112

JUSTICE HATCHER: - - - to my Chambers, and can you also send them to all the bargaining representatives, please?

PN113

MR MINUCCI: Most certainly, your Honour. We'll attend to that today. Now dealing then with some of the submissions that have been put against us, in respect of material I should say, that Bunnings refers to in the last (indistinct) outline which was filed 5 July.

PN114

Now, at paragraphs – and this is in direct response now to matters canvassed (indistinct) outline at 3 July - contrary to paragraphs 9 and 10, there's no contention of any inappropriate misleading statutory material provided to employees during the relevant approval process, and we refer to and repeat paragraphs 10 through to 17 of Bunnings' written outline.

PN115

The issues of the test time are dealt with briefly, and in my submission is fundamentally misconceived, and that has been dealt with at paragraphs 22 to 26 of Bunnings' written outline.

PN116

In response to matters raised by Mr Reynolds in his statement, in respect of paragraphs 20 to 22 of his statement, theoretically, or under the current enterprise agreement, there is still an ability to make alterations to his roster and that is (indistinct) to clause 10.4.4 of the warehouse agreement, but there are various protections for part-time employees present in the proposed agreement, and they're summarised at paragraph 40 of Bunnings' written outline.

PN117

In respect of paragraph 23 of Mr Reynolds' witness statement, we say that paragraph is misconceived and that the award gives Bunnings a right to change his days of work pursuant to clause 35.1 of the award on consultation.

PN118

JUSTICE HATCHER: Can you just pause there while we turn that up, Mr Minucci.

PN119

MR MINUCCI: Yes, your Honour.

PN120

JUSTICE HATCHER: How do you say that gives rise to a right to change days?

PN121

MR MINUCCI: So whilst may consult with respect to those changes, so 35.1 of the award carves out (audio malfunction).

PN122

JUSTICE HATCHER: Sorry, you broke up there. Say that again.

PN123

MR MINUCCI: Sorry, your Honour. This is by reference to the award.

PN124

JUSTICE HATCHER: Yes.

PN125

MR MINUCCI: That 35.1 talks about consultation in respect to the changes to hours of work, and this is in relation to prior to right of consultation in respect to those changes.

PN126

JUSTICE HATCHER: But it's not actually a power to change the roster, it simply says where something happens this is consultation you have to undertake. The power to change part-time rosters are what's contained in clause 10, isn't it?

PN127

MR MINUCCI: Yes. Sorry, your Honour, (indistinct) that it was the right in respect to consultation is in 35.1 and power is in clause 10.

PN128

JUSTICE HATCHER: In clause 10.10, 10.10(a), the right unilaterally to change the pattern of work does not extend to the employees' guaranteed hours.

PN129

MR MINUCCI: Yes.

PN130

JUSTICE HATCHER: And in 10.5(a) that expression 'guaranteed hours' subject to whatever you might want to say appears at least to me to refer to the number of hours worked on each particular day of the week.

PN131

MR MINUCCI: Yes, your Honour.

PN132

JUSTICE HATCHER: So I think, again speaking for myself, it would seem to follow that the unilateral right to change the roster couldn't change the number of previously agreed hours on each day of the week. So if the number is zero for example you couldn't increase it.

PN133

MR MINUCCI: That's right. I would say I think that's right, your Honour, in relation to the award.

PN134

JUSTICE HATCHER: So it appears under the award there you can change the starting and finishing time on a given day, but you can't change the number of hours on a given day, and you can't move the hours to another day that hasn't previously been agreed.

PN135

MR MINUCCI: That's right, without agreement, yes.

PN136

JUSTICE HATCHER: So I think Mr Cullinan's point is that the agreement allows the days of work to be changed.

PN137

MR MINUCCI: Yes, your Honour, I accept that.

PN138

JUSTICE HATCHER: Another thing Mr Cullinan said is that the part-time rostering provisions in the agreement protect the worker from a reduction in hours, but it would seem to not prevent Bunnings from increasing the number of contracted hours.

PN139

MR MINUCCI: Your Honour, the fundamental misconception with that analysis, in my submission, is that there will be a contracted set of hours that an employee is required to work, and increasing those hours unilaterally made by the employer can't be forced upon an employee in the absence of an agreement. There would be at the base level the ability for the employer to say, well, no, our agreement is not to work those additional hours, and consequently there will need to be an agreement in respect of those matters if those base level of hours is to be changed.

PN140

JUSTICE HATCHER: If you look at 8.2(d)(ii), which is the unilateral route for changing hours, it simply says they may be varied. It's the roster that's being varied.

