



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE ROSS, PRESIDENT**

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

**Four yearly review of modern awards  
(AM2014/269)  
Funeral Industry Award 2010**

**(ODN AM2008/72)  
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**Sydney**

**10.05 AM, WEDNESDAY, 29 MARCH 2017**

PN1

JUSTICE ROSS: Let's again go through the summary of submissions in the technical and drafting matters. The first is the same as the other one. That will be determined by the Bench in due course. The second is a question was asked about the definitions of "arranging officer" and "coffin maker" and you gave the argument that they are not used elsewhere and so they should be deleted. Does anyone oppose that?

PN2

MS WALSH: No.

PN3

JUSTICE ROSS: All right. The next issue is similar to the one I spoke about in the earlier matter, the cemetery matter, and that is the variation has been made in accordance with the plain language guidelines. We will retain the variation, we will publish a revised exposure draft and if, on reflection, you still want to pursue it, then put in a response to that.

PN4

Item 4, the AFEI raises the point that in the index to facilitative provisions, there should be an inclusion of clause 18.4(a). On the face of it, that seems right, and the notation should be "facilitation by an individual or majority of employees". Does anyone take a different view? I think it is just an omission.

PN5

The next item is item 5. Let's just have a look at this. If ABI can take me through what it is particularly that has been deleted that you think is a problem.

PN6

MS McQUILLAN: It was the removal of the phrases "on any or all days" and "inclusive" from the clause that, for us, we thought it made the clause perhaps less precise in explaining that employees can perform work on any or all of the days and I think it was more of a question for us that it made it less precise and less clear, so we just thought those words should be retained.

PN7

JUSTICE ROSS: My only hesitation is what the ripple effect might be. There will be other provisions in the award that just refer to Monday to Friday. Does it mean Monday to Friday inclusive? Does it mean any day Monday to Friday? And if you have got a clause which is very prescriptive or provides more elaboration and you are comparing it with a term that doesn't, then, just adopting normal principles, if different language is used, there must be some different result. It's not intended to change in any way the - and if it assists in any decision that finalises the exposure draft - well, there are two ways of approaching this.

PN8

We will probably retain what is in the current exposure draft in the revised document. You will have an opportunity to comment on it. If you wish to pursue the reinsertion of the award's wording, by all means.

PN9

You might want to consider an alternate submission in the event that your primary submission is not accepted, and that is that there is an acknowledgement by the Bench that there is no intention to change the meaning of the clause, and then if that is then in any ultimate decision, that will be an aid in the event there is any subsequent dispute about it, but, for what it's worth, and it's probably not worth much because the interpretation will take place in a court, not in the tribunal, but when I would look at a clause saying that the ordinary hours of work may be worked on Monday to Friday between 7 am and 7 pm, I would assume that means ordinary hours on a Monday between 7 am and 7 pm, on a Tuesday, a Wednesday, a Thursday and a Friday. So, on each of those days, between those times on each of those days, that's when ordinary hours are worked.

PN10

I don't think that is different to the previous one. It is just, where we can, it is desirable to simplify the language. I don't disagree with your point that it reinforces the proposition by putting "any or all days", but it is the sort of thing that if someone is just picking it up and they are not an experienced practitioner, I think Monday to Friday, 7 am to 7 pm is fairly easily understood. When you start to add "on any or all days", and we are doing it in an effort - it was no doubt put in in the first place in an effort to provide some certainty, but there is a risk that it just confuses people.

PN11

We are trying, where we can, to simplify the language, but I do want to make it clear there is no intent at all to change the legal effect, so if you can take that into account when you see the revised exposure draft, but again I didn't want you to see it and just think, "Hmm", you know. All right?

PN12

Then there is item 6. This seems to be a debate about whether - well, there doesn't seem to be any debate about the rest periods. If we go to 6, 7 and 8, items 7 and 8 do not seem to be in dispute. It is accepted that 14.2 is a paid rest break, it is accepted that 14.3 is an unpaid break. All right?

PN13

When we get to item 6, this deals with 14.1 of the exposure draft:

PN14

*An employee engaged for a period of four hours or more is entitled to eight consecutive hours off duty without loss of pay.*

PN15

Those who say it is not paid, what do you think "without loss of pay" means in that context?

