

TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

1051155-1

JUSTICE ROSS, PRESIDENT

AM2014/209

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards

Award stage - Penalty rates issues - AM2014/209 & others

AM2014/209 Pharmacy Industry Award 2010

AM2014/264 Dry Cleaning and Laundry Industry Award 2010

AM2014/267 Fast Food Industry Award 2010

AM2014/270 General Retail Industry Award 2010

AM2014/271 Hair and Beauty Industry Award 2010

AM2014/272 Hospitality Industry (General) Award 2010

AM2014/282 Racing Clubs Events Award 2010

AM2014/283 Registered and Licensed Clubs Award 2010

AM2014/284 Restaurant Industry Award 2010

Melbourne

10.33AM, FRIDAY, 12 DECEMBER 2014

PN1

JUSTICE ROSS: Please be seated. Could you be careful with the microphones, interstate, because whenever you bump against them it just sends a noise to everybody else. Can I have the appearances, please, in Melbourne, starting at this end, going along the bar table?

PN2

MS J. DOLAN: Ms Dolan, initial J, for the ACTU. I appear for Ms Parker (indistinct)

PN3

JUSTICE ROSS: Thank you. No need to stand. If whoever is moving that lectern can stop doing that, thanks.

PN4

MS V. WILES: Wiles, initial V, for the (indistinct).

PN5

JUSTICE ROSS: Thanks. No need to stand.

PN6

MS J. BAULCH: Baulch, initial J, for APESMA.

PN7

JUSTICE ROSS: Thanks.

PN8

MR BULL: Bull, B-u-l-l - - -

PN9

JUSTICE ROSS: Don't stand.

PN10

MR BULL: Sorry, for United Voice.

PN11

MS S. BURNLEY: S. Burnley for the SDA.

PN12

JUSTICE ROSS: Thanks, Ms Burnley.

PN13

MS V. PAUL: Paul, V, for the Ai Group.

PN14

MR N. TINDLEY: Tindley, N, on behalf of the ARA, NRA and ANRA in relation to the retail award.

PN15

MR R. CLANCY: Clancy, initial R, for the Australian Chamber of Commerce and Industry.

PN16

JUSTICE ROSS: Thanks, Mr Clancy.

PN17

MR G. PARKS: Parks, initial G, your Honour, on behalf of the Accommodation Association of Australia, the Motor Inn, Motel and Accommodation Association and Restaurant and Catering Industry.

PN18

MS S. WELLARD: Wellard, initial S, seeking permission to appear for the Pharmacy Guild and for the Australian Hotels Association.

PN19

JUSTICE ROSS: Thank you.

PN20

MS M. BROWN: Brown, initial M, appearing on behalf of Master Grocers Australia.

PN21

MR S. FORSTER: Forster, initial S, for the Australian Federation of Employers and Industries for the Drycleaning Institute of Australia, and with me is Troy Cush for the Australian Amusement, Leisure and Recreation Association.

JUSTICE ROSS: Thanks.

PN22

MS L. SVENDSON: Svendson, initial L, for the Health Services Union.

PN23

JUSTICE ROSS: Thanks, Ms Svendson. Anyone else in Melbourne? Sydney?

PN24

MR L. IZZO: Izzo, initial L, seeking permission to appear on behalf of New South Wales Business Chamber and ABI.

PN25

JUSTICE ROSS: Thanks, Mr Izzo.

PN26

MR S. CRAWFORD: If it pleases the commission, Crawford, initial S, from the Australian Workers Union.

PN27

JUSTICE ROSS: Thanks, Mr Crawford.

PN28

MR R. TAIT: If it pleases, Tait, initial R, on behalf of Australian Industrial.

PN29

JUSTICE ROSS: Thank you. In Brisbane? Sorry, anyone else in Sydney?

PN30

MR: No.

PN31

JUSTICE ROSS: Anyone in Brisbane.

PN32

MR J. FRANKLIN: Franklin, initial J, your Honour, from the National Retail Association.

PN33

JUSTICE ROSS: Aren't you already represented in Melbourne?

PN34

MR FRANKLIN: I've been asked to sit in this morning, your Honour.

PN35

JUSTICE ROSS: Okay, you're observing. Is that right?

PN36

MR FRANKLIN: I'll be observing.

PN37

JUSTICE ROSS: Okay, thanks. In Adelaide?

PN38

MR CAIRNEY: Cairney, R, from the South Australian Employers Chamber of Commerce and Industry trading as Business SA.

PN39

JUSTICE ROSS: Thanks, Mr Cairney. Anyone else in Adelaide?

PN40

MR: Good morning, your Honour. I'm only an observer today.