PN141

MR MINUCCI: That's right.

PN142

JUSTICE HATCHER: And then it says it can't reduce the minimum contracted hours. By implication that would suggest that they can be increased without the employees' agreement.

PN143

MR MINUCCI: Certainly in my submission that's not what it says, and certainly not the implication that ought to be drawn from that, because we will (indistinct)

into that very issue about unilateral increases to hours of work. From a contractual respect that's (indistinct). This clause, in my submission, about the variation to rosters is purely a preservation type clause, that that preserves the nature of the hours that are agreed, and (indistinct) (d)(ii) (indistinct) is doing is capturing the ability to shift those hours about, and that is purely as a protection, if I can put it that way, from a reduction, rather than to be read as an implication that one can then increase hours unilaterally.

PN144

JUSTICE HATCHER: Can I invite your client to consider, if we have raised the concern about this I think, an undertaking that the second sentence in 8.2(d) would also extend to any increase in the team members' minimum contracted hours.

PN145

MR MINUCCI: Yes, your Honour, I will take those instructions.

PN146

JUSTICE HATCHER: And I think there would need to be a corresponding change to the second sentence in 9.3(a).

PN147

MR MINUCCI: Yes, your Honour.

PN148

JUSTICE HATCHER: Yes, all right. How soon do you think you need to get instructions for that?

PN149

MR MINUCCI: I will only need five minutes, your Honour.

PN150

JUSTICE HATCHER: All right. No doubt your instructing officers have heard that, they can consider that while we move on.

PN151

MR MINUCCI: Certainly.

PN152

JUSTICE HATCHER: All right. What's next, Mr Minucci?

PN153

MR MINUCCI: Your Honour, only briefly touching I can move through relatively quickly in respect of the balance of Mr Reynolds' statement. We say that there are protections in the agreement in respect to part-time team members again. In respect of the operation in respect of clause 2 to 3 we have the same protection. So that deals with the balance of those matters.

PN154

I also refer to and rely upon the responses to the Full Bench's questions that was provided by Bunnings on 3 July 2023. I believe the concerns in relation to clause 8.2(nf) were canvassed in those questions from the Bench, and we have set out our submissions, but I have heard the Full Bench about that a moment

ago. Unless there are any particular matters that the Full Bench wishes to raise with me that is all I propose to say in response to RAFFWU's submissions, but if I can be of any further assistance I am willing to assist the Commission.

PN155

JUSTICE HATCHER: All right, thank you. Yes, all right. In the event against your submissions that we considered Mr Cullinan to be correct and say that we should take into account in some way post 1 July award rates, would you seek to be heard further in relation to the better off overall scenario?

PN156

MR MINUCCI: Yes, your Honour.

PN157

JUSTICE HATCHER: Okay. Mr Friend?

PN158

MR FRIEND: Very little, your Honour, but if I might just say something about the undertaking on the overtime payments just to explain a bit how it works.

PN159

We had a concern that 8.2(f)(iv) which provides for overtime rates in circumstances where an employee has agreed to additional hours would be payable, and the interaction between that and 3.1(viii), which provides that there is overtime for additional hours for part-time workers, and then in brackets:

PN160

but excluding additional hours worked at the team member's contract rate pursuant to 8.2(f) –

PN161

and there seemed to be a contradiction in those two, and the undertaking, as we understand it, removes that contradiction. In other words, you don't get overtime hours simply because it's additional hours but if there's some other trigger, for instance, it's your third Sunday in a row in a four-week period or something else, then the overtime is payable.

PN162

That's the reason for that that we asked Bunnings to give that undertaking (indistinct) taking off addresses that problem. Other than that, the SDA supports the approval of the agreement.

PN163

JUSTICE HATCHER: Thank you. Mr Marr, do you want to say anything?

PN164

MR MARR: Nothing from the AWU. Thank you, your Honour.

PN165

JUSTICE HATCHER: All right. Mr Cullinan, we'll wait till we get the undertaking in writing. I'll ask you and the other bargaining representatives to respond to those in writing by a date which we'll determine early next week.

PN166

MR CULLINAN: Yes, your Honour.

PN167

JUSTICE HATCHER: You've heard that I've suggested an undertaking to deal with the increase in hours issue for part-timers. If that undertaking is forthcoming, does that resolve that problem?

PN168

MR CULLINAN: It resolves that specific problem, yes, your Honour, it does.

PN169

JUSTICE HATCHER: Yes, all right. Is there anything else you wish to say in response?

