TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s59 application to vary an industrial agreement

Minister administering the State Service Act 2000)

and

Australian Nursing Federation, Tasmanian Branch
(T13955 of 2012)

NURSES AND MIDWIVES HEADS OF AGREEMENT 2010

ACTING PRESIDENT TIM ABEY HOBART, 30 August 2012

Industrial agreement –inclusion of Schedule 7 and 8 – Classification Standards - variation approved – operative date 30 August 2012

DECISION

[1] On 21 August 2012, the Minister administering the State Service Act 2000 (MASSA) and the Australian Nursing Federation, Tasmanian Branch (ANF) lodged with the Registrar, pursuant to Section 59(2) of the *Industrial Relations Act 1984* (the Act) an application to vary the Nurses and Midwives Heads of Agreement 2010 (HoA.)

[2] In specific terms, the application seeks to introduce a new Schedule 7 which sets out the classification standards for the new 9 level career structure.

[3] The proposed new Schedule 8 outlines the basis of translation to the new career structure which includes an internal review process and, if an employee is dissatisfied with the outcome of this process, an external review through the Commission in accordance with s29 of the Act.

[4] At a hearing on 24 August 2012, Mr M Double and Mr T Kleyn appeared for MASSA with Ms M Chandler and Ms K Gabriel. Ms N Ellis and Ms A Stanislaus-Large appeared for the ANF. Mr J Eddington sought and was granted leave to intervene on behalf of the Health Services Union of Australia, Tasmania No. 1 Branch (HSUA).

[5] Both Mr Double and Ms Ellis outlined the process which had led to this application and strongly supported the proposed variation to the HoA.

[6] Mr Eddington indicated that the HSUA had some concerns with the application, particularly in what it viewed as the inappropriate use of the HoA as an ongoing instrument covering substantive industrial entitlements.

[7] In response to a question from the Commission, Mr Eddington indicated that the HSUA opposed the variation of the HoA in the manner sought.

[8] At the conclusion of the hearing I indicated that on the material before the Commission, my inclination was to approve the application and issue the appropriate order. However in light of Mr Eddington's submission, I would allow the HSUA until close of business on Tuesday 28 August 2012 to make any further submissions in writing.

[9] A submission from the HSUA, received at 5.07pm on 28 August, is reproduced in full:

"***Submission Re: T13955 s59(2) MASSA and ANF to vary the Nurses and Midwives Agreement 2010***

1. *As described at Hearing on Friday 24 August 2012 HACSU is concerned that a Heads of Agreement document has initially been registered, maintained and now sought to be varied in the same fashion as one would register an Enterprise Agreement or Award. Indeed the Heads of Agreement (HoA) is now sought to become a de facto Award – setting out a major component of Award matters, namely the Classification descriptors, without the consent or input of all parties who represent employees affected by the classification descriptors.*

2. *When the HoA was registered on 23 December, 2010 it was done so without the knowledge and consent of HACSU. At that date our members unwittingly and unwillingly had their terms and conditions of employment governed by HoA document that their Union knew nothing about.*

3. *It was apparent at the development, signing and registration of the HoA (none of which had HACSU's involvement) that the document was intended only to be purely a Memorandum of Understanding or HoA. Like other HoA it was designed outline the underlying agreement in principle but further negotiation and finalization would need to take place to then concretize the in-principle nature of the HoA into a formal Award or Enterprise Agreement.*

   This was expressly stated throughout the HoA:

   - *Clause 7: Intended consequences: The intention of the signatories to this Agreement is to fulfill the terms of this Agreement, as far as practicable, by consolidating all terms and conditions of employment into the Nurses (Tasmanian public sector) Award 2005 and registering the Nurses and Midwives (Tasmanian Public Sector) Enterprise Agreement 2010 and to retire the Nurses (Tasmanian Public Sector) Enterprise Agreement 2007.*

   - *Clause 7: The parties agree to undertake a modernization of the Nurses (Tasmanian Public Sector) Award 2005 by the end of February 2011.*

   - *Appendix A 2.1: The parties agree to lodge a section 55 Industrial Agreement with the Tasmanian Industrial Commission consistent with the terms of this HoA.*

     Appendix 2.2: The Registered Agreement will be entitled The Nurses and Midwives (Tasmanian Public Sector) Enterprise Agreement 2010.

It is clear therefore that the parties did not intend the HoA to be a long-lasting legally binding document that may be used in place of an Award or

formal Enterprise Agreement, more it was to be used a temporary forerunner to those documents.

4. *Indeed we submit that the clauses requiring modernisation of the Nurses Award and Enterprise Agreement were conditions precedent of the HoA and it loses/diminishes its ongoing binding nature when those conditions precedent have not been met.*

5. *It would appear that the parties to the HoA have now considered it more expedient to continue to register and vary the HoA than finalise an Award and/or Enterprise Agreement. Presumably they perceive a benefit of this is that they can alter and impose changing conditions of employment on employees who are a member of a Union without having to negotiate or engage with those employees or their Union.*

   The difficulty with this approach is that it creates ambiguity and uncertainty about how an agreement affects employees who weren't a party to the making of it.

