



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

1053378

JUSTICE ROSS, PRESIDENT

AM2014/209

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards

(AM2014/209)

Pharmacy Industry Award 2010

Melbourne

10.01 AM, WEDNESDAY, 27 APRIL 2016

Continued from 17/12/2015

PN1320

JUSTICE ROSS: Good morning. So we might do the appearances for the record in Melbourne first.

PN1321

MS J BAULCH: Baulch, J, for APESMA.

PN1322

MS L SVENDSEN: Svendsen, L, for HSU.

PN1323

MS K BIDDLESTONE: Biddlestone, K, for SDA.

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JUSTICE ROSS: Thank you. And in Sydney?

PN1325

MS LIGHT: It's Ms Light for the Pharmacy Guild.

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JUSTICE ROSS: Thank you. And Adelaide?

PN1327

MS K VAN GORP: Van Gorp, K, for Business SA. And with me, Klepper C.

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JUSTICE ROSS: And on the phone?

PN1329

MS TIEDEMAN: Ms Tiedeman, T-i-e-d-e-m-a-n, for Australian Business Industrial in the New South Wales Business Chamber.

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JUSTICE ROSS: Okay. The purpose of the conference today is really to work out what's the next step and there are two elements to that. The first is what sort of process do you think we should put in place to provide you with an opportunity to comment and then for the commission to resolve the plain language version of the Award? The second is whether there are any - or what are the remaining outstanding substantive issues and how should we resolve those?

PN1331

In terms of commenting on the report and in particular on the proposed Plain Language Award, there are a range of options. I appreciate you want a chance to have a look at it, so we could look at a program which might provide for all parties within a set time period, two to three weeks, to put in their comments or submissions about what they say about the Plain Language Award, then there be a further period of perhaps a week or ten days in which all parties could reply. So rather than either unions or employers doing it and then reply, then reply to the reply, all do it at once. Mainly because it's not really anyone's particular application.

PN1332

Once that material's done, we'd do a short background paper identifying what, if any, are the areas in contention and what do the parties say about it, and then there would be a short oral hearing in relation to it. So most of the material will be done in writing. That's what I suggest but, you know, it's only a suggestion.

PN1333

We need to also think about what are the remaining substantive issues that are outstanding in relation to this Award and how are we to bring those to fruition as well.

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The directions that can go out can deal with both; that is, it can say that, for example, in three weeks from today all parties are to put in their comments on the plain language document and secondly they are also to advise what remaining substantive issues there are that they wish to pursue. They should identify what they are with the proposed draft variation determination.

PN1335

Then I'd have a separate mention in relation to the substantive issues and work out a program for those.

PN1336

MS SVENDSEN: Your Honour, I just - this Award - leaving aside some other things, in terms of that program you just laid out, this Award, there's actually been quite a lot of progress on.

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JUSTICE ROSS: There has.

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MS SVENDSEN: So I would hesitate to say this and others.

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JUSTICE ROSS: But you might be able to reach agreement on that.

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MS SVENDSEN: Yes. And that occurred to me - - -

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JUSTICE ROSS: In relation to both, Ms Svendsen, or - - -

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MS SVENDSEN: Well, yes. I think that - you know, that if we identify - I think that identifying the issues we have with the plain language draft's a great idea but I actually think that before we did in reply, we might be better having a conference.

PN1343

JUSTICE ROSS: That's fine. No, that's fine. We can set down a program, then, to give you, say - is two to three weeks, or is there - I mean you're reasonably familiar with it. There'd been some tweaking as a result of the feedback, some of

it which I think you probably agree with as, I must confess I was a bit reluctant too, initially, about the structural change. This idea of putting redundancy and termination at the end of the Award. I was just thinking that, we've done all group 1 and now I have to re-do them. But when you think about it there's a certain logic to that proposition.

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MS SVENDSEN: There's a logic to that. Absolutely.

PN1345

JUSTICE ROSS: Okay. So the idea would be say Friday fortnight all parties would put in their comments on the draft and identify any outstanding substantive issues that they have. And following that we would have a conference to see if we can work through those issues. Is that the - well, to see whether we can get anywhere on the substantive issues but also those comments on the Award. Is that the proposition?

PN1346

MS SVENDSEN: Yes. Yes.

