



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER JOHNS

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2015/6)**

Educational Services (Schools) General Staff Award 2010

Melbourne

9.54 AM, THURSDAY, 21 JULY 2016

PN1

THE COMMISSIONER: Yes, good morning. Before we start with all of the issues of the objections, has a table been prepared in terms of – or a schedule or timetable for which witnesses are going to be called this afternoon, that would just be useful for the members of the Full Bench if we could know who it is intended might be before us, this afternoon?

PN2

MS GALE: Commissioner, the expectation we've been operating on is that this afternoon might be taken up with openings from the parties.

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THE COMMISSIONER: Yes.

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MS GALE: And that the witnesses would commence tomorrow morning.

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THE COMMISSIONER: Yes.

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MS GALE: If necessary, we would commence this afternoon - - I mean, if time permits, we would commence this afternoon with Mr McAlpine.

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THE COMMISSIONER: Yes.

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MS GALE: However - - -

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THE COMMISSIONER: Well, he might take some time.

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MS GALE: However the constraint that we have is that tomorrow morning Mr Wilkes will be in Adelaide at 10 am, and if possible, due to his time constraints, we would like to deal with him at 10 am.

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THE COMMISSIONER: Interpose.

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MS GALE: If that meant taking a hiatus in Mr McAlpine's evidence, than that's what we would propose to do.

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THE COMMISSIONER: Sorry, just remind me. Who's that person?

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MS GALE: Mr Wilkes.

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THE COMMISSIONER: Wilkes.

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MS GALE: But if we do not get to witnesses this afternoon then we would propose dealing with Mr Wilkes, Mr McAlpine, Dr Dann, D-a-n-n - - -

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THE COMMISSIONER: Yes.

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MS GALE: And Mr - - -

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THE COMMISSIONER: Holloway.

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MS GALE: Holloway, tomorrow.

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THE COMMISSIONER: Yes. Thank you, that's very useful. Parties, can I thank you for providing the table setting out the objections. Is the most convenient way, we just work through it?

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MR PILL: Perhaps I can assist.

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THE COMMISSIONER: Have there been more refinements?

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MR PILL: Yes, there have.

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THE COMMISSIONER: Are you going to tell me you've resolved them all?

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MR PILL: We've significantly reduced the number, you'll be pleased to know.

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THE COMMISSIONER: I'm very pleased.

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MR PILL: Can I hand you this document, thank you. The one I'm handing you, Commissioner, is the document that has unchanged text. So it has highlighting in it. There are a number of issues still about the general comments and issues but once you skip past those you will see that there are a number of rows that are shaded in yellow. Once you get past the people who are being proffered as experts you'll see that, particularly in relation to the other lay witnesses, that there are a number of objections that were not conceded but which we don't press, and I
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THE COMMISSIONER: So the experts – am I right, that's Junor, May and Strachan - - -

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MR PILL: Correct.

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THE COMMISSIONER: Yes. Yes, go on.

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MR PILL: And so you'll see – perhaps if I can take you to an example, if I take you to page 12, Commissioner, you'll see Mr Steve Adams from the University of Melbourne.

PN33

THE COMMISSIONER: Yes.

PN34

MR PILL: There's reference in the first row to an objection that was made, which was conceded. Then in relation to paragraph 8, 9 and 10, those objections aren't pressed.

PN35

THE COMMISSIONER: Aren't pressed?

PN36

MR PILL: Are not pressed.

PN37

THE COMMISSIONER: Right.

PN38

MR PILL: So that the ones you need to focus your attention on, Commissioner, are - - -

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THE COMMISSIONER: The things in yellow.

PN40

MR PILL: The things in yellow, and the general comments upfront which feed into the experts.

PN41

THE COMMISSIONER: Right. Okay, well that's useful. All right. Well, let's start on page 2.

PN42

MR PILL: Yes, Commissioner. Can I ask, are you intending to remain on transcript or is it going to be more efficient to work these - - -

PN43

THE COMMISSIONER: I think we're going to remain on transcript because if we make some agreements or whatever, we'll all have a permanent record of it.

PN44

MR PILL: If the Commission pleases. Perhaps I'll step you through then and my friend can comment. Just on the first page which relates to the general comments, in amongst the material and there were some documents that are entitled "literature reviews", and the NTEU submitted in soft copy USB, the articles that are referred to in those literature reviews. In addition there are some survey outcomes attached to Mr McAlpine's statement, and again, electronically the NTEU submitted some raw data, so some questions and answers where we're seeking clarification as to whether that's relied upon, whether it's going to be tendered. You'll see the explanation that was received, which is that it was by way of - - -

PN45

THE COMMISSIONER: Can we just do this by way of – so if we go to the Professor Glenda Strachan witness statement there's an attachment to the literature review, academic working hours claim.

PN46

MR PILL: Yes.

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THE COMMISSIONER: I guess my question is, what are we meant to do with this? And who wrote it?

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MR PILL: Well, indeed, Commissioner. So there's a few related issues here. The first, which is fairly mundane, was to get clarification as to whether the 13,000 pages of academic articles were intended to be tendered, were they being relied upon, how were they being relied upon, and the answer, in short, is - - -

PN49

THE COMMISSIONER: Yes.

PN50

MR PILL: No, the answer as I understand it, and what we're clarifying is that it's not sought to be tendered, it's there by way of – you'll see the NTEU comments there by way of disclosure, so it's – and it's available resource that appears but it's not sought to be tendered. So that's – but it segues into the more fundamental issue that we have with the literature reviews. Now there is a potential distinction between Dr Junor who is the author of the literature review that's attached as part of the first statement.

PN51

THE COMMISSIONER: Yes.