PN41

JUSTICE ROSS: Okay. I've prepared a short document which I'm now going to distribute to the people in Melbourne. I've got a copy for the people in Sydney, but I wasn't aware of the links to Adelaide and Brisbane. I'll briefly take you through the document then I'll take steps to make sure it goes to those parties. have the parties in Sydney got a copy?

PN42

MR CRAWFORD: We do, your Honour.

PN43

JUSTICE ROSS: Let me briefly take you through it, then I propose to adjourn for 15 minutes to allow you to absorb some of the observations and also to make sure that the parties interstate have a copy of it. There's briefly a suggested agenda. That really follows the Ai Group's suggestion. They were the only parties, I think, to respond in relation to that item. That's not seeking to confine what anyone wants to raise. I've attached a copy of the various submissions. Unless you've got some major thing that's been omitted, it's not intended - it's not going to appear anywhere; not in a decision, at least, so you don't need to be anxious about whether it's a full and accurate representation of every detail of what you said. I've expressed some preliminary views, because otherwise this would take a very long time indeed. I've also attached the ACCI's submissions that came in late. As it turns out, some of the preliminary views I'm expressing are consistent with the ACCI's submission.

PN44

It seems to me that the various awards can be grouped conveniently into three broad categories. I've got a question about whether Drycleaning and laundry is properly grouped in "other" or it's in "retail". Leave that aside, but there seemed to be a range of hospitality industry awards, then there's retail, which is at least the general retail award, hair and beauty and pharmacy. They seem to have some common elements. Then there's other, which doesn't seem to fit neatly in any of the other categories.

PN45

I've then identified the parties in each group and I've aggregated what the parties say are the hearing days required and the number of witnesses. In due course - well, I'll make the observation now. I'll be staggered if we end up with that many witnesses and that many hearing days, but I've simply aggregated what each of the parties has said. I've also noted what the parties say about the timing. Can I make this observation about the timing to the NRA, ARA and ANRA for you to think about during the adjournment? It seems to me that the proposition that that matter not be heard until late January, early February in 2016 is far too leisurely an approach to be hearing a determination of the matter. So unless you've got a very good reason, given you've had knowledge for some time and have been agitating for some time for the penalty rate issue as to why it can't be heard for another 13 or 14 months I'm going to propose to bring that forward. It seems that a number of observations follow from what's been said. I also need to fill in the details about who the union parties are interested in each of those groupings because obviously you haven't put in material because you weren't asked to, but I need to just fill in those gaps and I didn't want to guess because I'm invariably wrong about that and I'd leave someone out.

PN46

But there seem to be some observations that logically follow. One, the employer parties, if those groupings are right, need to confer and need to do it pretty quickly, both to reduce duplication and come up with a common position if you can about what the variations are that you're seeking. A common position in relation to the evidence to avoid duplication will be to identify what evidence is common across the various awards, that is across the groupings and even within the groupings and then sorting out who is going to advance evidence in relation to what aspect. I think the evidence in each grouping should be sequenced and the sequencing based on what you've said about the timings should be hospitality, then the other group and then retail. Common evidence across each grouping could be heard at the same time as the hospitality evidence.

PN47

In each case there would be a gap between the hearing of the evidence and the hearing of submissions of at least four weeks. Within that gap you would then file final written submissions. We need to discuss when you might file an outline of in essence what is your case, why do you say the change should be made and what do you say the evidence will support? What findings do you want the Commission to make on the basis of the evidence? I've suggested some timings in 5.5, that would be July, common evidence across all groups and hospitality evidence. August, other group evidence and the hospitality hearing. September, retail group evidence and the other group hearing. October, the retail group hearing. You need to think about that and if you need more than 15 minutes to

discuss it amongst ourselves, if we have half an hour then that might give you an opportunity to think through that. I'm proposing a further conference on 20 February where many of these issues will be nailed down.

PN48

The approach we are likely to take is for example once the applicants' witness statements are filed the bench will convene and go through the evidence and deal with any objections. So I want to put you on notice, don't put submissions in a witness statement because they'll be struck out. Don't put opinion evidence in a witness statement if the witness is not an expert because we'll strike them out. We'll be quite clear about the rules, they'll apply to both sides. It is intended to focus the evidence and any cross-examination. So witnesses should state what they know as a matter of fact, unless they're an expert in which case they can be qualified as an expert and deal with opinion evidence. A stricter approach to the admissibility of evidence will limit cross-examination and provide for more focus in the proceedings and that will take place after each tranche of evidence is filed.