PN16

MR JACK: Your Honour, our view is it is without loss of pay but only for those ordinary hours that occur during that period. So if an employee, you know, finishes work at 5 am, they have got to have eight hours off work, but if, during

that eight hours, they would otherwise have ordinary hours of work, then those hours need to be paid.

PN17

MS McQUILLAN: That is our position as well, your Honour.

PN18

JUSTICE ROSS: Is that your - do you understand how that works?

PN19

MR ROBSON: Yes, our submission is that it would be depending on someone's roster, we think it would only come up with overtime.

PN20

JUSTICE ROSS: Which is your point, too, really, isn't it?

PN21

MR JACK: Yes.

PN22

JUSTICE ROSS: So you both agree that it is really between midnight and 7 am. So let's assume - does it work this way - can I just test my understanding of it. If someone works overtime from - no, they just work - they work for four hours between midnight and 4 am. Their usual start time is 10 am in the morning. The effect of this clause is that they would not start until 12 noon because they would get their eight-hour break and they would be paid ordinary time for the two hours between 10 am and 12 noon. Is that how it works?

PN23

MR JACK: That is our interpretation.

PN24

MS McQUILLAN: That is our interpretation.

PN25

JUSTICE ROSS: That is how you understand it to work?

PN26

MR ROBSON: That is our understanding.

PN27

JUSTICE ROSS: Then there is probably no need to say anything more about that. There doesn't seem to be any real dispute. I think it just came down to an expression in the submissions, but you all agree about how it is intended to work, so I think 6, 7 and 8 are resolved.

PN28

Item 9, it is put there is no schedule required on school-based apprentices because the award doesn't provide for them. Anyone disagree with that? No.

PN29

Then we are into the uniform allowance. Uniform allowances always seem to excite a lot. I think where we are at is that the current award provides a uniform allowance paid to full-time employees. The exposure draft provides it is paid to full-time employees. A question is asked, "Is that what the intention is?" What do the parties say about that? The unions say that it should be paid to part-time and casuals; the employers say, "Well, it reflects the current award and we don't think it should extend."

PN30

It is sort of slightly odd in one way that if you are requiring someone to wear a uniform, particularly if they are a part-timer, the normal incident would be the allowance, but I certainly accept what you say, that the current award provides that it is only for full-timers.

PN31

I think where we are is that if you want to change the current award provision and extend the operation of the uniform allowance then you will need to put a claim in and run a case. I don't think it needs to be - it's not a part-time/casual type monster case, but it may be that the answer lies in the award history. I just don't know how many awards came into this award or what was the basis for that clause going in in the first place, nor do I know - and you would have a better idea - what's the incidence of part time and casual work amongst people who are likely to be required to wear uniforms?

PN32

The real point is that if you want to vary, if you want to move - it's not a technical drafting variation, it is more of a substantive change - so you should give some thought and let me know by the end of next week whether you want to pursue that claim and, if you do, that's fine, and there is no reason why the Full Bench can't consider it.

PN33

I don't think we need to separately constitute a Full Bench to deal with an issue like that, but give some thought to it, put in a note saying you intend to pursue it with some draft directions setting out how long you think you need to put your material in and some time for any employer interests to respond, and we would probably - then a response from you - and we would probably deal with that on the papers, I think, unless anyone wants to have an oral hearing. So just reflect on it, but I think you would need to run it as a claim. Anyone have any different view about any of that or anything else you want to say?

PN34

MS WALSH: No, I guess just if it were the case that that's popped in at some point, that expression or limitation to full-time employees, everything else in the award would support the uniform allowance applying to casuals and part-time employees. So if it were the case that that was a fairly trackable change, I guess we probably wouldn't be putting on extensive submissions.

PN35

JUSTICE ROSS: I agree. It may just come down to a construction history argument or it might come down to a merit argument.

PN36

MS WALSH: Yes.

PN37

JUSTICE ROSS: But we don't really know at the moment. It may have been included in the award before you had part-time and casual provisions, but that would be a bit odd. Why would you expressly refer to full-time? I just don't know where it comes from. It is a bit unusual, but I think we need to know more about it. Have a look into it and also, amongst your members, whether it is a requirement or what the practice is at the moment and see how we go. All right?

PN38

MS WALSH: Yes.

PN39

JUSTICE ROSS: Then item 11, this is really the cross-referencing. With AFEI, you agree that clause 27 applies?

PN40

MR JACK: Yes, in situations where it's kind of an important change to hours of work, not just for the - not for something like - not for kind of a one-off roster change.