PN52

MR PILL: But in relation to Glenda Strachan and Robyn May, they attach these documents called "literature reviews". We ask the question that you'll see in no. 3

there. "On its' face they're unattributed hearsay. Who are the authors?" Now we didn't get an answer to the question, "Who are the authors?" But what is clear, is it's not Dr Strachan or Dr May, and they're in the nature of instructions. What appears - - -

PN53

THE COMMISSIONER: What does that mean?

PN54

MR PILL: Well, it might be a question directed to my friend but what appears to have gone on here is that the NTEU have, itself, produced a document, which it could do by way of submission, put it to the witness and said in a very leading way, "What do you think of that?" And the evidence at its highest is actually in Dr Strachan's statement on that section 2, which is at the second paragraph, "Both of these literature reviews reflect clearly the research on the matters which they cover in Australia". But as to - - -

PN55

THE COMMISSIONER: So just, where am I looking?

PN56

MS GALE: Page 5.

PN57

MR PILL: So it's page numbered 5.

PN58

THE COMMISSIONER: Yes.

PN59

MR PILL: The second – she starts in paragraph 1, referring to the literature reviews submitted in support of the NTEU applications. And she says, "Both of these literature reviews reflect clearly the research on the matters which they cover in Australia and other English-speaking countries, and which we generally compare ourselves in relation to hours worked and workloads in universities". And then in the second-last paragraph on that page, "The copious literature and long hours of work in the Australian workforce generally and the impact on the health of workers is well represented in the literature reviews".

PN60

THE COMMISSIONER: But how does that help us? Mr Borgeest, if you – anyone can help me out? How can that be of any useful, probative value to this Full Bench?

PN61

MR BORGEEST: The highest I can put that, Commissioner, is that it's a statement by someone with her experience that the literature review has captured broadly the state of learning in that body of knowledge.

PN62

THE COMMISSIONER: So what?

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MR BORGEEEST: Well, that's – that she'll be a person available to be tested on – off on that. It's - - -

PN64

THE COMMISSIONER: But I mean, but what do you want the Full Bench to do with the literature review? I mean, how – we can't rely upon it, we can't – it's not evidence, it's – what do we do with it? Why is it even here?

PN65

MR BORGEEEST: It's an overview of research findings in a body of knowledge that - - -

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THE COMMISSIONER: How does it help the Full Bench to know that there's been this research done?

PN67

MR BORGEEEST: Well, that will be a matter of specific submission, claim by claim. I would anticipate that in support of a claim such as that there would be limits on working hours, it would be relevant to point to material that illustrates the extent of working hours and the extent of uncompensated work, and - - -

PN68

THE COMMISSIONER: But surely then all you're saying is, there's been this research done on working hours. It doesn't prove the correctness of all of that. I'm just struggling to understand how the NTEU want us to use these literature reviews in a way that is properly probative from an evidentiary perspective. I mean, you know, if you look at, you know, "the copious literature of long hours of work in the Australian workforce generally, and the impact on the health of workers is well represented in the literary reviews" – well, you can't be cross-examined – maybe she could be cross-examined on that. You could say, "Well, it's not well represented in the literature reviews". But even if she's right, that it is well represented in the literature reviews, so what?

PN69

MR BORGEEEST: The opinion of the experts, Strachan and May, will not take things substantially further than the parties being – taking them to - - -

PN70

THE COMMISSIONER: But her opinion is, simply, that this is a very good literature review. That's what it boils down to. How does her opinion that it's a comprehensive literature review assist us to decide the matters which are before us? You don't ask us to rely upon what's in the literature review, do you?

PN71

MR BORGEEEST: Well, the literature review is ultimately in the form of a submission, is ultimately in the form of a submission but it's – that's the way it's prepared. But all that is added to that by the experts, Strachan and May, is a relevant verification that it has not been prepared with eyes closed to significant other bodies of work that are relevant to the questions.

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THE COMMISSIONER: Yes, I understand.

PN73

MR BORGEEST: So it's a negative verification in that sense, Commissioner.

PN74

MR PILL: Can I perhaps just one make brief comment. It's broadly consistent with what's been stated by my friend in the 11 July submission of the NTEU, the NTEU responded to a submission that we made about the voluminous materials and their relevance, and references at paragraph 8, the GO8 attack on the NTEU for providing voluminous materials. It relevantly says, and I'm quoting, "What the NTEU has attempted to do is to place before the Commission such factual material as it considers may be relevant to the case, including clear and non-contentious summaries of the state of the existing research and knowledge about this industry, and references to those materials. The NTEU has not been selective about these materials except as regards to relevance and currency.

PN75

This means the parties or indeed the Commission can refer to these where it's considered necessary or appropriate". Now what I take from that is, and this is one of the challenges for my client and it's a natural justice issue, but it's also just a practical issue in the programming of this proceeding. You can't dump 13,000 pages of material on the Commission with a summary that the NTEU have written, call instructions, stick it in front of an expert, and try and bootstrap that by saying, "What do you think about that? Is that a fair representation of all of these articles?" The experts don't even attest to the fact that they've read all the 13,000 pages that have somehow been summarised by persons unknown into the summary.

PN76

And so with respect to my friend's comment that they provide expert verification, I'm not sure if it's being suggested that May and Strachan are experts in all of the studies that are referred to in the literature review but if they are we would take significant issue with that. And so echoing the Commissioner's comments, in our view they shouldn't be admitted as evidence. The sections of their statements that refer to the literature review should not be admitted as evidence either, and the NTEU can make a submission. Now if they wish to make a submission that someone in the NTEU has prepared this literature, and here it is, then they can do that as part of their submissions. If the Commission pleases.

PN77

THE COMMISSIONER: Mr Borgeest?

PN78

MR BORGEEST: So long as we're not shut out from raising the literature reviews with these witnesses, either by letting them say the very modest things they've said in this section 2 and similar - - -

PN79

THE COMMISSIONER: But I guess what I'm struggling with is even if we allow in the sentence, "The copious literature on long hours of work in the Australian workforce generally and the impact on the health of workers is well represented in the literature reviews", I don't know, even if she's right, how that helps your case and what we, as the full Bench, are meant to do with it. Answer me that.