PN49

You will see in 5.7 that the consequence of the hearing dates in July, August, September for witness evidence means that you have to have dates for the filing of the applicant's evidence and the union's reply and those are some proposed dates that would fit within that sequencing. If you don't like those you need to come up with an alternative way of dealing with it. Employer parties will have to file their proposed variation determination prior to the conference on 20 February. I'm really asking the question when should an outline, and by outline it's really no more than 10 pages of submissions be filed in support of the applications. I think out of fairness it's important that those opposing the claims be advised at an early stage otherwise they're going to ask for more time for the filing of their witness material, but be advised at an early stage precisely what is the nature of the variation that's being sought and what's your argument in a nutshell, why do you say the rates should be reduced in the way you propose and what findings do you say should be made on the basis of the evidence that you're going to file and when should that be done? So that is the structure. Are there any questions about any of that before I make sure that the interstate parties have a copy and you are given half an hour or so to think through some of those issues.

PN50

MR BULL: Sir, is it assumed that the outline of the applicant can be filed before the evidence?

PN51

JUSTICE ROSS: Yes.

PN52

MR BULL: Thank you.

PN53

MR IZZO: Your Honour, Louis Izzo from ABI APA Sydney.

PN54

JUSTICE ROSS: Yes.

PN55

MR IZZO: I just have one query that I wanted to clarify. Some of the parties, including the New South Wales business chamber at ABI have sought to vary public holiday penalty rates. Am I correct in assuming that will be entirely dealt with in these penalty rates proceedings and that there will be no overlap with the public holiday proceedings that are separately being conducted by the Commission?

PN56

JUSTICE ROSS: That's probably an issue for discussion really. I'd be interested in the views of the other parties. I think from memory Mr Parks you might have - - -

PN57

MR PARKS: Yes.

PN58

JUSTICE ROSS: - - - foreshadowed that there was an application of the part day public holidays?

PN59

MR PARKS: Yes.

PN60

JUSTICE ROSS: Look, that is a peculiar beast really, so it may not – well you think about whether you want it in this proceeding or in the public holiday proceeding but given part day public holidays only apply to two public holidays and only in South Australia, it's likely to be quite a focussed issue and I'm sure there will be a union view about it but it's really an issue focussed in South Australia, so it might not attract the attention of everybody else, so it might be dealt with in the public holiday case. But a broader application – if there is an application to reduce public holiday penalties generally and you want to rely on presumably whatever common evidence you're putting in this case, is that the proposition?

PN61

MR IZZO: Your Honour, I think from our perspective it would be preferable to keep it all in this case. If we could have it all in one case that would be the ideal scenario, rather than having the same type of subject matter ventilated in two different cases, that was all.

PN62

JUSTICE ROSS: Yes, but is the merit argument in support of that that the common evidence that you're proposing to lead would also go to the reduction of public holiday penalty rates?

PN63

MR IZZO: Yes, your Honour, so I imagine that some common evidence relating to penalty rates might be focused on weekends, things like that when you look at the Sunday rate, for instance what we're doing, but then there will be separate evidence which may be common across a number of awards about public holidays and various merit arguments about penalty rates on public holidays.

PN64

JUSTICE ROSS: All right. The parties can have a think about that and I'll hear from the unions and the other employers when we come back. Is there anything else? Yes, Ms Burnley.

PN65

MS BURNLEY: Your Honour, just one question regarding common evidence which hasn't been time tabled save for the sake of (indistinct) hospitality.

PN66

JUSTICE ROSS: Yes, so it would be July.

PN67

MS BURNLEY: Does that mean that employers in the retail industry will have to file - - -

PN68

JUSTICE ROSS: That's right

PN69

MS BURNLEY: - - - earlier?

PN70

JUSTICE ROSS: They'll have to file their common evidence. Yes. Otherwise if we wait for them to file their common evidence on their time table that will be some time in December. I'm also not proposing evidence in reply. The way you deal with that would be orally, that is you put your witness in and say have they read the union statement in reply, what do you say about, and deal with it that way. I think that's going to be much quicker than having an endless process. That then allows the unions to cross-examine on what they say and otherwise there would be another reply statement in response, et cetera. You would also have to cross-examine the union witnesses to the extent you don't agree with their evidence. As we get further through this process I'll be encouraging you to conference between employer and union parties to remove the need to cross-examine and you might be able to do that by either amending a statement in a particular way or by a concession in a particular respect.

PN71

MS DOLAN: Your Honour, just a further question. How are you envisaging or have you considered what the decision might look like, it would be three separate decisions or a single decision?

PN72

JUSTICE ROSS: No, I haven't really. Look I think the difficulty with three separate decisions might be this that there is common evidence in them. The way we could deal with three separate decisions would be to in the first of the hearings, hospitality, to invite submissions generally on the common evidence and then make findings and conclusions about that and deal with the hospitality specific evidence so we could do with it that way.

PN73

MS DOLAN: We would be happy to discuss that during the break.