PN1347

JUSTICE ROSS: All right, let's just test that. Each of you happy with that? Yes? All right. Ms Light, what do you think about that?

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MS LIGHT: I think that that's an appropriate course of action. There would be a great benefit in having a conference to see if we can resolve any of the matters arising from the plain language draft changes.

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JUSTICE ROSS: I neglected to take the appearances in Canberra. I should do that now.

PN1350

MS PRICE: Good morning, Commissioner, it's Pam Price and Zoe Blandfort from the Pharmacy Guild.

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JUSTICE ROSS: Thank you. Ms Tiedeman, what do you say about that proposal? Are you content with that course?

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MS TIEDEMAN: Yes, we would be happy with that, Your Honour.

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JUSTICE ROSS: All right. And Business SA?

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MS VAN GORP: We would be happy with that, Your Honour.

PN1355

JUSTICE ROSS: All right. That's what we'll do. And in the directions we'll send round a proposed date for the conference and we'll see how we go. All right.

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MS SVENDSEN: Could we just ask a couple of questions, please?

PN1357

JUSTICE ROSS: Sure.

PN1358

MS SVENDSEN: In relation to the process of actually doing the review we had two major matters. One was (indistinct) to do with - in terms of the process that the research body's gone through.

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JUSTICE ROSS: Yes.

PN1360

MS SVENDSEN: And the other was a concern that we have about the way - or the flavour of the report. It seems to talk more about the preference of participants as opposed to the comprehension of their entitlements or what they are required to do. And I can't see any reason to do this if it's about someone's preference. I can see a reason where it's about comprehension.

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JUSTICE ROSS: We can ask them the question. I must admit I had sort of taking them to be pseudonyms in a way. That when they were talking about preference -
- -

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MS SVENDSEN: I had until I actually looked at the reports.

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JUSTICE ROSS: Yes. We can ask them that question. But I had sort of assumed that they were expressing a preference because they found it was easier to understand. But that's really the nub of your question, is it?

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MS SVENDSEN: It is the nub of the question because there's nothing in the report that indicates actually how they - how they assessed or if they really assessed comprehension of the entitlement, of what flowed from the Award. So because of that it kind of just - I just went, "I don't get this preference stuff."

PN1365

JUSTICE ROSS: Yes. No, that's fine.

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MS SVENDSEN: I understand what it's about, but - - -

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JUSTICE ROSS: We'll ask them that question and we'll get something in writing from them.

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MS SVENDSEN: Thank you.

PN1369

MS BIDDLESTONE: The other concern that we had was just from the report, how the choice of participants was arranged, and also in terms of coming back to peoples' understanding, it's not really clear who they actually interviewed in terms of, you know, their age and whether they were a pharmacy assistant, whether they were a pharmacist.

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JUSTICE ROSS: Yes.

PN1371

MS BIDDLESTONE: The pharmacists interviewed could have all been pharmacy managers.

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JUSTICE ROSS: We'll endeavour to find out a bit more of a profile of who - - -

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MS BIDDLESTONE: Yes. Because I think that would all really go to the understanding.

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MS BAULCH: We'd also like to know whether their first language was not English as well.

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JUSTICE ROSS: Yes.

PN1376

MS SVENDSEN: So it didn't appear to us that the selection was done in any randomised approach so that there could be any analysis of whether this is actually a better Award language to comprehend, for people to understand their entitlements.

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JUSTICE ROSS: In some ways it will inform the process, but it's not in evidence.

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MS SVENDSEN: No.

PN1379

MS BAULCH: No, I know.

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JUSTICE ROSS: An issue to that extent. Ultimately - - -

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MS BAULCH: We understand that.

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MS SVENDSEN: No, we understand that.

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JUSTICE ROSS: Ultimately there's a - look, if you can't agree amongst yourselves, or even if you do agree and the bench has a different view, that's - - -

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MS BAULCH: It'll be the bench's view.

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JUSTICE ROSS: Yes. It's less likely, but the most I can say about it is it informs the process. I don't think it provides - and I don't think anyone's suggesting that it's providing expert evidence - - -

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MS SVENDSEN: Statistical analysis? No.

PN1387

JUSTICE ROSS: No. Because, almost inevitably, and we're looking - our next phase is to then look to extend this to perhaps ten or 12 awards, but probably no further, only because it's quite resource-intensive from our end.

