



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE ROSS, PRESIDENT**

**s.156 - 4 yearly review of modern awards**

**Four yearly review of modern awards  
(AM2014/286)  
Supported Employment Services Award 2010**

**Sydney**

**12.04 PM, THURSDAY, 15 DECEMBER 2016**

PN1

MR MOSTAFAVI: They were really geared towards your comments, your Honour last week.

PN2

JUSTICE ROSS: It's the second last one. We say in relation to some variations and submissions, you have not made any comment. Where you haven't made a comment, you are not opposed to it?

PN3

MR MOSTAFAVI: That's correct, yes.

PN4

JUSTICE ROSS: Let's just go through relatively quickly and go through the summary.

PN5

MR BULL: This is the summary of technical and drafting matters?

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JUSTICE ROSS: It is, yes. In relation to the first one, the ABI's point, can I get you to have a look a Full Bench decision, 2015, FWCB 4658, at paragraph 8, and that's where that comes from and just reflect on that and let me know, I will say in seven days. I will say in seven days, but if that creates a difficulty - it's a fairly small point, but if that creates a difficulty just let my chambers know and the conference is being recorded and the transcript will be uploaded so you will be able to follow there as well.

PN7

MR MOSTAFAVI: Thank you, your Honour.

PN8

JUSTICE ROSS: The second point, the HSU says the definition should - because it's not used elsewhere - I think it is used in schedule B(2).

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MS SVENDSEN: Yes, I noted that and thought - I actually wrote this - well, it shouldn't be.

PN10

JUSTICE ROSS: Do you want to have a look at it and see what - - -

PN11

MS SVENDSEN: Yes, I will have a look at it. I haven't had a chance to look back. I will have a look at that, but I think on that premise that it was a comment really looking at it about let's remove stuff that doesn't need to be there as opposed to anything else.

PN12

JUSTICE ROSS: No, no, that makes sense. You did have to dig around to find out.

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MS SVENDSEN: I don't know how the search function didn't work.

PN14

JUSTICE ROSS: Who knows?

PN15

MS SVENDSEN: Because that's actually what I did with all of those things was, you know, took the clause, took the definition and tried to find it.

PN16

JUSTICE ROSS: Item 3 is an AWU point. What if both were included? Do you want to have a think about that, Mr Bull?

PN17

MR BULL: I'm looking at it, sorry.

PN18

JUSTICE ROSS: No, you don't need to. I don't want to push you to necessarily a view now.

PN19

MR BULL: What's the problem? They are saying that obviously the ordinary rate is the base rate. This is not this all-purpose allowance issue, is it?

PN20

JUSTICE ROSS: No, I don't think so. No, because the casual loading is paid for all purposes.

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MS SVENDSEN: Yes. I actually didn't think there was an all-purpose allowance.

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JUSTICE ROSS: I'm not sure why you would.

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MS SVENDSEN: But the clause says that.

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MR BULL: The casual ordinary hourly rate is the base rate plus 25 per cent, isn't it?

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JUSTICE ROSS: Yes, which is payable for all purposes. That's right.

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MS SVENDSEN: Which is what the definition says.

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MR BULL: This doesn't seem to be a problem, I'd say.

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JUSTICE ROSS: Yes, I just wasn't sure why you wanted to delete it.

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MS SVENDSEN: That's AWU, not - - -

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JUSTICE ROSS: I'm sorry, yes, yes.

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MR BULL: Sorry.

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JUSTICE ROSS: They are not here?

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MS SVENDSEN: No.

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MR BULL: I think the person who probably wrote that has left, so I think it's safe.

PN35

JUSTICE ROSS: Left the building, so that's the end of that. I thought it was - no, that's okay, that's fine. The second is the - yes, the clause used is grade. Classifications generally use but if it makes it easier to retain grade - - -

PN36

MS SVENDSEN: I think the concept of looking at - and that's about it being consistent and making it easier to read. It's not significant - - -

PN37

JUSTICE ROSS: Most awards provide classification, but it may be that it's in the clause structure. Rather than referring to grades 1 to 7 and then referring to them as classifications in the text.

PN38

MR BULL: It doesn't really mean anything. It's six of one, half a dozen of the other, isn't it?

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JUSTICE ROSS: I think that's right.

PN40

MS SVENDSEN: Yes, I think I have possibly - yes, and I think that, you know, this issue has been discussed conceptually in the business services wage assessment tool discussions around the concepts of classifying people appropriately and then paying a percentage of that appropriate classification. Anyway, I still don't think it's fundamentally a problem.