PN74

JUSTICE ROSS: Yes, I think ultimately that's for fairness issue, I would not want to make a finding and a decision in the hospitality case that has an impact on the later cases without ensuring that the parties to the later cases have been heard about what findings might be made. That's really probably the only issue and to some extent it would be desirable to do it in three. A bit hard to know what's the balance going to be between common evidence and industry specific evidence. These things always start with an estimate of a large number of witnesses and experience teaches that over time the number drops for a range of reasons and not surprisingly advocates always put in more witnesses than they think they're going to be likely to call and more days. No one has a real estimate of how many days this will take because you don't know who is going to be cross-examined and to what extent. You don't know to what extent your evidence is going to be admissible at all. So until we get to that point. I should say the same process on admissibility will apply to the union's evidence in response. Not long after that's filed we'll have a hearing, deal with any objections and apply the same approach, okay? Anything else? 20 past? So half an hour for those who are interstate on different time zones that at this time of the year I can never follow. We will be about half an hour, give you the opportunity to think about that. If different groups want to caucus, a bit difficult with the AWU in Sydney but nevertheless there is another room available and you can use the video conferencing facilities to talk to you colleagues. I'll see you in half an hour, thank you very much.

<SHORT ADJOURNMENT

[10.53AM]

<RESUMED

[11.52AM]

PN75

JUSTICE ROSS: Please be seated. Look, I know we've got the other matter at 12.00, but I don't want you to feel constrained by that. We'll just move it back a bit and take the time we need for this matter, because I suspect the parties are going to be largely the same in any event. Let's just go through the items in the document. I'll come back to the agenda to make sure we've covered everything when we get to it. Can I deal with the propositions under the preliminary views and, firstly, the grouping of these matters into three categories. Does anyone want to take issue with those, the three categories?

PN76

MS DOLAN: There's an agreed position to reduce those categories to two.

PN77

JUSTICE ROSS: Yes.

PN78

MS DOLAN: So that would involve moving fast food out of the hospitality group into the retail group.

PN79

JUSTICE ROSS: Right, okay.

PN80

MS DOLAN: Then in the retail group including dry cleaning and fast food in that group, and amusements and events.

PN81

JUSTICE ROSS: So including dry cleaning in the retail group.

PN82

MS DOLAN: Yes, and fast food.

PN83

JUSTICE ROSS: Yes, and fast food. What about amusements?

PN84

MS DOLAN: Amusements and events would move to the hospitality group.

PN85

JUSTICE ROSS: Right, okay. We don't need to worry about who is in which groups. Do you want to add the unions that are interested then in what are now the hospitality and retail groups?

PN86

MS DOLAN: Your Honour, it might be prudent to program a bit more time to allow them to give final notice, but in relation to amusement and events, for example, the MEAA would also be interested, along with the AWU.

PN87

JUSTICE ROSS: What we can probably do is you can just confer with the unions and let me know in a week or so who falls into which group.

PN88

MS DOLAN: Yes, your Honour.

PN89

JUSTICE ROSS: That way we - and, look, that's not intended to preclude anyone who bobs up. These will be public hearings. Submissions won't be restricted to the people who are identified. No doubt other people will be bob up as we go through it. So if we then go through the preliminary observations, are the employer parties content to confer to try and consolidate their position on the witness side? Okay. The sequencing then would be presumably hospitality, then retail. Is that an agreed proposition?

PN90

MS PAUL: Your Honour, we thought we might still keep the timetabling in relation to three blocks so that we hear the common issues first.

PN91

JUSTICE ROSS: Yes, I see. All right.

PN92

MS PAUL: Because we believe maybe that would then feed into when you get to the hospitality and the retail - - -

PN93

JUSTICE ROSS: All right. Yes, okay. So you'd have common issues, hospitality, then retail, would be the sequencing.

PN94

MS PAUL: Yes.

PN95

JUSTICE ROSS: So that deals with 5.3 as well. You'd separate out those issues.

PN96

MS DOLAN: Your Honour, just on the common evidence, we envisage that that would be potentially like the expert witness evidence that's common. Is that your - - -

PN97

JUSTICE ROSS: There might be other evidence, documentary or other material, so I wouldn't want to confine it, but you would expect it to be expert evidence, perhaps government reports, or statistical material, social commentary material. It's difficult to know.

PN98

MS DOLAN: Thank you, your Honour.

PN99

JUSTICE ROSS: I'm assuming that's the case, but we'll get more of a crystallised idea as we go through. I don't think evidence from individual business operators about their particular experience would fit within that category, and evidence about the structure of a particular industry would probably be best dealt with in the context of the other tranches.

PN100

MS DOLAN: Yes.

PN101

JUSTICE ROSS: That's something that we can revisit at the next mention. Once the employer groups have had an opportunity to consider their position amongst themselves they'll have a better idea and to crystallise what they're looking at doing in that space and you'd have the opportunity to do the same.

PN102

MS DOLAN: Thank you.