PN80

MR BORGEEEST: No, I can't tell you what you're supposed to do with it.

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THE COMMISSIONER: Then why should I receive it?

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MR BORGEEEST: No, there's – you shouldn't.

PN83

THE COMMISSIONER: All right. I think that's an important concession. Sorry
- - -

PN84

MS PUGSLEY: Commissioner - - -

PN85

THE COMMISSIONER: Ms Pugsley?

PN86

MS PUGSLEY: Another issue that we'd identified was the difficulty of testing the evidence - - -

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THE COMMISSIONER: Yes, of course.

PN88

MS PUGSLEY: Testing what is in the literature reviews, because the authors of the material that forms the basis of the literature reviews has not been called.

PN89

THE COMMISSIONER: Yes. Yes. Well, have we got to a position then that the literature reviews don't go in?

PN90

MR BORGEEEST: Commissioner, my concession was to the sentence in Strachan's report to which you drew my attention.

PN91

THE COMMISSIONER: Yes. But if that sentence comes out, the literature reviews come out too, don't they?

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MR BORGEEEST: We would seek that they be tendered.

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THE COMMISSIONER: And how do they help us?

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MR BERGEEST: The NTEU will rely on those literature reviews by way of submission.

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THE COMMISSIONER: Well, the - - -

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MR BERGEEST: The ones that are referred to in the reports of Strachan and May.

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THE COMMISSIONER: Well, does that deal with the issue, Mr Pell, that we say in relation to the literature reviews that they are put forward as submissions on behalf of the NTEU?

PN98

MR PILL: And if I can just clarify, and the relevant sections of their statements which is section 2 of Strachan and section 2 of May are not admitted.

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THE COMMISSIONER: Well, is that right, Mr Borgeest, Section 2 – let me just have a look at the May one, as well.

PN100

MR BERGEEST: Commissioner, those – look, the particular attack from my friend was on those provisions which referred to the literature review, which are specifically paragraphs 1, 2 and the penultimate one. And so I embrace them in the concession.

PN101

MR PILL: Perhaps I can clarify why we say - - -

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THE COMMISSIONER: So let's just deal with the Strachan one on page 5. The first paragraph there, that comes out, doesn't it?

PN103

MR PILL: The whole section is about the literature review but - - -

PN104

THE COMMISSIONER: Well, paragraph 3 says, "The national data collected on employment of staff in all Australian universities shows that the number and proportion of staff classified as general staff as opposed to academic staff has increased since the late 1990's". Is that contested?

PN105

MR PILL: Sorry, Commissioner?

PN106

THE COMMISSIONER: Is that contested?

PN107

MR PILL: I don't believe so. I – but - - -

PN108

THE COMMISSIONER: Then why do we leave that sentence in?

PN109

MR PILL: Well, my understanding, Commissioner, is the way this is presented here under section 2, the literature reviews, is she starts at the first sentence. "I refer here to the NTEU literature reviews", and I take that to be the section, and so each of the paragraphs including the one that you're referred to, or the next one which talks about a range of studies, she's essentially been providing commentary on matters that are identified in the literature reviews. And she attaches her own research about some other matters which we'll come to. Mr McAlpine also attaches commonwealth statistics to his statement, that speak for themselves. So I don't have any objection to the content, as such, but it's obviously being put in the context of the literature reviews and to provide commentary on it.

PN110

THE COMMISSIONER: Just near the fourth paragraph, "It is clear from range of studies that a large proportion of university staff including general staff work beyond their ordinary hours of work and many do not receive compensation, either monetary or time-related for these extra hours". As an expert, can she express that view?

PN111

MR PILL: Well, we would submit not, in the sense that what's clear from her statement and from her own research which then follows is that she researches in gender equity and employment equity. Now her research does gather data around things like demographics and hours of work. I don't believe that anywhere in her data does it go to some of the matters that she's referring to there, such as whether they receive compensation, either monetary or time related. So we acknowledge that she is obviously an academic of some standing in relation employment matters but particular expertise in gender equity issues, and that's her field of research and that's borne out by looking at her papers, but also her own research and her description of her research in section 3.

PN112

THE COMMISSIONER: Well, Mr Borgeest, isn't then really, when you read section 2 in its entirety, it is Professor Strachan expressing a view about what is contained in the literature reviews?

PN113

MR BORGEEST: Yes.

PN114

THE COMMISSIONER: And how is that helpful to the full Bench?

PN115

MR BORGEEST: Well, that view is - - -

PN116

THE COMMISSIONER: It might be very interesting, what she thinks the literature reviews say, but how does it help us?

PN117

MR BORGEEST: But it's not to the exclusion of that. There's – I mean, she makes specific reference to work that she's been involved in of particular note, et cetera. Where she's referring to the particular report, itself - - -

PN118

THE COMMISSIONER: To the extent that she can give some evidence about her own research and what's she's found, maybe the way to deal with it is we strike out section 2 and you be given some liberty to ask some question of her when she's in the box.

PN119

MR BORGEEST: That will do the trick.

PN120

THE COMMISSIONER: All right. We will strike out section 2 and you will be given liberty to ask any questions about the professor's own research in relation to these matters when she is called. Does that then – do we deal with it on the same basis in relation to Dr May, which is page 6, section 2?

PN121

MR PILL: Yes, Commissioner, I would submit the same approach. There's a reference again in this section to the witness' own work, so subject to that leave we'd concede that.

PN122

THE COMMISSIONER: All right. And is there a similar section in the Junor witness statement, is there?

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MR PILL: No, Commissioner.

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THE COMMISSIONER: No. Right.

PN125

MR PILL: There's a section with a similar title but a different subject matter.