PN41

JUSTICE ROSS: A change to their regular roster?

PN42

MR JACK: Yes, that's correct, your Honour.

PN43

JUSTICE ROSS: Maybe 18.4(c), if that was amended to say "Changes to an employee's regular roster or ordinary hours of work will be subject to" - - -

PN44

MR JACK: Yes, something like that. I think, your Honour, it is kind of in relation to clause 18.4(b) where it talks about an employer just needs to give seven days' notice of a variation, and our view is, in those circumstances, if it's a one-off change to the roster, you don't have to consult with your employee.

PN45

JUSTICE ROSS: That is really - I think you would have to look at when we inserted that consultation clause in and it operates in conjunction - otherwise it would have no effect. If you simply had the employer can change on seven days' notice without consultation, why would you need clause 27, bearing in mind it's a statutory requirement to include it?

PN46

MR JACK: Yes.

PN47

JUSTICE ROSS: What we will do in the revised exposure draft is amend 18.4(c) so that it more accurately reflects the obligation that is in clause 27, and I think

that seemed to be your primary point. So, it would be that proposed changes to an employee's regular roster or ordinary hours of work are subject to clause 27, et cetera. All right?

PN48

Item 12, yes, this is one I struggled with a bit. The issue is the use of the term "applicable rate". The parties were asked to confirm whether the "applicable rate" refers to the shift rate or the minimum hourly rate. What is the difference between you?

PN49

MR ROBSON: I believe the union parties say that the overtime allowance is calculated from the shift rate and the employer parties say that it is calculated from the minimum hourly rate.

PN50

JUSTICE ROSS: The current award doesn't help you much, does it? It uses "applicable rate" as well; is that the problem?

PN51

MR ROBSON: That's correct.

PN52

JUSTICE ROSS: And we don't know. All right.

PN53

MS WALSH: Our explanation for that is that if the term "applicable rate" is being used, we would assume it is referring to a range of rates as opposed to one set rate, and given that there are two types of shift penalties, we would certainly expect that that term was trying to adapt to or to incorporate.

PN54

JUSTICE ROSS: I think we can determine the issue on the papers, that is the Full Bench. Do you want to say anything more than you have already said? You will have an opportunity in the revised exposure draft, if you want to say anything more about that issue, to say it.

PN55

It probably comes down to two things. Firstly, the construction of the current provision in context. Now, that might be, for example, and I don't know whether this is the case, but if the current award generally, in describing overtime, talks about a percentage of the minimum rate and yet here they are talking about a percentage of the applicable rate, they are using different language, that might suggest that they mean something that would go against your submission, whereas if they refer consistently to "applicable rate", that might lend weight to your position. So there is the construction of it in context. How does it look and how does it make sense in the current award - let's focus on that - and try and determine the current legal meaning.

PN56

The second thing that might throw some light on it would be - and this is less likely - any discussion when any of these provisions were put into the award, or the predecessor awards, whether there has been any dispute about them, are there any enterprise agreements, what do they say? That is of sort of less relevance, but it might pick up what parties thought had to be done in order to comply with the BOOT in relation to that issue.

PN57

I think the starting point is probably the language itself in context and then see if the history tells us anything. So, you might want to give some thought to that and you might want to supplement the submissions that are already in, but we can, I think, deal with that one. That is just going to be a construction argument and we can deal with it on the papers and we would do that once you have had an opportunity to file further material. Is everyone content with that?

PN58

MS WALSH: Yes.

PN59

MS McQUILLAN: Yes, your Honour, thank you.

PN60

JUSTICE ROSS: I don't know whether there might be some general arbitral authority about what is overtime paid in relation to shift workers. You might find - there is usually useful stuff in some of the earlier New South Wales Commission decisions on shift work. They had the five/seven day test cases. Not too much federally, but there might be something there that you may also be able to draw on. All right?

PN61

Item 13, this is to make it more grammatically correct, an ABI proposal, and that seems to be right. Anyone have any problem with that? That's just the getting rid of the word "for" in 18.6(a). I will read it out just so you can see how it makes more sense. 18.6(a) currently says:

PN62

*All time worked in excess of, or outside, the ordinary working hours in clause 18.2, or on a shift other than a rostered shift -*

PN63

Here is the relevant bit -

PN64

*will be paid for at 150 per cent of the applicable rate.*

PN65

You are just deleting the "for", so "will be paid at 150 per cent of the applicable rate", which is consistent with the way it is used elsewhere. No opposition to that? All right, I will take that out.