PN41

MR BULL: Are the particular grades for different jobs in the sense that - - -

PN42

MS SVENDSEN: No.

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MR BULL: Because sometimes you can have increments within a classification.

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MS SVENDSEN: And there are.

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MR BULL: You know, every year you go up. Do you understand what I mean? But you still do the same job. You have done it for 12 months.

PN46

JUSTICE ROSS: What do you want me to do with this one?

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MS SVENDSEN: I don't think it's - I mean, I have written beside my note saying: "This is not a significant issue." I think it really is about what you think is an appropriate response.

PN48

JUSTICE ROSS: We will do a revised exposure draft and if you are really anxious about it, we will revisit it.

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MS SVENDSEN: Yes.

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JUSTICE ROSS: The next one, the "whichever makes it more accessible." Can I refer you to a Full Bench decision that deals with a similar point?

PN51

MS SVENDSEN: Yes, I know. I have actually re-read it and I am aware of that and I think - I can't remember when we did this, but I remember that I did it and then subsequently thought about that and I'm aware of the Full Bench decision.

PN52

JUSTICE ROSS: That means we probably won't.

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MS SVENDSEN: Yes. No.

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JUSTICE ROSS: Then we have got ABIs. No, that's fine.

PN55

MS SVENDSEN: Yes, ABI just comments that it is the Fair Work - the decision has already been made.

PN56

JUSTICE ROSS: I think your item 6, yes, splitting it would make it easier. Do you want to just have a go at that?

PN57

MS SVENDSEN: Yes, sure.

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JUSTICE ROSS: The general approach has been to list specific inclusions and exclusions first such as 4.3.

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MS SVENDSEN: Yes.

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JUSTICE ROSS: Then general exclusions such as 4.5, but again you are not, sort of, fussed about it one way or the other.

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MS SVENDSEN: No, no, but I think that that actually - you know, some of the redrafting has made things much clearer and easier to read and that concept of what's in and then what's out, all together in one hit is better, I think.

PN62

JUSTICE ROSS: Then seven I think, seven, eight and nine, they're all dependent on your broader discussions, aren't they? Don't they follow the roll out of the NDIS?

PN63

MS SVENDSEN: Look, no, I actually think this is NDS getting anxious about ADEs being covered by this award. I don't think it's - they're not here, it's a bit of a problem - I don't think it's - I actually don't think it's a problem. I think it goes to an issue we have also been discussing in SCHADS about whether or not, you know, people are covered and if you start identifying that ADEs are covered then you actually get into the concept more broadly with modern awards of identifying parts of industries or specific employers which is not what we're supposed to be doing. It's clear that supported employment services, however defined, are covered.

PN64

MR BULL: But that's what ADEs do isn't it?

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MS SVENDSEN: Yes, that's exactly right.

PN66

JUSTICE ROSS: Do you think they might be jumping at shadows to some extent?

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MS SVENDSEN: I think they're more than jumping at shadows. I think, you know, what's this: "Continuing ongoing recognition of right of ADEs to continue using the award"?

PN68

MR BULL: If they start running a sort of - - -

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MS SVENDSEN: There is nobody else covered by this award except supported employment services.

PN70

MR MOSTAFAVI: These are really substantive comments in any event, aren't they?

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MS SVENDSEN: They are substantive because I actually wanted to make that - -  
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PN72

MR MOSTAFAVI: Yes. As I recall their submissions, they were an amalgam of technical and substantive issues, but it strikes me that they are sort of substantive -  
- -

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MS SVENDSEN: I think if they want to pursue them, they're definitely substantive.

PN74

MR MOSTAFAVI: Yes.

PN75

MR BULL: But are they suggesting that ADEs are going to do things other than provide supported employment services?

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MS SVENDSEN: ADEs will do more than other supported - - -

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MR BULL: But this is part of the - - -

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MS SVENDSEN: But as a consequence of NDIS.

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MR BULL: But there's also this general funding model which is, you know, what's the term where it's more competitive.

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MS SVENDSEN: Yes, competitive, generally, I don't know.

PN81

MR BULL: You do. You will get batches and so forth, so disability services are going to be provided by also the same (indistinct) provide aged care services and so forth.

PN82

MS SVENDSEN: Yes, but not supported employment services. I doubt that those kind of - well, no, the concept of supported employment service is defined by a Commonwealth legislative program. It's not one that we define, but the concept of that supported environment, the old sheltered workshop, is clear in their legislation, in the Commonwealth legislation about that. But this award only applies to people who provide those services. If new people provide those services, it would apply to them or they could use it. If these people provide other services, that doesn't preclude this award from covering them.

