



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE ROSS, PRESIDENT**

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

**Four yearly review of modern awards  
(AM2014/262)  
Cemetery Industry Award 2010**

**(ODN AM2008/30)  
[MA000070 Print PR988929]]**

**Sydney**

**9.03 AM, WEDNESDAY, 29 MARCH 2017**

PN1

JUSTICE ROSS: Please be seated. It might be easier if I come down here. I think probably the most useful thing is to go through the summary of submissions, technical and drafting, just so I can test my understanding of it and where you maybe in agreement or disagreement. The table is really to - so I can try and understand what ABI's point is in relation to the casual issue. If we go through them item by item - well, firstly are there any corrections or additions you want to make to the table as a whole? No?

PN2

MR JACK: No, thank you.

PN3

JUSTICE ROSS: The matters here are of fairly short compass. I understand some them will be important to you but there are not many of them. The first is title and commencement, this is the "as varied". That'll be a matter for the Full Bench, that's a consistent issue across the board. The question of the definition, this is item 2, and I think ABI's position is it's not necessary. We've inserted the definition in the Pharmacy Award in the plain language project, mainly because coverage is one of those near and dear issues to both employers and unions, and it's the defining point at which you can decide which award it applies to. So for that reason, although I accept there's a degree of repetition in putting it there, the reason it's been put in the beginning is it's central to determining the scope of the award.

PN4

While on one view you might be right, that it's not necessary because it's there elsewhere, you could really advance the same point with any cross-referencing, and we are seeking to minimise cross-referencing. But where it raises an issue we do do it, and that's incorporated in the plain language guidelines that have now been finalised as well. That's the reason and I propose to leave it there and provide you with an opportunity to reflect. That is, that we are going to insert the definition. There'll be a revised exposure draft published. AFEI can consider what I've put and if you want to press that it not happen then you'll be entitled to put a submission about that.

PN5

MR JACK: Your Honour, I think this might be a little bit different to some of the other awards and that I think, is this correct that there's actually no definition in any of the award?

PN6

JUSTICE ROSS: In - - -

PN7

MR JACK: Of the Cemetery - - -

PN8

JUSTICE ROSS: There is no definition at all.

PN9

MR JACK: Is that correct?

PN10

MR ROBSON: Yes, that's my understanding.

PN11

MR JACK: The question was never - - -

PN12

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

PN13

MR ROBSON: Yes.

PN14

MR JACK: Yes. So it wasn't so much - - -

PN15

JUSTICE ROSS: No, no, I follow, I follow. If there's no definition and there's - is there any definition in any of the predecessor awards? I mean how does one work out whether you're covered by this award? I suppose you know what a crematorium looks like. So is that basically - is it - to give you an illustration, in some awards the operations run by the employer have a defining legal characteristic. They're a club registered under various state laws et cetera. I suppose it's - well perhaps if we proceed with it on this basis, that we don't want to invent a definition.

PN16

We'd invite the parties to give some thought to - I'm sure these bodies are regulated. You can't just bury someone in your backyard, unless it's a pet. So I'm pretty sure there is a legislative prescription at state level of what a cemetery and crematorium is, and it may be that that can easily be reduced to it. So I want you to think about two things; one, whether there is such a descriptor and secondly whether it's worth the Kandel(?) type of proposition. If as you say that you haven't had one in the award before because most people know a cemetery when they see it, and look, for that matter if we do strike a problem in the future there's no difficulty with then amending it at that point.

PN17

If you can collectively reflect on it, I'd ask you to confer and desirably just put in a short common position in relation to that. I know the United Voice doesn't oppose the insertion but on the face of it, I had rather assumed that there was something elsewhere, as is common in other awards, and we were simply bringing it forward. But the creation of a new one might be just a level of effort that might not be worth it. Unless it can be done very simply. Perhaps you can reflect on that too and - - -

PN18

MR ROBSON: Well we asked our branches and they've never had a coverage dispute that - - -

PN19

JUSTICE ROSS: No.

PN20

MR ROBSON: To be honest, most of our coverage is in the Northern Territory in this and they've, you know - - -

PN21

JUSTICE ROSS: Yes.

PN22

MR ROBSON: Yes.

PN23

JUSTICE ROSS: No, no, look I - perhaps just reflect on it and if you can shoot a joint thing in then you can take it that we're not going to get too excited one way or the other. I think 3 is again the proposition flowing from the plain language, we'll retain that if you - if any party gets sufficiently excited about it after the revised exposure draft comes in, you can make a submission about it. We won't be relying on the submissions you've made previously, you'll have to make fresh ones on the revised draft, so that we'll know then really what's in contention.

PN24

Part of this process is so we can explain how we've put things in, give you an opportunity to reflect on that and then work out what's important to you and what you want to press.

PN25

Casual employment. Look, can I make - the first observation I'd make to ABI is - well of course the clause will depend on the outcome of the part-time/casuals, that if there is, for example, a decision emerging from that Full Bench that says we're not going to adopt this - please don't interpret here, I've got no idea what they're going to do. But if they said they're going to abandon this proposition of the casual employees and employees engaged as such, then we'll obviously - awards will be varied to give effect to that, the exposure drafts will be varied and the same if there's an outcome from the public holiday case, we'll amend these. So I don't want you to think that in any way this is then going to be the outcome. It will be varied as is appropriate, depending on that test case.

PN26

The reason for the split pages, I couldn't really see - it does, look, I suppose because I've been involved in it, I think the exposure draft one just seems clearer. It does delineate the function - the particular topics, and I'm not sure, I couldn't quite follow what you say the legal difference is - the difference in legal effect between - you want the current award retained but what's the difference in legal effect between the current award and the exposure draft?