PN66



Item 14, payment for overtime. Don't worry about the clause reference in 24.2(a) in the first bit.

PN67

MS WALSH: Your Honour, before you summarise the issue, I did just want to sort of recapture what we were trying to say.

PN68

JUSTICE ROSS: Sure, absolutely.

PN69

MS WALSH: In our submissions, we have provided a clause, but what we were actually trying to do was just reproduce the current award clause.

PN70

JUSTICE ROSS: Yes, all right.

PN71

MS WALSH: So our preference is to go back to 24.2(b) of the current award.

PN72

JUSTICE ROSS: All right.

PN73

MS WALSH: The issue we take is that we have lost the wording "the appropriate rate" in the exposure draft and we have also included the wording "specified in clause 19.1(a)", so that is in the exposure draft, which we see as problematic.

PN74

JUSTICE ROSS: Let's deal with the items one at a time then.

PN75

MS WALSH: Sure.

PN76

JUSTICE ROSS: "At the appropriate rate", is that different to "will be paid a minimum of one hour's pay", if it was "at the overtime rate specified in clause 19.1(a)"? Isn't that what it is?

PN77

MS WALSH: Well, if they were recalled on a weekend, say on a Sunday, then the penalty rate would be applied instead.

PN78

JUSTICE ROSS: I see.

PN79

MS WALSH: So, if recalled, it would be paid at the rate of 200 per cent rather than the 150.

PN80

JUSTICE ROSS: Yes, all right.

PN81

MS WALSH: And then at 200 thereafter.

PN82

JUSTICE ROSS: You can say "a minimum of one hour's pay at the overtime rate" - it could be either "at the applicable overtime rate" or it could be "at the overtime" - well, it's really "at the overtime or penalty rate", isn't it?

PN83

MS WALSH: Yes. So you could change the reference, I suppose.

PN84

JUSTICE ROSS: "At the overtime or penalty rate"?

PN85

MS WALSH: Yes.

PN86

JUSTICE ROSS: Just bear with me. I follow the issue now. "At the applicable overtime or penalty rate specified in clauses 19.1(a) or 20.1."

PN87

MS WALSH: Yes, 20.1.

PN88

JUSTICE ROSS: Does that meet - - -

PN89

MS WALSH: Yes.

PN90

JUSTICE ROSS: I follow. I hadn't quite appreciated that by confining it to 19.1(a), it is not dealing with if you are recalled on a weekend. I follow that issue, and if you are doing that change, then you probably do need "applicable" because it can be either 19.1(a) or it can be 20.1. We can make this change, you can have a look at it in the revised exposure draft and see what you think, but let me test the proposition. In 19.1(b), it would read as it does now until you get to the second line:

PN91

*The employee will be paid a minimum of one hour's pay at the applicable overtime or penalty rate specified in either clause 19.1(a) or clause 20.1, on each occasion the employee is recalled to work.*

PN92

Does that meet your - - -

PN93

MS WALSH: It certainly does, yes.

PN94

JUSTICE ROSS: All right, we will see what you think about it when you get it and that will give you chance to consider is that right if they do get weekend and we will see where we go, but I think that change will address that issue.

PN95

Then we go to item 15. This is the interaction between the overtime and the minimum engagement clauses. There is a clear difference between you. Are you content to have that dispute dealt with on the papers?

PN96

MS WALSH: Yes, your Honour.

PN97

JUSTICE ROSS: And the Full Bench can decide it. Anything else you want to say about it?

PN98

MS WALSH: I don't think so. We have all sort of made a short submission.

PN99

JUSTICE ROSS: I will say any further subs can be in response to the revised exposure draft and then we will determine it on the papers. All right?

PN100

MS WALSH: The only thing I should say is to the extent that our position was supported by the Full Bench, we did make some suggestions to make some amendments.

PN101

JUSTICE ROSS: Yes, that's fine. Probably put any supplementary material and repeat what you have already put in.

PN102

MS WALSH: All right.

PN103

JUSTICE ROSS: Try and avoid - when you are putting in a further submission, don't just say you refer to your earlier ones because I don't want to have to read two bits of - - -

PN104

MS WALSH: Yes.