PN103

JUSTICE ROSS: Then we go to the timing, about how that sequencing might work, common issues, hospitality, retail. The challenge here is the constraint in hospitality on the employer evidence to really want that evidence in July but could push it into August if pressed. I think that's broadly their position, and the retailers are some time after that. Is there a common view about that?

PN104

MS DOLAN: Your Honour, there's not a common view, but we have shared our views between the groups, so if it's appropriate, we could express ours.

PN105

JUSTICE ROSS: Sure, yes.

PN106

MS DOLAN: In relation to the common or expert type evidence, we would say that that needed to be put on in full in April and an outline of the experts and the other kinds of evidence to be relied on would be provided to us in mid Feb.

PN107

JUSTICE ROSS: No, I'm not going to go to when you'll get it. I'll decide that once I know when it's going to be heard.

PN108

MS DOLAN: Okay.

PN109

JUSTICE ROSS: So when would it be heard?

PN110

MS DOLAN: We're proposing a hearing around 20 July.

PN111

JUSTICE ROSS: Yes. What's the employer response in relation to when it might be heard?

PN112

MR CLANCY: The common - the same, 20 July.

PN113

JUSTICE ROSS: Okay, and the difference between you is when you'll be filing the material. Is that right?

PN114

MR CLANCY: Yes.

PN115

JUSTICE ROSS: Well, let's worry about that later. In terms of when the hospitality evidence would be heard is there a common view about when it would be heard?

PN116

MS DOLAN: No, your Honour.

PN117

MR CLANCY: (indistinct) proposing for hospitality employer evidence be June and - - -

PN118

JUSTICE ROSS: To be heard on 30 June?

PN119

MR CLANCY: No, late August.

PN120

MS DOLAN: We're talking about hearings.

PN121

MR CLANCY: The hearing is late August, beg your pardon.

PN122

JUSTICE ROSS: Late August, yes.

PN123

MR CLANCY: And then the retail in September.

PN124

JUSTICE ROSS: In late September.

PN125

MR CLANCY: Yes.

PN126

JUSTICE ROSS: All right.

PN127

MS DOLAN: Your Honour, with hospitality, we propose the hearing to be mid September, and for retail for the hearing to be in October.

PN128

JUSTICE ROSS: Why mid September?

PN129

MS DOLAN: We believe that we would need some extra time to respond to some of the employers' submissions and that would build in some time for us to have extra time to respond. Considering they've had notice for a few months, or potentially six months, more than us about what's going to be put on.

PN130

JUSTICE ROSS: Yes. I'm not persuaded that you're going to need that much notice to respond to the evidence, and bearing in mind that late August is the outside of when it would suit them, their evidence could be dealt with then and your evidence in response could be dealt with in early September for that matter. Bearing in mind, look, in most cases - well, if you take the Federal Court, it's viva voce evidence, no statements. You're in and you're arguing it then.

PN131

I know everyone always wants months to have a look at it, but the practical reality is, with the other demands on your time I don't think you're going to be sitting there for three months cogitating on the evidence that comes in, bearing in mind we've got the annual wage case running over that period, you've got part-time and casuals, and to require employers to put it on in February, the outline of their expert evidence, when they haven't even got together and sorted out how they're going to do their witness evidence at all and we don't have draft determinations, I just can't see - I think you need a reasonable time, and you'll get as much time as those dates can provide you, but the time also has to be reasonable for - I think the key things are the employers have to put in a draft determination, and that has to be done fairly soon, and really it has to be done before the next mention. The second thing that needs to happen is there needs to be an outline of their case is and what findings they're seeking to draw from the evidence. Then there is the filing of the statements, the determination of what's relevant and what's not, your opportunity to file a response and then the hearing.

PN132

MS DOLAN: Sorry, your Honour, to clarify, in relation to the common evidence, or the expert evidence, we've had discussions with ACCI and we propose that there's an outline of the expert evidence and who - - -

PN133

JUSTICE ROSS: Who would be proposed.

PN134

MS DOLAN: Yes, so that we're in the position to consider who they're using and we're able to consult with our own experts.

PN135

JUSTICE ROSS: Yes.

PN136

MS DOLAN: That would be around mid Feb.

PN137

JUSTICE ROSS: So that would be before the mention.

PN138

MS DOLAN: Yes.

PN139

JUSTICE ROSS: That's agreeable?

PN140

MR CLANCY: We were - - -

PN141

MS DOLAN: Sorry, that was with my colleague Mr Izzo in Sydney.

PN142

JUSTICE ROSS: Yes, okay.

PN143

MR CLANCY: I think we would propose a variation determination put on before the conference on 13 February with an outline to follow by 6 March, after the conference.

PN144

JUSTICE ROSS: Yes, and what about the identification of the experts? I mean, you must know who they are because you've said you're going to call experts.

PN145

MR CLANCY: Yes, I don't think that's an issue

PN146

JUSTICE ROSS: Well, by the 13th, the same day as the variation determinations?