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THE COMMISSIONER: Right.

PN127

MR PILL: That's a reference to a literature review conducted by the witness.

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THE COMMISSIONER: Yes.

PN129

MR PILL: And perhaps my friend can articulate - - -

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THE COMMISSIONER: That's her own, yes.

PN131

MS GALE: Sorry - - -

PN132

THE COMMISSIONER: His or her own. Yes, I understand. all right, so does that deal generally then with the literature review issue, Mr Pill?

PN133

MR PILL: Yes, Commissioner. The only related issue, sorry, Commissioner - - -

PN134

THE COMMISSIONER: Yes.

PN135

MR PILL: Is coming back to where I started the underpinning articles, which are technically filed in the Commission and served on us, that the indication from the NTEU is that they're not seeking to tender that material. And so short of it being specifically put to a particular witness and put in through that witness, that would be the situation, so that the Commission is relieved of having to read all of those articles. If the Commission pleases.

PN136

THE COMMISSIONER: Yes, I understand that. So does that deal with the general comments? Will we then go through each of the witness statements now?

PN137

MR PILL: It does, Commissioner.

PN138

THE COMMISSIONER: Yes. So Glenda Strachan, attachment 2, we've deal with that and attachment 3, so the literature reviews are there by way of a submission on behalf of the NTEU. Section 2, we've deal with that because that will be removed. Section 3, her own research, what's the issue here?

PN139

MR PILL: The issue here, Commissioner, really is one of relevance. You will see this bit starts on page 6. She gives evidence of a particular study she did in relation to gender equity issues and you'll see, for example, on page 9, the key findings for professional and it talks about essentially the gender segregation. It talks about percentages by gender at particular levels. There is no apparent relevance to the claim in the proceeding. Now the response from the NTEU was that the research describes the incidence of casual employment and fixed term employment amongst university workers. The first is relevant to the number of people who might benefit from the potential cost impact the NTEU claims about

additional payment for academic casuals, and the second is relevant to the merits of the employer proposed for a new category of fixed term employment.

PN140

THE COMMISSIONER: Isn't all that just something that can be dealt with in the submissions?

PN141

MR PILL: Yes, it can, Commissioner. Look, we acknowledge that buried in amongst what is essentially a gender study there are some tables of information. There are about five other reports of demographic information before the Commission. It's an odd matter to be trying to bring in through a particular expert. But we acknowledge that it can largely be dealt with through submission. The conclusions of the particular study, in our respectful submission, bear no relevance to any matter that the Commission needs to determine, so having an expert come and give evidence to the Commission about gender impacts that don't relate to any of the matters before the Commission is not particularly helpful, in my respectful submission. But I'm happy to proceed on the basis that you've indicated that it's a matter that can be dealt with in submission as to the relevance of her particular research.

PN142

THE COMMISSIONER: Yes. All right, well I'm inclined to retain section 3. As I say, it'll be a question of weight and subject to submissions. All right, that brings us to Junor. I'll just grab that one. Page 4, the last paragraph on that one.

PN143

MR PILL: It's a minor point, Commissioner. You'll see the response is – so there's a reference on page 4 and the top – basically, what she's been doing for the last – or sorry, from 2011 to 2014, and she talks about the skills required for non-academic staff. She's been called essentially as an expert in relation to - as we understand it in relation to the claims for academic discipline and currency, and potentially in relation to an academic work regulation. The evidence doesn't go to academic staff. Now the response is, it's not – the research findings as described are not relied upon. The material relied upon is solely to supplement the statement of expert witness experience and background.

PN144

THE COMMISSIONER: Just to bolster her expertise.

PN145

MR PILL: So – but we don't take any - - -

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THE COMMISSIONER: If it's going in on that basis then there's no real issue, is there?

PN147

MR PILL: No, there's not and there's also no real point because we want to qualified her as an expert in something that's not in issue in the proceedings, but I don't – it's largely irrelevant.

PN148

THE COMMISSIONER: We probably don't need to press that.

PN149

MR PILL: If the Commission pleases.

PN150

THE COMMISSIONER: Then we're up to section 4.2.

PN151

MR PILL: So the issue here, it goes primarily to – well, two issues, the first is, I guess, relevance on currency, notwithstanding the NTEU submission that I took you through in July that dealt with the currency. We have a literature review with references to literature from 1933, 1957, 1970's, et cetera. The broader issue here, Commissioner, is there's a lot of material that's been put before the Commission about the increase in the number of casual academics, or the reasons that might sit behind that. But there's no variation that's been dealt with by this full Bench to cap the number of academic casuals or to convert the academic casuals, or to somehow respond in some way to this issue. There's a claim for what's been badged, "discipline currency", and I'll call it "reading policies". So there's two allowances that are sought, one of 10 hours for every academic who is there for at least six hours, to be paid 10 hours to read some university policies. And secondly, that for every four hours of lectures you do, you should get an extra hour to maintain currency discipline.

PN152

The number of casual academics, or why we have casual academics is not relevant to those determinations. It's not probative of any matter that the Commission is going to need to determine. My friends of the NTEU have indicated that it might be relevant to how many people are affected and we can acknowledge that but - - -

PN153

THE COMMISSIONER: Doesn't it sort of indicate that there's sort of a more pressing need for this, because there's so many of them now? Isn't that how it's put?

PN154

MS GALE: Commissioner, we'd say it's relevant to the merits of granting the application in terms of its impact in the workforce. It's relevant to understand the composition of the casual academic workforce and the proportions within that, which Junor's research goes to. It's also relevant to our response to the employer's proposal for a new category of fixed term contract employment which is, in part, founded upon evidence relating to an alleged need for greater flexibility in employment practices, and the extent of casual employment clearly relevant to what the current level of flexibility in the industry already is.

PN155

THE COMMISSIONER: Do you say it exists already?

PN156

MS GALE: I'm sorry?

