



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

1052566

JUSTICE ROSS, PRESIDENT

AM2014/305

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/305)**

Sydney

9.02 AM, MONDAY, 12 OCTOBER 2015

Continued from 1/10/2015

PN11884

JUSTICE ROSS: Could I have the appearances in Sydney, please.

PN11885

MR DIXON: May it please your Honour, I appear for the Ai Group.

PN11886

JUSTICE ROSS: Mr Dixon.

PN11887

MR M SECK: May it please your Honour, Seck, initial M. I appear for the Pharmacy Guild of Australia with Ms Wellard, initial S.

PN11888

MS S WELLARD: If it pleases, Wellard, initial S, I also appear for the Australian Hotels Association.

PN11889

MR L IZZO: Izzo, initial L, your Honour, for ABI New South Wales Business Chamber.

PN11890

JUSTICE ROSS: Thank you.

PN11891

MR G PARKES: Parkes, initial G, on behalf of Restaurant and Catering Industrial.

PN11892

MS S BURNLEY: Burnley, initial S, for the Shop Distributive and Allied Employees Association.

PN11893

MR N ROBSON: Robson, initial N, for United Voice, if it please.

PN11894

JUSTICE ROSS: And in Melbourne.

PN11895

MR P WHEELAHAN: If your Honour pleases, Wheelahan, P. I appear for the NRA, MGA, and the ARA.

PN11896

MR C BRIAS: Brias, initial C, for the NRA, your Honour.

PN11897

JUSTICE ROSS: Thank you. The purpose of this mention is set out in a statement issued on 1 October. It deals with the scheduling of the expert witnesses. There was a draft schedule of the expert evidence attached and parties were given an opportunity - or directed to file any comments in relation to the draft schedule by no later than 4 pm last Thursday.

PN11898

A number of comments have been filed. Subject to one thing I want to say about the Ai Group's comments, none of the other comments appear to seek any change to the schedule of the expert witnesses.

PN11899

MS BURNLEY: Your Honour, I must apologise, the SDA did miss putting in a comment regarding the scheduling.

PN11900

JUSTICE ROSS: It's not the first time. There have been a number of occasions where you've put in late comments. You did the same thing with the retail lay evidence last week. We didn't receive your comment until after the due date.

PN11901

MS BURNLEY: Yes, I must apologise, your Honour. That was - - -

PN11902

JUSTICE ROSS: What's your comment in relation to this?

PN11903

MS BURNLEY: The comment relating to this one - and I've had discussion with the parties that are here in Sydney, I haven't been able to discuss it with the party in Melbourne - is that the difficulty with it is Professor Peets on the Wednesday, because he only arrives in the country at midnight that Tuesday - Tuesday to Wednesday - from being overseas. So the proposal would be to move both Professor Peets and Dr Ian Watson to Friday morning because they're both dealing with the same report. So that would mean that there would be Professor Peets, Dr Ian Watson and Serena Yu on Friday morning.

PN11904

JUSTICE ROSS: How long is the cross-examination estimated, Mr Izzo, for Peets and Watson?

PN11905

MS BURNLEY: Your Honour, I think it was 30 minutes each.

PN11906

MR IZZO: Peets, your Honour, is an hour and 10; and Dr Yu, I think was approximately one and a half - yes, approximately one and a half hours.

PN11907

JUSTICE ROSS: One and a half hours for Dr Yu?

PN11908

MS BURNLEY: And Watson is one hour.

PN11909

JUSTICE ROSS: And Watson?

PN11910

MR IZZO: Watson, one hour, your Honour.

PN11911

JUSTICE ROSS: So we could have Peets at 11 on the Friday and - well, I know the estimates are rough, but we could have Dr Watson available from 12.

PN11912

MR IZZO: Sorry, your Honour, if I could just - apologise - those numbers were actually a bit off. The numbers are Peets is half an hour.

PN11913

JUSTICE ROSS: Yes. Yu?

PN11914

MR IZZO: Dr Yu is one hour.

PN11915

JUSTICE ROSS: All right.

PN11916

MR IZZO: And Watson is half an hour.