PN170

MR CULLINAN: I don't believe there is. I think we've gone into a great deal of detail in various parts of our submission. We understand that they have been read and they will be considered. But I don't think in response there is anything further that we need to say.

PN171

JUSTICE HATCHER: All right. Mr Cullinan, what I'll do is I'll give you to close of business on Monday for any cases that you want to cite in support of your proposed approach - - -

PN172

MR CULLINAN: Understood.

PN173

JUSTICE HATCHER: - - - to section 193(1). So I don't want further submissions, just the name of the case, the citation and the relevant paragraph numbers.

PN174

MR CULLINAN: Yes, understood. Thank you, your Honour.

PN175

JUSTICE HATCHER: Any news on the undertaking, Mr Minucci?

PN176

MR MINUCCI: Sorry, your Honour. My instructing solicitor has just stepped out to take those instructions. I just need a brief moment, if I may.

PN177

JUSTICE HATCHER: All right. We might just go offline as the Bench for a short while while you obtain those instructions. We'll come back on when you're ready.

PN178

MR MINUCCI: I'm grateful. Thank you, your Honour.

PN179

JUSTICE HATCHER: Thank you. We'll adjourn for a short period.

SHORT ADJOURNMENT

[2.48 PM]

RESUMED

[2.54 PM]

PN180

JUSTICE HATCHER: Mr Minucci?

PN181

MR MINUCCI: If the Commission pleases, I'm grateful for that time. I do have an undertaking that I can offer on behalf of Bunnings in respect of clause 8.2(d) and the corresponding clause in clause 9, and that's as follows, that:

PN182

Any roster variation by Bunnings must not unilaterally increase or reduce the

—

PN183

and then the clause will continue in respect of those matters.

PN184

JUSTICE HATCHER: Thank you. While you're there, Mr Minucci, did you want to respond to the submission that the roster change provision would allow a reduction in the amount of time between shifts to as little as 10 hours?

PN185

MR MINUCCI: Your Honour, my instructions are it does do that, it does reduce it by two hours, and that that is - we've identified that as a detriment in the F17, and it's addition that ultimately needs to be taken into account the balance, and we submit that having regard to all of those matters we are still better off overall.

PN186

JUSTICE HATCHER: Just for a more abundant caution, Mr Cullinan says that in respect of the capacity to change the days upon which a part-timer works unilaterally, in effect no amount of additional money can outweigh that detriment for the affected employee if it causes, for example, some massive inconvenience – family life or loss of some other amenity. What's the response to that?

PN187

MR MINUCCI: My submission in response to that, your Honour, is that Bunnings generally takes great care in ensuring that these matters are discussed with employees. There are various protections in respect of part-time employees that we canvassed in the agreement as it is, and they I believe are set out and summarised again – I think it's paragraph 40 of the written outline of submissions that deal with those matters, which talk about, for example, having regard – requirements to have regard to family responsibilities, consulting team members in respect of those matters, as far as possible setting rosters by mutual agreement, and entitlement to refuse additional work hours.

PN188

In my submission, those matters alleviate any of the concerns raised in respect of those matters.

PN189

JUSTICE HATCHER: So do you go as far as to say that taken together those matters would in effect prevent the worst case scenarios identified by Mr Cullinan from occurring?

PN190

MR MINUCCI: Yes. Yes, I do.

PN191

JUSTICE HATCHER: Do you agree with that, Mr Friend?

PN192

MR FRIEND: It's a big hypothetical, your Honour. One can't ever say never. They certainly do offer those protections against that and significant ones, but I'd need more time to consider it before I gave you an absolute answer along those lines.

PN193

JUSTICE HATCHER: All right. If there's nothing further, Mr Minucci, you'll send those undertakings in writing to my Chambers later today and serve them on the bargaining representatives?

PN194

MR MINUCCI: Yes, your Honour.

PN195

JUSTICE HATCHER: We'll direct the bargaining representatives if they want to say anything about those undertakings to do so by close of business Tuesday.

PN196

MR MINUCCI: Thank you, your Honour.

PN197

JUSTICE HATCHER: As discussed, Mr Cullinan, we'll give you till close of business Monday to identify any citations in support of your position about 193(1).

PN198

MR CULLINAN: Thank you.

PN199

JUSTICE HATCHER: And other than that we'll reserve our decision. Thank you for your attendance.

ADJOURNED INDEFINITELY

[2.58 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

**EXHIBIT #1 WITNESS STATEMENT OF JIM REYNOLDS DATED
05/07/2023PN19**