PN147

MR IZZO: Your Honour, Mr Izzo from ABI - - -

PN148

JUSTICE ROSS: Yes, just a sec, Mr Izzo. So it was the identification of the experts and?

PN149

MS DOLAN: And an indication of what kind of evidence they would be providing.

PN150

JUSTICE ROSS: Yes, okay. So the expert, where they're from, so some identification of them and their qualifications, to the extent you know them, not

the full CV or anything like that at this stage, and an identification of the nature of their evidence. Mr Izzo?

PN151

MR IZZO: In relation to that point, your Honour, we were - and this is what I was discussing with Ms Dolan - more than happy to provide that. I was just seeking if we could do that around about, if I could seek the indulgence of the commission, maybe 16, 18 February, just because in terms of leave commitments in January the time it will take to finalise those arrangements, we might not be finalising it until the beginning of Feb. So I just wanted - if it's only an extra week, just to say a couple of days before the conference, to notify the unions, maybe say the 18th. They'll then know at the conference at least who the experts are. They won't need to worry about putting evidence in response for some time, still. So that's what I'm seeking, perhaps just another five days on top of what's been mentioned there.

PN152

JUSTICE ROSS: All right. Let me just run through the dates and get the responses. So the variation determinations would be filed on 13 February. The identification of the experts to be called and the nature of their evidence by 18 Feb. Conference on 20 Feb. Now, at that conference, because prior to it I would expect the employer interests in the groupings to have conferred and sorted out amongst themselves how many witnesses they're really likely to call, and it will give you a chance to test your previous estimates so when you come to the mention you'll be able to give an update on where you're up to with that and what your current thinking is.

PN153

The conference would then also confirm - I'll give you some indicative dates in a statement from today, but they'll be in a draft form for you to consider, confer amongst yourselves. You can take it that if you reach an agreed position then I'm likely to adopt that. I'll work backwards from the times that have been indicated for the hearings that I'll come to in a moment in an effort to try and be fair to both sides. Then we'll issue a further statement after the conference on the 20th. On 6 March, that would be when the outlines of submissions and the findings you would seek us to make on the evidence would be filed. The other dates, the other sequencing, the filing of witness evidence, et cetera, would arise out of the conference on the 20th, so I'm not proposing to lock any of that in at this stage. Is there anything about that that is irritating you?

PN154

MS DOLAN: The one thing that we're concerned about is the identification of the expert witnesses. We would be in a much better position and be able to participate in the conference on the 20th if we had that identification done on 13 February.

PN155

JUSTICE ROSS: Yes, well, you've heard ABI's problem.

PN156

MS DOLAN: Sorry, your Honour, I - - -

PN157

JUSTICE ROSS: You've heard ABI's problem. What do you propose I do about that?

PN158

MS DOLAN: Your Honour, we would expect that most of the employer groups would have an idea of who they're going to be calling as an expert. This has been on notice for quite some months.

PN159

JUSTICE ROSS: Yes. Well, look, I'll put it in as for the 13th, understanding the position in relation to ABI, but you should put it in as soon as possible after the 13th, all right, Mr Izzo?

PN160

MR IZZO: Thank you, your Honour.

PN161

JUSTICE ROSS: You've got the time in January, but we haven't yet closed for the Christmas break.

PN162

MR IZZO: That's true, your Honour. We will endeavour to do our best to get it in by the 13th. The problem was that whilst we know the type of expert that we wish to engage, we don't actually have the individual or the organisation chosen. We know kind of broadly the type of expert evidence we're after, but not the specific entity, if you like, and so with people on leave it just might not be - what I'm worried about is just ensuring that we're able to speak to the people, ensure that they can perform the scope of work, et cetera, before giving over the name, that's all, but we'll do everything we can to do it by the 13th, and if there's a problem we'll identify that to the commission as soon as possible.

PN163

JUSTICE ROSS: When are the unions going to identify what experts they're going to call?

PN164

MS DOLAN: We didn't propose the filing of our expert witness evidence - - -

PN165

JUSTICE ROSS: No, but when will you indicate who and the scope of it?

PN166

MS DOLAN: Sorry, your Honour, we haven't had detailed discussions about that yet.

PN167

JUSTICE ROSS: No, that's fine.

PN168

MS PAUL: Your Honour, may I flag one other thing? Whilst this is being programmed around the fact that it's the employers that will be seeking amendments to the award, we believe the same timetable should apply to any applicants. So if the unions are seeking at some point between now and the conference to put an application in for variation that should also occur at the same time and with the same timetabling.

PN169

JUSTICE ROSS: Why? What application are they seeking to put in about penalty rates?