PN11917

JUSTICE ROSS: Did you say Peets was half an hour?

PN11918

MR IZZO: Yes, your Honour.

PN11919

JUSTICE ROSS: All right. So Yu at 9.30, Peets at 10.30, and Watson at 11. Anything else? No. What about the location?

PN11920

MS BURNLEY: Your Honour, the SDA is intending to fly their experts into Melbourne for those hearings.

PN11921

JUSTICE ROSS: Where are the experts based?

PN11922

MS BURNLEY: South Australia, Queensland - - -

PN11923

JUSTICE ROSS: Let's go through them. Mirlink?

PN11924

MR IZZO: I believe he's based in Queensland.

PN11925

JUSTICE ROSS: Oliver?

PN11926

MR IZZO: New South Wales.

PN11927

JUSTICE ROSS: Brackley(?)?

PN11928

MR DIXON: Sydney, your Honour.

PN11929

JUSTICE ROSS: Bartley?

PN11930

MS BURNLEY: Victoria.

PN11931

JUSTICE ROSS: Kershner?

PN11932

MS BURNLEY: South Australia.

PN11933

JUSTICE ROSS: Watson?

PN11934

MS BURNLEY: New South Wales.

PN11935

JUSTICE ROSS: Yu?

PN11936

MS BURNLEY: New South Wales.

PN11937

JUSTICE ROSS: Peets?

PN11938

MS BURNLEY: Queensland.

PN11939

JUSTICE ROSS: Anyone else have a view about whether it's in Melbourne?
Anyone opposed to that course?

PN11940

MR ROBSON: Your Honour, United Voice would prefer the hearings to be in Melbourne.

PN11941

JUSTICE ROSS: Yes. Anyone opposed to that course? No?

PN11942

COUNSEL: No, your Honour.

PN11943

JUSTICE ROSS: We will hold the 4th, 5th and 6th in Melbourne. What about 15 December, O'Brien, Charlesworth and McDonald? I think Charlesworth and McDonald are RMIT, aren't they?

PN11944

MS BURNLEY: Yes, your Honour. They're in Victoria.

PN11945

JUSTICE ROSS: Yes. O'Brien?

PN11946

MS BURNLEY: Is in New South Wales.

PN11947

JUSTICE ROSS: Any issue with that being in Melbourne? No? All right. The only other issue that arises from the correspondence is Ai Group's correspondence where they make the point that some of the experts are overseas and the SDA has not yet specified a time when each of them may be in a position to comply with the notices to produce. Have you had a discussion with them, or have your instructors?

PN11948

MR DIXON: We've attempted, but we don't have a resolution of that matter yet, your Honour.

PN11949

JUSTICE ROSS: All right. Well look, I would suggest you adopt the same course as ABI has adopted; that is, that whilst we will endeavour to get - as soon as the witnesses are back - and the SDA should be able to assist in that regard - you would be notified and a time given to you as soon as possible as to when they will be in a position to comply with the orders.

PN11950

Have orders been issued against the unions that are calling those witnesses as well as the experts? I know there was a case in relation to some of the witnesses. I didn't sign the original orders. They were directed at the union parties. One of the employer parties pointed that out - it might have been the retailers, I can't recall - and so I issued orders against the experts as well.

PN11951

The union parties at that point indicated that all the material that was available had been supplied, so it's obviously some of the material that's in the union's hands, and there may be additional material that's in the hands of the experts.

PN11952

MR DIXON: Yes. One of the unions, I think United Voice, has indicated that although orders were not made against them, they would comply as if the orders had been made.

PN11953

JUSTICE ROSS: Good.

PN11954

MR DIXON: Your Honour, in relation to the notices to produce, forms have been filed on behalf of Ai Group against a number of the union expert witnesses but the Commission has not yet issued those orders. Some of them have - there had been an exchange and an attempt made in correspondence between the Ai Group and the other side as to whether there would be objection, but that matter is not yet resolved. So there are at least five form 52s that have not yet been issued.

PN11955

JUSTICE ROSS: Have been filed. When were they filed?