PN105

JUSTICE ROSS: Just try and capture - because there aren't many of these issues - just try and capture what your current position is and why you say you should succeed in that, and if you have alternate wording then put that in the further submission that you will file in response to the revised exposure draft. All right?

PN106

MS WALSH: Yes.

PN107

JUSTICE ROSS: Removals, 19.4(a).

PN108

MS McQUILLAN: Similar issues. I actually thought, your Honour, that it was the same issue but just split out into the - - -

PN109

JUSTICE ROSS: I see, yes, yes. All right, 15 and 16, we will deal with it in the same way.

PN110

MR JACK: And 17 as well, I think.

PN111

MS McQUILLAN: Yes, I think so.

PN112

JUSTICE ROSS: All right.

PN113

MS McQUILLAN: There's a lot of different sort of issues that each one raises, I think, so that might be why they have split them off.

PN114

JUSTICE ROSS: All right. 15, 16 and 17, perhaps we can just have a composite response to the revised exposure draft indicating what your position is and, if there are any variations required to the revised exposure draft, setting out what they are.

PN115

Item 18 is the AWU's proposition in relation to public holidays, 20.1.

PN116

MS WALSH: Yes, we suppose, just in reviewing some of these questions on what the minimum engagement was, we just noticed that there was a minimum for Saturdays and Sundays and it was odd that it wasn't there for the public holidays.

PN117

JUSTICE ROSS: Yes.

PN118

MS WALSH: Assuming that the employers would object.

PN119

JUSTICE ROSS: Well, take - - -

PN120

MS WALSH: We could go and have a look and see if it's been - - -

PN121

JUSTICE ROSS: Or if you want to pursue the claim, then you can look across awards.

PN122

MS WALSH: Yes.

PN123

JUSTICE ROSS: How does it interact, or is that really the issue with the rest of it?

PN124

MS WALSH: You would get it for - - -

PN125

JUSTICE ROSS: You get it as a part-timer.

PN126

MS WALSH: Yes.

PN127

JUSTICE ROSS: It would be odd that you would get it for a part-timer because you can only be rostered for a minimum of three hours on a public holiday.

PN128

MS WALSH: Yes.

PN129

JUSTICE ROSS: A casual would get it, they have to be rostered for a minimum of four hours, but you could roster a full-timer for one hour. That just seems slightly odd. Perhaps the employers can consider the position, too, and you might reach an agreement about how it works; otherwise then we get called on to determine whether we have a minimum engagement on a public holiday in circumstances where minimum engagements are specified for Saturday and Sunday and for part-timers and casuals on all days. It would be preferable if you could come up with an agreed formulation, but if you can't, I guess we will determine it.

PN130

If you can, again by the end of next week, just write in letting us know what you are intending to do with that. If part of it is that you intend to pursue a minimum engagement period, then just set out some draft directions, copy it to AFEI and ABI and United Voice, and I would encourage you to have some discussions between the four of you about it and you might be able to reach a resolution without running a major case on it.

PN131

MS WALSH: Yes.

PN132

JUSTICE ROSS: All right. Anything else on this award?

PN133

MS McQUILLAN: No, Your Honour.

PN134

JUSTICE ROSS: Thank you. I hope your day gets more interesting.

PN135

MS WALSH: Your Honour, sorry, I did have - - -

PN136

JUSTICE ROSS: Yes, sure.

PN137

MS WALSH: It's such a small thing.

PN138

JUSTICE ROSS: That's all right.

PN139

MS WALSH: I just noticed that clause 19.1 had an incorrect reference.

PN140

JUSTICE ROSS: This is in the exposure draft? Just bear with me for a second. Yes?

PN141

MS WALSH: 19.1(c), it's just an incorrect reference to 16.1.

PN142

JUSTICE ROSS: Yes.

PN143

MS WALSH: Which I think should be 15.1. It refers to the minimum hourly rate and 16.1, I think, is allowances, not the minimum hourly rate.

PN144

JUSTICE ROSS: That's right, and minimum hourly rates are dealt with in 15.1, yes, I think that's right.

PN145

MS WALSH: Yes.

PN146

JUSTICE ROSS: In the revised exposure draft, we would amend clause 19.1(c) so that the cross reference is to clause 15.1 and not to clause 16.1. All right? Thank you very much.

**ADJOURNED INDEFINITELY**

**[10.38 AM]**