PN27

MS McQUILLAN: I would agree with your Honour. In terms of the difference between the two clauses, the only one that I'm instructed that might be problematic was the removal of the word of the 138, the weekly rate. But whether

that would in fact give rise to any sort of difference in the outcome, I don't - I think it was more maintenance of the status quo until the decisions were out.

PN28

JUSTICE ROSS: No, I understand that point. I think the hourly rate, the reason it's expressed that way is now there are schedules with hourly rates and hourly rates are what - well the earlier feedback says it's easier for people to apply. There's certainly no intention to change the legal effect and your rights are reserved pending the outcome of the Full Bench. That's probably how we'll deal with it. We'll leave it as it is there but when you see it I don't want you to think that we've just run over the top of your objection. It's just that we will have to have a look at all of these in all the group 1 and 2 awards as well.

PN29

MS McQUILLAN: Yes.

PN30

JUSTICE ROSS: That we've already gone through once we see the outcome of the case. Then we've got item 5, there seems to be general agreement that the industry allowance is paid for all purposes. There's just - it's mentioned in item 6, in AFEI's reply submission you note that the current award does not specifically provide that the allowance is - - -

PN31

MR ROBSON: Yes.

PN32

JUSTICE ROSS: It doesn't expressly do so but I'd have to say I'm not sure how else you'd read it because it says:

PN33

*In addition to the rates prescribed by clause 14 minimum wages an employee must be paid an allowance of -*

PN34

MR ROBSON: Yes, yes.

PN35

JUSTICE ROSS: It's got that sort of - - -

PN36

MR ROBSON: Yes.

PN37

JUSTICE ROSS: But in any event, you're not contesting that the provision in the exposure draft that's it's paid for all purposes.

PN38

MR JACK: Yes, that's correct and we've reviewed the matter and we're not going to oppose including that clause there that specifies that.

PN39

JUSTICE ROSS: Right, thanks. Part of this exercise is about clarifying so that people are clear about what's paid for all purposes, what isn't, so we minimise non-compliance through poor drafting.

PN40

In paragraph 7, there's an agreement - sorry, did you have something - - -

PN41

MS WALSH: Sorry, no, I was going to ask if you were going to clarify but I just saw that it's listed as a sub-clause.

PN42

JUSTICE ROSS: Which one?

PN43

MS WALSH: I was going to ask if you were clarifying that it would be to make changes to the exposure draft but I hadn't noticed that industry allowance is listed as one of the all-purpose allowances in the exposure draft.

PN44

MR JACK: Yes, I think that was the change from the current award.

PN45

MS WALSH: Yes, yes.

PN46

JUSTICE ROSS: You right?

PN47

MS WALSH: I'm fine, yes.

PN48

JUSTICE ROSS: Item 7, I think it's agreed that the cross-reference should be amended. Let me just explore - it doesn't really relate to the exposure draft but AFEI's reply contest the AWU comments that:

PN49

*Overtime is paid for all hours worked in excess of eight hours per day.*

PN50

The only reason I raise this is if that's a dispute about the interpretation, well let's see where it goes? What's the basis for the AWU's submission that you get overtime if you work more than eight hours on a day? I mean overtime is paid for time worked outside ordinary hours. Ordinary hours is specified in 12.2 if that helps, and I just couldn't quite follow how you get to you point.

PN51

MS WALSH: Honestly, I think these aren't my personal submissions and I would like to disagree with the first person that drafted these. So as the AFEI's interpretation, we would agree with that given that there is the averaging cycle.

PN52

JUSTICE ROSS: Yes, look and also if you work outside the spread of 7 am to 6 pm Monday to Friday you're entitled to overtime. If you work more than 38 hours a week over a four week cycle you're entitled to overtime.

PN53

MS WALSH: Yes.

PN54

JUSTICE ROSS: But it doesn't seem to say much else. I just wasn't sure if you were foreshadowing a claim that it - - -

PN55

MS WALSH: No.

PN56

JUSTICE ROSS: Let's fine. Then we don't need to spend any more time on that. Item 8, this is the question about the summary of hourly rates of pay. Given we've resolved that it's paid for all purposes, it would be included in the hourly rate of pay which is consistent with what we've done with all the rest. Probably separately identified. As you know, we're obliged to separately identify allowances anyway. Is there anything else on the technical and drafting issues?

PN57

Then as I say, we'll publish a revised exposure draft picking up those couple of points. The transcript will be available on the site. I don't think there are any - are there any substantive issues in relation to this award?

PN58

MR ROBSON: None from United Voice.

PN59

JUSTICE ROSS: I think - are each of you involved in the next one?

PN60

MS WALSH: Yes, we are.

PN61

JUSTICE ROSS: You've got an exciting day ahead.

PN62

MR ROBSON: I know, it's quite - it's a bit dead for a Thursday morning but I need to go to the car park - - -

PN63

JUSTICE ROSS: No, no, I think just in case anyone comes back, just have a coffee and we'll see how - we'll come back at 10. But I think I'm right in that award, all of the substantive claims have now been withdrawn. That's my understanding, so you might just check that. At least I've got a page which had them all there and they're all crossed out, so I'm assuming that's the position in that one. There are a few more technical and drafting questions and I'm not sure about one in particular that (indistinct) there's about a page in the summary toing and froing about it so we need some assistant to try and work out what precisely

the issue is between you. The rest seems fairly straightforward. I'll adjourn until 10. Thanks.

**ADJOURNED INDEFINITELY**

**[9.19 AM]**