PN11956

MR DIXON: 2 October.

PN11957

JUSTICE ROSS: Well, when I adjourn, I'll get my Associate to talk to your instructor about getting some copies because I've certainly not seen them.

PN11958

MR DIXON: Yes, thank you. May I just mention one other thing while I'm on my feet because it might assist in your programming of matters. At the moment, your Honour, this is not an expert witness matter, it's a lay witness. AiG had indicated and had filed a statement from Mr Stephen Flook, F-l-o-o-k.

PN11959

JUSTICE ROSS: Yes.

PN11960

MR DIXON: At the moment he is listed to appear on Tuesday the 20th. We have received instructions that Mr Flook will not be called as a witness and so that will be formally confirmed in writing and uploaded on the system. But it means that Tuesday afternoon of the 20th is entirely unallocated at this stage.

PN11961

JUSTICE ROSS: Yes. Well, what we have in the afternoon, we won't fill the 2 o'clock spot, we'll have the first employee witness commencing at 2.30 on that day.

PN11962

MR DIXON: Sure.

PN11963

MS WELLARD: Your Honour, just in relation to the orders for production. The AHA filed a couple, one witness has already been dealt with. The other is Dr Oliver. With respect to Dr Oliver, the order for production in draft form was issued against the expert himself but the actual order was against United Voice. I did raise it at the last mention but I don't think an order has been re-issued on the expert himself.

PN11964

JUSTICE ROSS: In the last hearing United Voice had mentioned that everything that had been produced was available for production, both from their expert and themselves had been produced and they were going to have a discussion with you about that.

PN11965

MS WELLARD: That I think, your Honour, is the case with respect to Professor Quiggin and I think one of the others. I don't think it's the case for Dr Oliver.

PN11966

JUSTICE ROSS: Have you had the discussion with United Voice?

PN11967

MS WELLARD: I have attempted to.

PN11968

JUSTICE ROSS: Well they're here now so - - -

PN11969

MS WELLARD: I think that the counsel for United Voice and the email exchange had been caught up in other hearings, so I just wondered if, for an abundance of caution, it could just be re-issued.

PN11970

JUSTICE ROSS: Well, what do you mean re-issued?

PN11971

MS WELLARD: Sorry, issued against the expert as opposed to issued against the union.

PN11972

JUSTICE ROSS: Do you have anything to say about this?

PN11973

MR ROBSON: No, I understood that we had given assurances that the orders had been issued against either the union or the expert rather than both. We were happy to deal with them as being compliant in both cases.

PN11974

JUSTICE ROSS: What we can do is during the adjournment before we start at 9.30, if you can confirm that's the case with this witness and talk to the Pharmacy Guild in relation to it. If there's then a need to issue the order just submit it to my Associate.

PN11975

MS WELLARD: Yes, your Honour. Nothing has been produced with respect to Dr Oliver. I understand that the United Voice asked for some extended time in relation to that and were going to come back to us.

PN11976

JUSTICE ROSS: See if you can sort it out with them before we deal with an order and a return date.

PN11977

Can I go back to Ai Group. In relation to Professors Altman, Peets and Ms Bartley, whilst as I've indicated obviously the material should be provided as quickly as possible. If it's not provided with sufficient time prior to those witnesses appearing, then the witnesses will go ahead on those days and be subject to recall if after receiving any of the material or having an opportunity to consider it, if it's provided late, you wish to ask any further questions. We adopted the same course in relation to ABI in the Quiggin and - - -

PN11978

MR ROBSON: Altman.

PN11979

JUSTICE ROSS: Yes.

PN11980

MR ROBSON: If your Honour please.

PN11981

JUSTICE ROSS: Obviously, Mr Dixon, it would be better if the material was provided in a timely way so we don't have to do that but that's probably the most expeditious way of dealing with.

PN11982

MR DIXON: We would just ask that those calling those witnesses make every endeavour to get the material to us as soon as possible.