PN83

MR BULL: But if the employer, you know, in addition to providing support employment services provided, you know, home-based care for disabled and elderly people.

PN84

MS SVENDSEN: That doesn't exclude them from this award.

PN85

JUSTICE ROSS: I think I will make the note that if it's pursued, it looks like a substantive change and it will be dealt with that way and we will see, perhaps, by direct discussions with them by other parties, I will come to a different view about it. Item 10, that's really more consistent with - the current ordering is more consistent with the standard approaching being taken across awards. That's the reason for that and, look, we'll do a revised exposure draft and if parties still want to pursue some of these items, then you will be at liberty to do that and we will make a decision about it. But that's the explanation. It's a consistent plain language structure that is being adopted.

PN86

Item 11, I think is being dealt with by the casual and part time Full Bench, in any event. That's the AWU's claim and ABI's opposition to it.

PN87

Item 12, that's really moving around and that seems to be right. That's just the order, I think, of those clauses 11 - - -

PN88

MS SVENDSEN: Yes, I remember looking at this and thinking that I thought it maybe sort of actually made sense.

PN89

JUSTICE ROSS: Yes. But we will have a look at that and deal with it in a revised exposure draft and you can see whether you are content with it or not.

PN90

MS SVENDSEN: Yes, but it's not - - -

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JUSTICE ROSS: And 14, again that's one of the ordering and the location is consistent with the template structure.



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MS SVENDSEN: Yes, it is.

PN93

JUSTICE ROSS: But if there is a reason to change it here then we will look at changing it here, but just have a look at that and see where we go.

PN94

MS SVENDSEN: Yes, okay.

PN95

JUSTICE ROSS: A cross-reference in 14, I think the reference should be 15.4, 15.5 and 16, not 15.3. Can you just have a look at that and see whether you agree with that?

PN96

MS SVENDSEN: Yes, I will cross-check. I will review those cross-checks.

PN97

JUSTICE ROSS: Payment of wages, ABI's point, yes, there is a logic to having those clauses together as per the current award. That issue, though, might be affected by the payment of wages Full Bench and the provisional view in that, so that whole clause might be the subject of reconsideration. But for the moment, we'll include in the revised exposure draft what you have suggested and then other parties can see what it looks like and have an opportunity to comment on that.

PN98

MR MOSTAFAVI: Thank you, your Honour.

PN99

JUSTICE ROSS: Sixteen is the wage assessment matter and that's currently before Booth DP.

PN100

MS SVENDSEN: The issue about the tools that are identified is that they're not actually in use anywhere in Australia and they are tools - - -

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JUSTICE ROSS: They could be deleted.

PN102

MS SVENDSEN: They could be deleted and the tools were only ones that could be used by that were already using them as at a date principally.

PN103

JUSTICE ROSS: If we accept their submission, delete them and in the revised exposure draft they won't be there, then there will be an opportunity to have a look at that. But that's the starting point.

PN104

MS SVENDSEN: Yes, yes.

PN105

JUSTICE ROSS: Seventeen - - -

PN106

MS SVENDSEN: That's just making sure the numbering is correct.

PN107

JUSTICE ROSS: Yes, that point seems to be right.

PN108

MS SVENDSEN: If we remove any of those tools, then it will be slightly different anyway, but, yes.

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JUSTICE ROSS: The same is true of 18, I think.

PN110

MS SVENDSEN: Yes.

PN111

JUSTICE ROSS: Nineteen, if it's got no work to do, well, we can remove it. Is that the general - that's the position put by HSU?

PN112

MS SVENDSEN: Yes, it is, because that referred - I mean, it was necessary at the time, but those times have now passed. The business services wage assessment tool has been removed. The transitional provision time periods finished actually last year, I think - not even this year - so, there is no reason for it to continue.

PN113

JUSTICE ROSS: Yes. Again, item 20, that's a common clause in all exposure drafts. If proposition is that conduct might leave you in breach of two terms, it wouldn't expose you to - and we have dealt with this issue in the - I think a similar argument was run in either the (indistinct) Full Bench or the annual leave one and there the Benches went through why you wouldn't be exposed to a double penalty because of the provisions of the Act and also the sentencing approaching taken by the Federal Court.

PN114

MR BULL: Duplicity.

PN115

JUSTICE ROSS: Yes.

PN116

MR BULL: Walsh v Tattersall is the High Court case, sorry.

PN117

JUSTICE ROSS: You are not going to get belted for the same.