PN157

THE COMMISSIONER: You say that level of flexibility exists already?

PN158

MS GALE: Yes. We say it's perhaps already too high. So the evidence inherent in this particular part of the statement is relevant to a number of different aspects of the case.

PN159

MR PILL: Look, in a broad sense it's not irrelevant but the issue of the insecure nature of casual employment is not a claim currently before the Commission.

PN160

THE COMMISSIONER: Well, we'll leave it in and it can be a question of weight.

PN161

MR PILL: If the Commission pleases.

PN162

THE COMMISSIONER: That brings us to Robin May. So section 2 in attachment 1, we've dealt with that. Section 4, her own research, what's the issue here?

PN163

MR PILL: Look, it's a similar issue to Strachan, Commissioner, and indeed, May seems to be Strachan's protégé. They researched together in gender equity.

PN164

THE COMMISSIONER: It's a matter of submissions.

PN165

MR PILL: If the Commission pleases.

PN166

THE COMMISSIONER: All right, then we come to Mr McAlpine. In his first witness statement if we go to - - -

PN167

MR PILL: So it's paragraph 16(a) and attachment J. Perhaps I can just make a general observation. Mr McAlpine puts in three statements. They're predominantly vehicles to attach documents, and in amongst those documents there's - and he's the author of none but we don't take great objection to that. The documents could have been handed up, by and large. This particular area, there are surveys that were apparently conducted by the NTEU and they've attached outcomes of those surveys but in this particular case, and the reference is at 16(a), part way down, "Attachment J is an analysis of the data in relation to workloads prepared by Dr Paul Niest", or "Niest, policy and research co-ordinator from the NTEU national office, analysing the results. To the extent that analysis makes claims of fact, there are drawn directly from the data or from sources indicated in the report". So we say that Mr Niest hasn't been called. It's - - -

PN168

THE COMMISSIONER: How can you test it?

PN169

MR PILL: Well, indeed, how can we test it? To the extent that it makes claims of fact that are drawn directly from the data – the report itself is in and so this is really, at best, a submission.

PN170

MR BORGEEST: We certainly don't press that sentence, "To the extent that the analysis makes claims", et cetera. That is a submission and we'll withdraw that from the statement.

PN171

THE COMMISSIONER: So that last sentence, we strike out? Strike out the last sentence, "To the extent that analysis makes claim to fact. These are drawn directly from the data or from sources indicated in the report". We strike that sentence out. And then 16(b)?

PN172

MR PILL: So 16(b), he references a survey conducted by Dr Kenny and he says, "The results were analysed in Dr Kenny's witness statement and there's proceedings" – it's probably a technical point, given that Dr Kenny is being called, but as to why Dr Kenny's - - -

PN173

THE COMMISSIONER: So why isn't that attached to his?

PN174

MR PILL: Indeed. That's - - -

PN175

THE COMMISSIONER: When Dr Kenny is called we'll give you some leave to put this Annexure K to him. Does that deal with the issue?

PN176

MR BORGEEST: I understand, Commissioner.

PN177

THE COMMISSIONER: Mr Pill, that deals with it, doesn't it?

PN178

MR PILL: Yes, Commissioner.

PN179

THE COMMISSIONER: Yes, all right. To that extent, 16(b) comes out of Mr McAlpine's. All right, then statement 2, paragraph 9 - - -

PN180

MR PILL: There's two issues, here, Commissioner. One is acknowledging that we're in the Commission and that we're not bound by the rules of natural justice.

This does stretch the bounds of hearsay, lack of probative weight, you know, unattributed various inquiries of experienced industrial and organising staff - - -

PN181

THE COMMISSIONER: What do the universities say? Do they say there is – do they deny this?

PN182

MR PILL: Well, the second issue is relevance. This – on its face, this question that there is some annual leave that – so there's one fixed-term contract, it comes to an end, the staff member starts a new fixed term contract and rather than have the annual leave paid out – I don't have instructions as to whether that occurs or not but the question is relevance. If this is being put forward as evidence of fixed term contracts being some sort of contrivance then it falls extraordinarily short, because this is the totality of the evidence on this issue, other than Elodie Janvier who gives evidence that in two contracts her annual leave was carried forward.

PN183

THE COMMISSIONER: Sorry, Mr Borgeest, the fact that Mr McAlpine received no report that any university pays out annual leave as a question of practice or policy when employment continues from one contract to the next, how does that help the Full Bench?

PN184

MR BORGEEST: Well, his - - -

PN185

THE COMMISSIONER: What does it go to?

PN186

MR BORGEEST: (Indistinct) relevance question. I might defer - - -

PN187

THE COMMISSIONER: Yes. Yes, Ms Gale?

PN188

MS GALE: It goes to the employer's claim in relation to payments made at the conclusion of the fixed term contract, and their application to vary the award in relation to that issue. It goes to the question of whether - - -

PN189

THE COMMISSIONER: So what are they saying about that? What's their claim in relation to that, remind me?

PN190

MS GALE: The award currently provides that at the conclusion of some categories of fixed term contract employment that the employee receives a payment akin to a severance payment. And they're seeking to remove that and their fundamental proposition is that it's not a severance circumstance.

PN191

THE COMMISSIONER: So they want to be able to do what Mr McAlpine says they're doing anyway?

PN192

MS GALE: No. No, they're wanting to remove an award obligation to pay a compensatory payment on termination and we are providing evidence to the effect that the practices in the industry do not treat some categories of fixed term contract employment as though they were strictly fixed term contracts. There is an underlying and continuing employment relationship that continues from - - -

PN193

THE COMMISSIONER: So how does that help us?

PN194

MS GALE: That continues from - - -

PN195

THE COMMISSIONER: How does that help us?

PN196

MS GALE: One contract to the next. And we say that is relevant to the question of whether a severance payment is justified in those circumstances.