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MS SVENDSEN: And I suppose that comes back to some of our concerns, that if this is chosen to be the process that's going to run out in other Awards then - - -

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JUSTICE ROSS: No. No, it's not.

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MS SVENDSEN: - - - there may be - - -

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JUSTICE ROSS: No, no, no, it's not. Because we're not doing the testing again. We can't afford to. So we're not doing that.

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MS SVENDSEN: Okay. We - - -

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JUSTICE ROSS: But there's nothing to stop - - -

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MS SVENDSEN: It is in fact our bigger concern because, as I indicated before about the conference idea, is this Award's been easy. I know of several of our Awards that will be targets. Because it makes sense that they would be.

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JUSTICE ROSS: Which Awards do you think are going to be targets?

PN1396

MS SVENDSEN: I think the Social Community Home Care Disability Sector Award is almost a shoe-in, Your Honour, and - because it's badly written, it covers - - -

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JUSTICE ROSS: That doesn't necessarily distinguish it from - - -

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MS SVENDSEN: - - - most of the - yes, but it's seriously badly written. Most of the people are Award-dependent and there are many small employers, so I thought it was kind of a bit of a target practice one.

PN1399

JUSTICE ROSS: No, we don't have yours.

PN1400

MS BIDDLESTONE: But now that you've flagged it as an issue, Lee, do you want to go on the list?

PN1401

MS SVENDSEN: No. It's - - -

PN1402

JUSTICE ROSS: But no, no, look, the process will be - - -

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MS SVENDSEN: I just - with a lot of parties I just perceive the - - -

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MS BIDDLESTONE: I think several of ours will be - - -

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JUSTICE ROSS: That's exactly right. But we're going to put out a statement which will identify these are the ones we're thinking of, this was the methodology, inviting comment on that.

PN1406

MS SVENDSEN: Okay.

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MS BIDDLESTONE: Okay.

PN1408

JUSTICE ROSS: If you want a further - we may decide to do yours when we get to it. There are a couple of other Awards that are not on the list that are also - they're in a sort of shocking state.

PN1409

MS SVENDSEN: The MRSNR?

PN1410

JUSTICE ROSS: Well, no, business equipment, for example. The Award Mod Bench commented on that as being too long and complex for what it was doing and there are a few others, yes, RSNR, although that's going through a separate process, so we'll see what happens over that. But it becomes a sort of a resource versus reward type equation. So we're going to look at Award reliance, small business coverage. This Award - pharmacy has some common elements with some elements of retail.

PN1411

MS SVENDSEN: Yes.

PN1412

JUSTICE ROSS: Retail's an obvious area. And we'll just see how we go. But there's no doubt that yours is - it has a lot of parties. That may mean that agreement's difficult but it doesn't necessarily mean that the task ought not be done.

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MS SVENDSEN: No. It's - I mean it's - - -

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JUSTICE ROSS: But certainly agreement will be more difficult.

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MS SVENDSEN: It's probably the more - I mean just in disability itself there are 2200 providers registered with NDIS or NDIA.

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JUSTICE ROSS: Yes.

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MS SVENDSEN: That will be that those are primarily new providers. They will be faced with - they will all be Award-reliant, and that's just in a small part of what that Award coverage is, which is why we kind of looked at it with some trepidation. Fear might be closer.

PN1418

JUSTICE ROSS: But it might also mean that that's a reason why we should do it.

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MS SVENDSEN: Yes.

PN1420

JUSTICE ROSS: If we were avoiding things that were hard, the review would have been finished by now. So, look, you'll have the opportunity to comment on it and it may be a reason why we look at that one. But from the commission's perspective, we're trying to manage our resources in doing it, so whilst we've not been under a closed view about adding additional Awards, we're going to have to be cautious about how many, the degree of difficulty and the pacing of it.

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MS SVENDSEN: Yes.

PN1422

JUSTICE ROSS: And the pacing might provide a partial solution to the problem. There is also the question of what we've referred to in this pilot as the Part B matters.

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MS BIDDLESTONE: Yes, sir. Just to clarify, the process we've just outlined is just for Part A.

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JUSTICE ROSS: Yes, that's right. Part B will be a broader consultative process because there are more parties involved.