PN118

MR BULL: You can't. The same facts can't - - -

PN119

MS SVENDSEN: They'll be different.

PN120

JUSTICE ROSS: Twenty-one, I think the range of \$6 was apparently set in 1993 when the minimum rate of pay was founded in \$25.40.

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MS SVENDSEN: That's a fair comment.

PN122

MR BULL: It's got superannuation.

PN123

MS SVENDSEN: Yes, yes.

PN124

MR BULL: Because we have got a claim about that, but that's a substantive claim.

PN125

MS SVENDSEN: I mean, I don't think anybody has even though to review it and it probably should have been reviewed, I don't know, in the context of the award annual wage increases almost.

PN126

MR BULL: The problem with the super is that it's so low that it's all gobbled up by fees and I'm going to try and get some very brief sort of evidence to the effect that what we're proposing at least will mean that it actually accumulates, but that's a substantive issue because they're below the threshold. I think you need to earn more than 450 a month or something.

PN127

JUSTICE ROSS: You do, yes.

PN128

MS SVENDSEN: Yes.

PN129

JUSTICE ROSS: For the SGC to kick in, that's right.

PN130

MS SVENDSEN: Yes.

PN131

MR BULL: Yes.

PN132

MS SVENDSEN: I don't think most would.

PN133

JUSTICE ROSS: I don't know whether the 450 has ever been indexed, but that's where it started.

PN134

MS SVENDSEN: Yes.

PN135

MR BULL: We don't necessarily want it to be indexed.

PN136

JUSTICE ROSS: No, I wasn't advocating for it, but I am not sure if it's still 450 or not.

PN137

MR BULL: But the problem would be that the super for people is that, you know, it's all gobbled up by fees.

PN138

MS SVENDSEN: If it applies.

PN139

JUSTICE ROSS: Yes, yes. I suppose it's either three per cent or six or whichever is the greater, so it's not as if, you know - but, in any event, that's more likely to be a substantive that whole issue, is that what you're saying?

PN140

MS SVENDSEN: Yes.

PN141

JUSTICE ROSS: Let's deal with it that way. Twenty-two, yes, the cross-referencing, you're right, is wrong there, so that will be amended to be 20.4. Generally in exposure drafts, we haven't included percentage and dollar signs through it because it looks a bit cluttered, but if you think it's necessary in this award, then that's something we can look at. If you agree it will make it easier.

PN142

MS SVENDSEN: I always look at - I look at it - generally speaking it's not an issue, but every so often the clause actually has both in them and you first read, you have to keep referring back to the top of the clause and where it's only one column - sorry, or one row, it's not too bad. Where it's multiple, it starts to get confusing if you're only reading one. I actually think it is, but I don't think it's substantive either - substantial.

PN143

JUSTICE ROSS: We can put it in the revised exposure draft and the parties can look at it and see whether they prefer having the dollars and percentage signs in or not is probably the easiest way of doing it. The last point is an AWU point which I'm not quite sure I can make much sense of it. The reason for the use of the casual ordinary hourly rate in that column is because the rates include the base rate plus the 25 per cent loading. That's why. That's the way it was described earlier.

PN144

MS SVENDSEN: Yes, so it's the two missed casual ordinary hourly rate which would be the only time it's referred to in this award.

PN145

JUSTICE ROSS: Yes, that's exactly right. It relates to the earlier point, but I am not quite sure what they were on about.

PN146

MS SVENDSEN: No.

PN147

MR MOSTAFAVI: Perhaps they can clarify with respect to everyone's exposure draft, your Honour.

PN148

JUSTICE ROSS: Yes, exactly right. All right, anything else?

PN149

MS SVENDSEN: That was relatively painless. Can we do that one again?

PN150

JUSTICE ROSS: We call it on for regular conferences.

PN151

MS SVENDSEN: Use that as a model because it's painless unlike some of our - -  
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PN152

JUSTICE ROSS: Pick up the points, put it in a revised exposure draft, give you an opportunity to comment on it and then we will see where we go. If there is anything remaining outstanding, we'll have another conference, but I think it's likely most of the matters when the parties look at them, you will make your own judgment about whether you want to chase it any further.

PN153

MR BULL: Thanks.

PN154

MS SVENDSEN: Thank you.

PN155

JUSTICE ROSS: Thanks very much. Have a good Christmas if I don't see you beforehand.

PN156

MS SVENDSEN: You too.

PN157

MR MOSTAFAVI: Thank you, your Honour.

**ADJOURNED INDEFINITELY**

**[12.27 PM]**