PN170

MS PAUL: I'm not sure, your Honour. It's just on the basis that if there is an award application to be made then all the parties should be putting their - - -

PN171

JUSTICE ROSS: No, I'm unlikely to be dealing with award applications other than penalty rates in these proceedings. It's complicated enough without - and at this stage we don't know - because the timetable was released yesterday for the group 3 and 4 awards. We won't know for some time what the nature of any of those variations are.

PN172

MS PAUL: Your Honour, then for clarity's sake, in terms of the other applications that may come from an award, those you're proposing will be held separately as part of the stage 3 and 4 and they're not going to be - you won't be putting evidence in relation to that?

PN173

JUSTICE ROSS: Well, I don't know, but I'm not going to make a decision about that until I know what the claims are. I don't know whether it may be convenient to deal with some of that material, and that might be the employer's view as well, but until we know what the claims are I don't think anyone can say much useful about that proposition. We just have to wait.

PN174

MS DOLAN: Your Honour, we've consulted about when we would be able to provide an outline of the experts we would be relying on and what they might be saying in response to the employers' evidence.

PN175

JUSTICE ROSS: Yes.

PN176

MS DOLAN: We would propose some time in April, but we note that Easter is in the first week. It's the 5th, I think.

PN177

JUSTICE ROSS: All right.

PN178

MS DOLAN: So some time after Easter, the later for us in relation to that the better, considering we need to look at specifically what those other experts are going to be putting on .

PN179

JUSTICE ROSS: I think you also need to look at the outlines on 6 March to probably form a view. That's something we can come back to at the conference on the 20th I think. There is broad agreement - it might be over-stating it - in terms of the hearing of the evidence 20 July, around then for the common evidence. Late August for hospitality, late September for retail. What about the - leave with me the who files what when, because I can imagine the range of views

probably isn't going to assist me much, I've got the picture of it. What about the idea of separating the evidence from the subsequent hearing and you put in your written submissions after the evidence, then we go to a hearing.

PN180

What do people think about that as a proposition generally? Because I think most of the submissions that came in seemed to assure that we had the evidence and the hearing all in one lot and I am not entirely sure that's the best way of running a case like this. I think you need a bit of time, and I know I certainly do, to absorb evidence and then to work out how it fits within your submission and your argument, because I really want your argument to – you'll foreshadow the findings you want us to make, then there will be the evidence, then you have to make good the findings based on the evidence and it would certainly assist the Commission if your submissions then say well, this is the finding and here's the reference to the evidence that supports it and similar those who have got a different view say the evidence doesn't support any finding of that nature for these reasons. So a bit of time and consideration is probably a good idea but I'm also conscious that you're going to roll pretty quickly into the next evidentiary hearing. So what do you think generally about both separating the process and then about how much time you might need?

PN181

MS DOLAN: Your Honour, we're broadly happy with that proposal.

PN182

JUSTICE ROSS: What about the time, any thoughts on that?

PN183

MS DOLAN: We would be happy to consider that in the draft time table, otherwise we would need more time to confirm - - -

PN184

JUSTICE ROSS: No, that's fine, I can have a stab at it and there will be a draft and you can certainly pick over it before the 20th and I will put in the directions that any comments you've got on the draft can probably come in on the 13th as well, so everyone will see what everyone else thinks. What do the employers think about the separation idea firstly and if you have a view about how long.

PN185

MR CLANCY: Your Honour, I think we felt that submissions following the evidence was a useful way to proceed, particularly after the common hearing because it may then inform the subsequent matters. Timing is going to be the issue.

PN186

JUSTICE ROSS: Do you think because we've separated out the common evidence now one approach may be that we then have submissions on the common evidence and what findings are proposed for that, we then hear you about that, make those findings and is what you're saying that might then inform the subsequent material or not?

PN187

MS PAUL: No, sorry your Honour, some of us have had a discussion around the fact that we would need to supplement our submissions with both the evidence

that we gather from the common issues as well as the evidence that we gather from (indistinct).

PN188

JUSTICE ROSS: No, no, I agree.

PN189

MS PAUL: The more efficient way or arguably in terms of handling that would be that we hear the common issues evidence, then hospitality comes straight after that. There needs to probably be some level of timing put aside, having some level of either written submissions and then oral supplementation of those written submissions may be the way to go.

PN190

JUSTICE ROSS: Yes.

PN191

MS PAUL: Which then I do agree butts into a bit of the retail evidence coming in and then retail actually then has written submissions at the end of all its evidence clear.

PN192

JUSTICE ROSS: That's okay, I had a stab at it in the draft.

PN193

MR TINDLEY: I think your Honour that one of the things we were raising with that is that we expect that there will be evidentiary propositions that are aligned in terms of their common nature and then their industry specific nature, and it would effectively in our view be double drawing.