PN197

THE COMMISSIONER: But if the award provides for a severance payment at the end of one fixed term of contract, moving onto another - - -

PN198

MS GALE: No, it's when there isn't another.

PN199

THE COMMISSIONER: When there isn't?

PN200

MS GALE: Yes.

PN201

MR PILL: Can I address - - -

PN202

THE COMMISSIONER: Yes.

PN203

MR PILL: Your question highlights that this attempt to connect whether annual leave is paid out or not where a staff member is paid another contract, is completely irrelevant to the variation that the employers have sought. So the current situation under the award is that where there is two or more consecutive contracts of a particular sort, so under the research or specific task category, and the staff member is not given a further contract then they're effectively entitled to a severance payment. And they're, on my reckoning, the only employees in Australia who have that benefit where there's an expiration of a fixed term contact. We've put in a submission about that. We submit that it is inconsistent

with the NES and we've made a submission that it's also unfair, or doesn't – it's not a necessary part of the fair and relevant safety net.

PN204

THE COMMISSIONER: Safety net.

PN205

MR PILL: The annual leave question and whether it's paid out or not, is not relevant to any of those matters and with respect to Ms Gale, it's grasping, Commissioner.

PN206

THE COMMISSIONER: Well, Ms Gale, I'll come back to you. In respect of paragraphs 9 to 12, what work do they have to do? What would you have the Full Bench do with those paragraphs, in terms of the issues we have to decide?

PN207

MR BORGEEEST: If that evidence isn't undermined then it would be material that the Bench would be invited to draw inferences from it, that that is the practice.

PN208

THE COMMISSIONER: So, what if it is the practice? How does it help us?

PN209

MR BORGEEEST: Well, I acknowledge that the submission is exhausted, Commissioner.

PN210

MS GALE: It helps the Bench in understanding the actual character of the employment that's involved and the employment relationship that underlies it. Why the original Full Bench determined that it was appropriate to the safety net that there be a severance payment in those particular circumstances - - -

PN211

THE COMMISSIONER: But this doesn't deal with severance payments, this just deals with annual leave.

PN212

MS GALE: I'm sorry?

PN213

THE COMMISSIONER: This deals with annual leave.

PN214

MS GALE: Yes, which is an indicia of the employment relationship that we say is evidence - - -

PN215

THE COMMISSIONER: Just answer me this question.

PN216

MS GALE: Yes.

PN217

THE COMMISSIONER: Finish this sentence. The Full Bench should read paragraphs (9) to (12) and do what with it, in order to address one of the claims that is before us?

PN218

MS GALE: And conclude that there is evidence that the pattern of employment of fixed term contract employees in universities is such that the current award provision is an appropriate safety net.

PN219

THE COMMISSIONER: How does help us do that?

PN220

MS GALE: We will be submitting that the use of fixed term contracts in sequential employment, contract after contract, in these areas of employment are more reflective of an administrative and funding convenience for the employer than of the genuine employment relationship, and that the original Full Bench decision which introduced the severance payment reflected the fact that these people do have a level of continuing employment with the employer that when the cycle of contracts ends, it is appropriate in those circumstances where the work is continuing and they're not giving that work to those people, that there be a severance payment paid. And the fact that as a matter of practice the employers from contract to contract, do not treat the employment relationship as having ended but carry forward the entitlements of the employee. If the employment relationship ended at the end each contract people would be paid out.

PN221

THE COMMISSIONER: Why can't you put this to the universities' witnesses for cross-examination?

PN222

MS GALE: Well, we can. We've also - - -

PN223

THE COMMISSIONER: Well, maybe that's a better way of dealing - - -

PN224

MS GALE: We've also – we've also put - - -

PN225

THE COMMISSIONER: Maybe that's a better way of dealing with it. I mean, regardless of the fact that you know, it's Mr McAlpine's sort of anecdotal experience, and based on some responses that he's received – I know we're not bound by the rules of evidence but I do think that this crosses the boundary in terms of hearsay and the like. I'm not satisfied about its probative value to the issues in dispute before the Full Bench and I propose to strike out paragraphs 9 through to 12.

PN226

MS GALE: Paragraphs 9 to 12?

PN227

THE COMMISSIONER: Yes. Now, and that brings us to Steve Adams.

PN228

MR PILL: Yes, Commissioner.

PN229

THE COMMISSIONER: Just let me grab the folder – paragraph 12.

PN230

MR PILL: We can deal with 12 to 20 together, Commissioner, they - - -

PN231

THE COMMISSIONER: Yes. Sorry, I might be – sorry, I'm looking at the wrong – my apologies. Mr Pill?

PN232

MR PILL: Relevance and opinion, Commissioner. There's a lot of it through the statement. We've not pressed a number of objections. We acknowledge it can be dealt with in submissions, potentially, but it should not be permitted, in my submission.

PN233

MR BORGEEST: It is an opinion. The strict application of the rules would exclude it. It's a pithy statement of the fundamental problem by a person – by a senior official whose been dealing with these issues for a long time. The universities - - -

PN234

THE COMMISSIONER: The fact that he personally characterises it is something.

PN235

MR BORGEEST: It's a pithy opinion. That's what it is.

PN236

THE COMMISSIONER: And in paragraph 12, the final sentence will be removed. In paragraph 20 – all of 20 comes out. Twenty-one – okay, then we just delete from "somehow chooses to ignore the uncompensated overtime being worked with full (indistinct) after work (indistinct)". That brings us to Karen Dann, volume 3 - - -

PN237

MR PILL: She has two statements but in her first statement - - -

PN238

THE COMMISSIONER: Just let me grab that. Yes, the first statement at paragraph 10, can we read that. Mr Pill?