PN11983

JUSTICE ROSS: Yes, and I'd reinforce that view as well. You also make the point that we will need to amend the revised directions because on the current program the evidence won't be complete until 15 December and the current revised directions provide at paragraphs 14 and 15 and through to 18, for the filing of final submissions by the employers on 14 October - well that's unlikely - in the hospitality matter; 9 November for retail and then the various unions to respond later in November and early December, and then for submissions in reply by 9 December.

PN11984

How I propose to deal with this matter - it's not particularly urgent but it would be useful to get the dates set in the not too distant future - is I direct the parties to confer in relation to the variation. Can I make two observations in that regard. I don't think there's any need for different dates as between the hospitality and the retail submissions. Given that the evidence will conclude on the 15th, the employer parties should give some thought to how much time they want for the filing of their written submissions, bearing in mind that the intent would be the employer parties file their full written submissions, the unions then file submissions in reply, then the employer parties have an opportunity to reply to those and then we would see a short oral hearing. I say short with a sense of optimism but I think it'd probably be at least two or three days.

PN11985

If you could think of that program rather than have me send out a draft and then have a squabble about it for the next three or four weeks, if you could have the discussion between yourselves and then come up with something that suits you and propose some dates for the short oral hearing. I think the sooner that's done probably the better because I'm in the process of setting the appeal roster for next year and I'd take into account these dates. I think you also have or some of you may have some commitments with the part-time and casual Full Bench and they have listings as well, so if you could - I think their hearings dates if they're not already out, they'll probably be out shortly. I'm not sure where that matter's up to. Let's see if we can get this done as soon as possible.

PN11986

What sort of report back - is there a happy volunteer that'd be prepared to take on the task of just advising my chambers as to where the parties are up to in relation to this?

PN11987

MR DIXON: We will, your Honour.

PN11988

JUSTICE ROSS: Thanks, Mr Dixon. Perhaps if I could hear from you towards the end of the week or early next week.

PN11989

MR DIXON: Yes, your Honour.

PN11990

JUSTICE ROSS: Thank you. Is there anything further in relation to any of the expert evidence? No. As well as the discussion between United Voice and the Pharmacy Guild, can I encourage the SDA to have some discussions with the employer interests in relation to the objections you've taken to the lay evidence. Because they do fall into the same pattern that we had with United Voice and they should be capable of being resolved by discussion. If they're not then we'll deal with each of them as they come up. Nothing further? Yes, Mr Parkes.

PN11991

MR PARKES: Your Honour, I'd just like to seek some clarification in relation to your statement and directions of 1 October, and also for the purpose of the program today. We obviously have an interest in the objections to the retail lay evidence, and I note there is a conference scheduled at 3.25 before Catanzariti VP.

PN11992

JUSTICE ROSS: Yes, that was really going to be dealing with the objections to the various expert evidence; Ms Pezzullo and a range of others, not the lay evidence.

PN11993

MR PARKES: Thank you.

PN11994

JUSTICE ROSS: Yes, that was really going to be dealing with the objections to the various expert evidence; Ms Pezzullo and a range of others, not the lay evidence.

PN11995

MR PARKES: Thank you. Yes, I just was trying to work out what was the program for today.

PN11996

JUSTICE ROSS: Look, I can talk to the Vice President. I'm sure he'd be happy to extend it and deal with the retail lay evidence, but frankly, I imagine, by the time we've dealt with the first couple of objections, I'm not going to spend the week repeating myself. So the parties will be the idea pretty quickly about what's in and what's out.

PN11997

MR PARKES: Sure. And also for the purposes of 930, that's going straight into the Pharmacy evidence, so there's no need for- - -

PN11998

JUSTICE ROSS: No, that's right. There is one matter that – I think the SDA was directed to advise the Commission whether they had any objections to any of the Notices to Produce filed at the commencement of the proceedings at 9.30. And the objections to the employer, Retail lay evidence, objections will be heard today at a time to be determined. Well, we'll see how we go. The matter will be mentioned at the commencement of proceedings at 9.30, but I can mention it now and expect you to resolve in between yourselves.

PN11999

If you can't, we'll deal with the first couple and if we need to deal with the balance after lunch, then we will. So for your purpose- - -

PN12000

MR WHEELAHAN: Your Honour.