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Another issue that I'll raise with you that we'll be putting out a statement within the next week or so, is the question of the training wage and the supported wage clauses. And the proposition here is that they in effect be removed from all Awards but they be referred to by reference - incorporated by reference. So they go into the Miscellaneous Award and they're incorporated by reference in all other Awards. Except where, you know, parties have a collective view that, "Well, they're strongly used in the Award, there's utility in remaining in the Award." Bearing in mind that in the electronic versions of the Award there will be the link, so you'll be able to access it easily.

PN1426

MS SVENDSEN: The links are really easy.

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MS BIDDLESTONE: The links are a great idea.

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JUSTICE ROSS: Yes. So I think that will - it's just that when you look at some of these Awards, about half of them, the bulk of them are taken up by provisions which are important but have limited day-to-day operation.

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MS SVENDSEN: Application.

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JUSTICE ROSS: So we're giving some thought to that as well. But the Part B will take a bit longer, and we'll see how we go with that, but I think that will involve any party to any Award being able to make a comment on it. So no, this one is focused on Part A, but if you have a view about Part B, I mean we may as well start to get the feedback on those as well.

PN1431

So I don't want to constrain you, but be aware that that will be a separate process and you'll have an opportunity to comment later. Are there any other - yes, sorry?

PN1432

MS BIDDLESTONE: I'm just noting in relation to the report, where it talks about how the Award might be changed, some of it - or a couple of the items were different to full back bench decisions earlier in the process.

PN1433

JUSTICE ROSS: Yes.

PN1434

MS BIDDLESTONE: So that - there won't be any issues in relation to that? They won't need to be re-heard or - - -

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JUSTICE ROSS: I'm not committing the commission to accepting the report either. I'm not saying - I think we'll wait and see where you come to - - -

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MS BIDDLESTONE: Back with. Okay.

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JUSTICE ROSS: - - - and then we'll see where we go.

PN1438

MS BIDDLESTONE: Yes. Okay.

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JUSTICE ROSS: To some extent - do you mean the examples or the NES ordering?

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MS BIDDLESTONE: And where the definitions are placed and - yes, just in terms of all of that.

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JUSTICE ROSS: No, well - yes, that's okay because those issues are part of the template decision and what I would probably do is if the parties reach a landing on that in this Award, is I then put out a statement saying, "We propose to - - -"

PN1442

MS BIDDLESTONE: Offer it through other Awards.

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JUSTICE ROSS: "- - - alter the template in this way", and we seek comment on that.

PN1444

MS BIDDLESTONE: Yes.

PN1445

JUSTICE ROSS: So we would probably do it that way. So let people know that's the intent and that's where we're going. Okay? So your questions are around the issue of preference, and what does that mean? Does it mean comprehension? And the participants. And a bit more of a break-down about them.

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Are there any questions from any other party?

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MS LIGHT: Your Honour, I had one in terms of the substantive matters.

PN1448

JUSTICE ROSS: Yes.

PN1449

MS LIGHT: I understand that part of the direction will be the file determinations or draft determinations in relation to the variations sought. The only thing I foreshadow is that there could be some difficulties in terms of formulating those words because we're effectively operating with three versions of the Award currently, so the Award, the exposure draft - - -

PN1450

JUSTICE ROSS: Yes. With the substantive issues, put in your variation directed at the 2010 Award as it currently is.

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MS LIGHT: Okay, perfect.

PN1452

MS BIDDLESTONE: Sorry, can I just raise one issue with that?

PN1453

JUSTICE ROSS: Yes.

PN1454

MS BIDDLESTONE: Our last two sets of submissions have been based on the exposure draft.

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JUSTICE ROSS: I see.

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MS BIDDLESTONE: So that's going to be problematic.

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MS SVENDSEN: That's exactly what I was going to say.

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JUSTICE ROSS: All right. All right. Is everyone content to put them in directed at the exposure draft?

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MS BIDDLESTONE: Yes.

PN1460

MS LIGHT: Certainly.

PN1461

JUSTICE ROSS: Okay. Are there any other issues or questions? No? All right. Thanks very much for your attendance, I'll see you in a few weeks.

ADJOURNED TO A DATE TO BE FIXED

[10.20 AM]