PN239

MR PILL: So we've raised issues of relevance. The explanation that's been provided is it's relevant to employer witness evidence that the preparation encompasses work done in the nature of discipline and currency. So just - - -

PN240

THE COMMISSIONER: Where? Where does it say that? I mean, I see what the explanation is but how – where is that in the paragraph?

PN241

MR PILL: We would submit it doesn't. I could only – I wrote down "how", question mark, Commissioner. The only way I could get close is to draw an inference from the fact that she doesn't have time to do research – "virtually impossible to undertake a significant amount of academic research", that the implication or the inference is that she's spending all of the other time preparing and it extends beyond the incorporated hours that form part of the casual rate. But in my respectful submission it doesn't - - -

PN242

MR BORGEEST: No, it's evidence of the experience of this witness of being unable to perform disciplinary currency work within the time that she's been - - -

PN243

THE COMMISSIONER: But she doesn't say, "I don't have enough time to perform disciplinary currency work", does she?

PN244

MR BORGEEST: She doesn't say that in terms, it's only by way of an inference from the proposition that it's virtually impossible to undertake a significant amount of academic research, so it's a matter of the weight of the evidence, in our submission.

PN245

THE COMMISSIONER: Well, I'm inclined to remove paragraph 10 and when Ms Dann is called you'll have leave to ask additional questions about her capacity to undertake disciplinary currency work.

PN246

MR PILL: Can I just say this before the Commissioner concludes, that if you turn the page, she's given the whole section of evidence on - - -

PN247

THE COMMISSIONER: Yes.

PN248

MR PILL: Maintaining disciplinary currency. It's paragraph 17 through 28.

PN249

THE COMMISSIONER: Well, I'll leave my ruling as is.

PN250

MR PILL: If the Commission pleases.

PN251

THE COMMISSIONER: To the extent that it's necessary, you'll have some leave but we note that there are paragraphs there dealing with it.

PN252

MR PILL: I understand, Commissioner.

PN253

THE COMMISSIONER: I think that brings us to Andrew Giles, paragraph 8.

PN254

MS PUGSLEY: Commissioner, in - - -

PN255

THE COMMISSIONER: Just bear with me, sorry.

PN256

MS PUGSLEY: Thanks.

PN257

THE COMMISSIONER: Ms Pugsley?

PN258

MS PUGSLEY: Thanks, Commissioner. In terms of the constraints of yesterday and having to file by 4.30, there are three issues here that we would have highlighted, had we sent a further document yesterday, which I'd like to take you to. That is that - - -

PN259

THE COMMISSIONER: Is this in relation to Giles?

PN260

MS PUGSLEY: Well, one is in relation to Giles, one is in relation to Holloway, and one is in relation to – sorry, there are four – Holloway, Ford, Giles and Schroder, and I'll take you to each of those, Commissioner. In relation to Mr Holloway - - -

PN261

THE COMMISSIONER: Can we deal with Giles? It's - - -

PN262

MS PUGSLEY: Absolutely, we can.

PN263

THE COMMISSIONER: Just open in front of me now, and I'm dealing with, first of all, paragraph 8.

PN264

MS PUGSLEY: Thank you. Paragraph 8 of Mr Giles' statement, in the third sentence refers to Mr Giles having asked a colleague why he worked such long hours, to which the colleague replied that he understood that was what the university expected and that he would not have any realistic prospect of career

advancement unless he was seen to put in long hours. We can't see that the issue of career advancement is relevant to the claim. The claim is that the employer should take steps to make sure that employees, general staff employees are not working excessive hours or overtime unless they are compensated.

PN265

THE COMMISSIONER: But I think my problem with it is, I mean, it's just – the hearsay nature of it is just extraordinary. I mean, we don't identify who the staff member is, we don't – nothing – I'm struggling to understand the probative value of it, at all. It is hearsay material that would be excluded under a strict rule. But how can it help the Full Bench decide anything, that Mr Giles had a conversation with someone who he doesn't identify, and this person told him, blah?

PN266

MR BORGEEEST: Commissioner, that's a basis to draw an inference. In that university people do experience pressure of that type.

PN267

THE COMMISSIONER: I can't see it getting that high, and the sentence is to be removed. Now, Ms Pugsley, you have some other issues with Mr Giles?

PN268

MS PUGSLEY: If I could take you to page 18 of the consolidated document, so if you move one page forward - - -

PN269

THE COMMISSIONER: Yes.

PN270

MS PUGSLEY: In relation to Mr Holloway - - -

PN271

THE COMMISSIONER: Sorry, do you have anything else in relation to Giles?

PN272

MS PUGSLEY: I'm sorry. No, we don't.

PN273

THE COMMISSIONER: Right. All right, now we'll go to Holloway. Just bear with me. Yes, I now have Holloway.

PN274

MS PUGSLEY: Thank you. It's a relatively short statement. If I take you to the second page, and the subheading, "University of Wollongong, recordkeeping of general staff working hours". Mr Holloway has filed two statements. I'm talking about the first one, Commissioner.

PN275

THE COMMISSIONER: I've got the one that begins, "I resigned from employment from the University of Wollongong".

PN276

MS PUGSLEY: That's a supplementary statement.

PN277

THE COMMISSIONER: Right.

PN278

MS PUGSLEY: And we have no issue with the supplementary statement.

PN279

THE COMMISSIONER: Yes, I have – I - yes, yes, yes. So which paragraph?

PN280

MS PUGSLEY: Paragraph 8, which is the first paragraph on the second page.

PN281

THE COMMISSIONER: Yes.

PN282

MS PUGSLEY: And all of the paragraphs which follow, to the end of the statement, go to issues that Mr Holloway has with the accuracy of the time-recording system at the University of Wollongong. The NTU claim is that employers should not require general staff to work overtime unless it's been compensated. So it doesn't go to the issue of whether or not Mr Holloway was compensated for having worked overtime, or flexitime.