   For example, Schedule 8 of the proposed variation to HoA describes: 'Employees covered by the Heads of Agreement….' and contains clauses outlining a review process for employees covered by the HoA. The question is whether the employees whose Union is not a party to the HoA are covered by it or indeed whether an industrial agreement can purport to cover employees who have not been represented in the making of it.

   Certainly in the Federal sphere safeguards exist to prevent an employer and one Union making an Agreement to the exclusion of another Union that has coverage.

6. *Our submission, therefore, is that the Commission should issue a direction that a Heads of Agreement document, whilst capable of registration in the initial sense, are not to be used in lieu of an Enterprise Agreement or Award where it stated or contemplated that the HoA is a precursor to the development and registration of an Award or Enterprise Agreement. This necessarily means the terms of a HoA are incapable of being the subject of application to vary (particularly a significant application) as it denotes the parties are elevating a HoA to the function of an Enterprise Agreement of Award.*

   In our submission it is not in the public interest (s. 55 (4C)(b) Industrial Relations Act 1984) to elevate variations to an HoA to the status of binding industrial agreement particularly when not all relevant employee organizations are a party to it.

7. *If the Commission forms the view that that a HoA is capable of being varied and sustained as an industrial agreement for the purposes of the Act, we submit that the Commission should seek from the parties a direction in the HoA that protects those employee's whose employee organisaton is not a party to the Agreement. In particular, employees may be affected by the review process described in Schedule 8 to the Agreement, as such a clause should be inserted in Schedule 8 as follows:*

> Whether or not a relevant employee is covered by this Heads of Agreement, an employee may avail of themselves of the ability to review their classification pursuant to the terms outlined herein and the employer is bound to negotiate such reviews with all employee organizations even if they are not a party to this Heads of Agreement."

[10] This submission was provided to the ANF and MASSA. The respective 'right of reply' responses have been recorded in the file and forwarded to the HSUA.

Conclusion

[11] Despite the title '*Heads of Agreement,'* it is an industrial instrument registered pursuant to s56 of the Act and is binding on the parties and employees subject to its coverage. Section 58(2) states:

> "*An industrial agreement registered under section 56 is enforceable in all respects as if it were an award."*

[12] Indeed the enforceability of the agreement has already been tested.[1]

[13] It is fair to say that the HoA contains a number of stated intentions which might be described as aspirational. In a number of cases the time-lines associated with these stated intentions have not been met, a consequence I suspect of an initial underestimation of the substantial resources which has been necessary to bring these matters to a satisfactory completion.

[14] The classification standards contained in this application is a case in point. The development of these standards has involved a significant commitment of resources and consultation from both parties. It has taken much longer than initially anticipated, but this should detract from the commendable final outcome.

[15] I am not aware of the circumstances under which the HSUA is not a party to the HOA. The question of which organisations are party to an agreement is a matter for the parties, not the Commission. That said, I do however accept that in approving an agreement, the Commission must exercise care to ensure that representational rights which would otherwise exist are not compromised.

[16] Section 58 deals with the categories of persons and organisations bound by an agreement. Section 58(1)(c) states:

> *(c) every employee who is, at any time while the agreement is in force, employed at a work site or place to which the agreement applies by an employer on whom the agreement is binding,…"*

[17] Thus it is clear that all nurses employed by the employer are covered by the HoA. Membership or otherwise of any organisation is not a material consideration in terms coverage.

[18] The HSUA has proposed that a new sub clause be inserted if the Commission is of a mind to vary the agreement.

[19] Whilst I note the HSUA concerns I do not consider this to be necessary. I am quite satisfied that HSUA representational rights are not compromised by the HoA and the application currently before the Commission is approved on that clear understanding.

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[1] T13859 7 June 2012 Abey DP.

[20] I am satisfied that there is an overwhelming public interest in enabling nursing staff to avail themselves of the improved career opportunities.

[21] I am also satisfied that the application to vary is legally open to the parties to the HoA.

[22] I note that clause 7, Intended Consequences, relating to the consolidation of the Award and the registration of a new agreement remains unchanged, even if the time-lines envisaged have moved out. This is a matter for the parties to address in the foreseeable future. My own view is that the HOA is not an optimal industrial instrument to cover detailed salaries and conditions of employment on an indefinite basis.

[23] Pursuant to s59(2) of the Act, the Nurses and Midwives Agreement 2010 is varied by including Schedule 7 and Schedule 8 in the terms proposed in the application. This variation is to apply from 30 August 2012. The order is attached.

Tim Abey
Acting President

Appearances:
Mr M Double and Mr T Kleyn for MASSA with Ms M Chandler and Ms K Gabriel
Ms N Ellis and Ms A Stanislaus-Large for ANF
Mr J Eddington intervening for HSUA

Date and place of hearing:
2012
August 24
Hobart