PN194

JUSTICE ROSS: As I say I have a go at it but the way it's likely to pan out I would think would be if it's 20 July for the common issues, late August for hospitality, late September for retail then it may be mid-October, mid to late October is the hearing in relation to hospitality to give you enough time and that may mean that it's late November, early December for retail. But look it will go in the draft and I think you need to see the full horror before any of us can usefully decide which bits to pick apart, and look, I appreciate there's always going to be an argument that employers are going to want more time to file their material, unions are going to want you to file it earlier so they get the maximum amount of time to respond. You need to bear in mind if you're going to move one date that's going to have a ripple effect on other parties. So just bear that in mind when you see the draft and I expect the outcome is likely to not be completely satisfactory for anybody because it's just difficult to balance the competing interests. But to the extent I can what I am endeavouring to do is to be fair to both parties to give the employer's sufficient time to get their material together, but to give those opening their claims time so they know what they're facing and also so they've got an opportunity to put in reply evidence. Yes?

PN195

MS WELLARD: Your Honour, just in relation to the draft and I'll flag this now. We would hope that with respect to hospitality any of the employer evidence that is due is – the final date for that is some time after – that it need only be a short time but some time after the union's common evidence is filed. Just because

there's no reply dates built into the time table to the extent that those hospitably employer witnesses need to – that we need to test any of that expert union evidence with what's happening in the industry for the industry evidence that then we suggest that date needs to be after.

PN196

JUSTICE ROSS: I'm not sure how that follows. The expert evidence will be expert opinions. How will an opinion from an industry participant qualify as an expert? Why wouldn't you just put to your expert the unions' evidence and see what they say about it?

PN197

MS WELLARD: That's right, your Honour, but to the extent for example that the common evidence, experts from both sides are talking about what people do with their weekends or who visits different venues or does whatever they do on weekends, if there is a union proposition from an expert, an opinion about that then I would want to test that with the true evidence of what the employer wants to say about that.

PN198

JUSTICE ROSS: They just built in a delay for the unions to respond, that's all.

PN199

MS WELLAND: I think your Honour that we can still make the time table with the hearing date in August.

PN200

JUSTICE ROSS: I will put out the draft and you can argue the proposition then rather than me trying to accommodate each of you now.

PN201

MS WELLAND: Yes.

PN202

MR IZZO: Your Honour, can I - - -

PN203

JUSTICE ROSS: Yes, Mr Izzo.

PN204

MR IZZO: - - - ask if your Honour is of the consideration when you put together the draft, with respect to reply evidence we are broadly supportive of what your Honour said about not having evidence in reply. Could I see if the Commission would consider one carve out to that principle which relates to the expert evidence, because the way I see things unfolding is that employers will file an expert opinion. Let's say there's an academic involved. That academic writes an opinion, the union expert may well respond to that opinion, have their own research, et cetera and then it would be quite difficult for the employer expert to simply respond in the witness stand to that. Ordinarily they would need to go back and put something in writing in response I would have thought.

PN205

JUSTICE ROSS: Yes.

PN206

MR IZZO: So just a carve out for expert evidence if necessary.

PN207

JUSTICE ROSS: That's probably also going to be the fairest for those who oppose it because they'll know then what the expert is going to say, they can test that with their own experts. Look, we may think about an expert conclave as well or hot tubbing, that is putting a couple of experts who have the same expertise, they may have different views in the witness box together and they can be asked questions concurrently about particular issues. There is no reason why we can't approach it that way either. But no, I hear what you say, Mr Izzo, and I'll endeavour to accommodate that. I think expert evidence is in a different category because it may be that there is an attack on the assumptions or the factual basis on which the expert opinion is delivered and that is probably best dealt with by a short supplementary statement. I imagine look, most of the industry evidence can be dealt with *vive voce* because you will be putting to them someone else's experience and asking them to comment on whether it's the same as theirs. Anything else?

PN208

MS DOLAN: Your Honour, just on the decision. We broadly considered that and we thought regardless of how you decide to deal with the matter if there was a decision at the same time that dealt with each award in its own right, rather than three separate decisions or that was broadly - - -

PN209

JUSTICE ROSS: One decision dealing with each award in its own right.

PN210

MS DOLAN: Or - - -

PN211

JUSTICE ROSS: Dealing with all of it.

PN212

MS DOLAN: (Indistinct) everything to be sort of handed down at the same time.

PN213

JUSTICE ROSS: I suspect that might be the case now that we're looking at the sequencing and two groups and the timing between the two hearings, that's probably going to be the likely outcome but yes, we'll wait and see. Anything else? I will work up a draft statement, get it to you early next week or a statement including a draft time table and get it to you early next week confirming the directions in relation to the next conference. Thank you very much. We will adjourn that matter. I'll stand down for five minutes while we do something with the VC and then I'll call on the public holidays and award flexibility matter.

<ADJOURNED INDEFINITELY

[12.21PM]