PN12001

JUSTICE ROSS: Yes.

PN12002

MR WHEELAHAN: If I could just mention something about that matter? The objections to the lay evidence of my clients, I've met with two of those witnesses and this morning we propose, at least with two of them, to file amended statements that will substantially take into account the objections. And as you said, the others are very minor and it's my preference not to have it listed during the day but I'm sure that the remainder can be resolved between the parties.

PN12003

JUSTICE ROSS: I'm sure they can. Look, if you are filing amended statements, I'd encourage you to do that in conjunction with the SDA, so that the amended statement, you both agree that either that deals completely with the objection, or

you both agree what the remaining matters, which are the subject of the objection, are. All right?

PN12004

MR WHEELAHAN: Yes, I was proposing to file a marked-up version and a clean version.

PN12005

JUSTICE ROSS: Yes. Now, my point is really that, if you can adopt the approach that was taken in the hospitality phase, and that is, the parties have a discussion and what occurred was then an amended statement is filed, handed up, and the union indicates that that resolves the objection.

PN12006

MR WHEELAHAN: Yes. There might be some availability issues with discussing with my opponent, today.

PN12007

JUSTICE ROSS: Why is that?

PN12008

MR WHEELAHAN: Well, I'm available, but I'm not sure that they're available.

PN12009

JUSTICE ROSS: Well, there'll be time during the course of the day and we can make them available by simply adjourning.

PN12010

MR WHEELAHAN: Yes.

PN12011

JUSTICE ROSS: So we'll see how we go, but I'd certainly encourage you to have the discussions before we get to your witnesses and this morning, I'd encourage the parties to have discussion between the Pharmacy Guild and the union, and if that means we don't commence at 9.30, we don't commence at 9.30. But I don't intend the Commission's time to be taken up, because when you go through the material – I've gone through all of the witnesses today and the objections – they all fall into the same pattern. And they fall into exactly the same pattern as United Voice went through and we dealt with those and then all of them were resolved by agreement.

PN12012

MR WHEELAHAN: Yes.

PN12013

JUSTICE ROSS: I don't see why that shouldn't occur now.

PN12014

MR WHEELAHAN: No, I expect it will, but the particular lay witnesses I will be calling won't be called until next week.

PN12015

JUSTICE ROSS: Well, in that case, look- - -

PN12016

MR WHEELAHAN: So I just- - -

PN12017

JUSTICE ROSS: No, I follow. We won't be determining all of the objections. We might mention at the commencement of each day to find out where matters are up to and that probably resolves your issue, Mr Parkes. That way, that you don't need to hang around thinking we'll do something unexpected today in relation to your witnesses – we won't be. Okay?

PN12018

MR PARKES: All right, thank you.

PN12019

JUSTICE ROSS: Anything further?

PN12020

MR WHEELAHAN: No, your Honour.

PN12021

MR IZZO: Your Honour, can I just inquire: in relation to the hearing that's listed at 12.15, is it proposed that we'll still have a hearing in relation to the objections to the Notice to Produce issues, the experts at that time?

PN12022

JUSTICE ROSS: Yes. It's really to just make sure that we're not missing anything in relation to any of those and I think, when we commence – almost be shortly, I may as well stay here – at 9.30, the unions were going to advise us as to what, if any, objections they had. And then we'll ask you generally what are the outstanding issues on the Notices to Produce, where are they up to, does anything need to be determined. It may be that there isn't anything, Mr Izzo, we don't know yet.

PN12023

MR IZZO: Your Honour, I think with respect to the Notices to Produce on the experts, they actually filed their objections last week and we've already filed submissions in reply.

PN12024

JUSTICE ROSS: Yes.

PN12025

MR IZZO: But I'll take it up with you at 9.30, your Honour.

PN12026

JUSTICE ROSS: Yes.

PN12027

MR IZZO: Okay.

PN12028

JUSTICE ROSS: We can find out where it's up to and part of the Bench will deal with those at 12.15. Anything further? No? Thanks, we'll adjourn until 9.30.

SHORT ADJOURNMENT

[9.25 AM]