PN283

MS GALE: Commissioner, this evidence is simply an example of a university having a system in place which prevents staff from properly recording, and therefore claiming, overtime that they have worked and therefore, is an example of a step the university could take to prevent that from happening in its - - -

PN284

THE COMMISSIONER: I'm inclined to allow it in and it can be a matter of submissions.

PN285

MS PUGSLEY: Thank you, Commissioner. The next one I would like to draw your attention to is on page 19 and it is the witness statement of Karen Ford.

PN286

THE COMMISSIONER: Bear with me. Karen Ford. Yes, which paragraph?

PN287

MS PUGSLEY: This is paragraph 5.

PN288

THE COMMISSIONER: Yes.

PN289

MS PUGSLEY: The first sentence reads, "I'm classified at the top of HUW Level 4 and earn \$63,359 per annum". And the second sentence relates to an attempt to be reclassified. The NTEU has conceded the second sentence that it's about

reclassification, not about the NTEU claim. We still don't see the relevance as to why the fact that Ms Ford is classified at the top of HUW Level 4, relates to the NTEU claim.

PN290

MS GALE: Commissioner, it's relevant in that different HUW levels have access to different entitlements in relation to overtime, toil, et cetera. Where she sits in that structure is relevant to which parts of the award would apply to her and which parts of the agreement would apply to her.

PN291

MS PUGSLEY: Commissioner, we don't see this as a major issue.

PN292

THE COMMISSIONER: Well, we'll leave the sentence in.

PN293

MS PUGSLEY: And Commissioner, the final one to draw your attention to is on page 21, and it's in relation to the statement of Dr Schroder.

PN294

THE COMMISSIONER: Of what paragraph?

PN295

MS PUGSLEY: I'm sorry. I've finished with Ms Ford.

PN296

THE COMMISSIONER: Right.

PN297

MS PUGSLEY: Just moving onto Dr Schroder.

PN298

THE COMMISSIONER: Just bear with me. Yes, which paragraph?

PN299

MS PUGSLEY: At paragraph 26, the third sentence of that paragraph, Commissioner.

PN300

THE COMMISSIONER: Just bear with me.

PN301

MS PUGSLEY: To do with complaints that Dr Schroder heard from other staff. "At a mid year meeting of staff in the department there were many complaints about the workload of staff". Now I understand the point that the NTEU has made about how this is being sought to be relied on, in terms of hearsay, that it's not proposed to be led to prove the truth of what was said, but evidence that Dr Schroder heard the complaints being made. Nevertheless, our concern is that the evidence can't be tested because those who made the complaints have not been called.

PN302

THE COMMISSIONER: But it's only being advanced on the basis that he said he's overheard complaints.

PN303

MS PUGSLEY: Yes, I understand that that's the point that NTEU has made.

PN304

THE COMMISSIONER: Well, if it's only going in on that basis, there's not much to be complained about. It probably doesn't assist us anyway.

PN305

MS PUGSLEY: No.

PN306

THE COMMISSIONER: But it goes in on that basis.

PN307

MS PUGSLEY: Thank you, Commissioner. Those were all the issues that we wanted to raise.

PN308

THE COMMISSIONER: All right. Does that mean we're done? Any outstanding issues?

PN309

MR PILL: No. Can I just – just for some clarity for this afternoon and expectations of the Bench, perhaps just to help manage, we are trying to confirm the sequencing after that date. There are a couple of challenges in relation to 18 October. The Bench has listed some more dates for the 18th, 19th, 20th and 21 October. Is now the right time to raise those with you?

PN310

THE COMMISSIONER: Yes. Yes, yes. I may not be able to answer you, but raise them with me.

PN311

MR PILL: Part of the issue, Commissioner, is identified, which I didn't appreciate when it was first mentioned by the Full Bench. I'm actually flying back into the country from America, the night before, after three weeks. Now on the current juggling it's likely that our witnesses will have been concluded by then. But as I understand it from Mr Ruskin, he has a challenge with the 18th, as well, and so to the extent that it was intended to segway into the research institute's issue, we may end up witnessless, if I can put it that way, on the 18th - - -

PN312

THE COMMISSIONER: Right.

PN313

MR PILL: As well as, I guess from my personal perspective, if there was any capacity to perhaps vacate that date that would be my final preference.

PN314

THE COMMISSIONER: But we're still good to go on 19, 20, 21?

PN315

MR PILL: We are, Commissioner. There's some juggling with witnesses and I haven't had the opportunity this morning to put to Mr Ruskin, if they had to start on the 19th, would that cause him any difficulties, but I'm not aware that it would.

PN316

THE COMMISSIONER: Any opposition to us vacating the 18th?

PN317

MS GALE: Commissioner, at this stage, we would ask you to hold onto it until we have – we've not seen the revised employer witness schedule and we're doing our own juggling, as well. We're not necessarily opposed to that outcome but we think it's a little early to express a view.

PN318

THE COMMISSIONER: All right. Well, why don't we just flag it, at this stage, and continue discussions and then come back to – maybe just email my chambers about the 18th.

PN319

MR PILL: If the Commission pleases, thank you.

PN320

THE COMMISSIONER: Is there anything further? Yes?

PN321

MS GALE: Commissioner, can I just say in terms of the witness statements and the changes that have been settled today, his Honour, Vice President Catanzariti, used words on Monday about wanting clean witness statements. Can I just seek your guidance on whether you simply want a clear indication at the commencement of each witness of what words and parts have been omitted, or do you want us to supply replacements statements with those omissions?

PN322

THE COMMISSIONER: I understand the Vice President's preference is for the latter.

PN323

MS GALE: Can I indicate then that I don't think that's possible for the witnesses this week, but we will endeavour to make it so from next Wednesday.

PN324

THE COMMISSIONER: I will inform the Vice President of that. Anything further, this morning? Thank you, very much, we're adjourned.

ADJOURNED INDEFINITELY

[11.06 AM]