



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

1052402

TRANSCRIPT IN CONFIDENCE

**JUSTICE ROSS, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON
COMMISSIONER LEE**

AM2014/305

s.156 - 4 yearly review of modern awards

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

Sydney

9.35 AM, TUESDAY, 8 SEPTEMBER 2015

Continued from 27/08/2015

PN392

JUSTICE ROSS: Can I have the appearances, please?

PN393

MR C DOWLING: Good morning, members of the Full Bench. My name is Dowling, initial C and I appear with Bourke for United Voice.

PN394

JUSTICE ROSS: Thank you, Mr Dowling.

PN395

MS J GHERJESTANI: My name is Gherjestani, initial J. I appear for the Australian Workers' Union.

PN396

JUSTICE ROSS: Thank you.

PN397

MR L IZO: Izo, initial L, seeking permission to appear on behalf of Australian Chamber of Commerce and Industry, Australian Business Industrial and the New South Wales Business Chamber.

PN398

JUSTICE ROSS: I think we've dealt with all the applications for permission, and permission's been granted, Mr Izo, on previous occasions.

PN399

MR IZO: Thank you, your Honour.

PN400

MR R CLARKE: If it please the Commission, Clarke, initial R, appearing on behalf of Restaurant and Catering Industrial.

PN401

MR M SECK: If the Commission pleases, Seck, spelt S-e-c-k, initial M, I appear with MS WELLARD, initial S, for the Pharmacy Guild of Australia.

PN402

JUSTICE ROSS: Thank you.

PN403

MR J STANTON: If it pleases, Stanton, initial J. I appear for the Australian Hotels Association and the Accommodation Association of Australia.

PN404

JUSTICE ROSS: Thank you.

PN405

MR WARREN: If the Commission pleases, Warren, I appear for Clubs Australia Industrial.

PN406

MS B O'HALLORAN: May it please the Commission, O'Halloran, initial B. I appear for Deloitte Touche Tohmatsu.

PN407

JUSTICE ROSS: Is there anyone for the SDA?

PN408

MR DOWLING: In Melbourne.

PN409

JUSTICE ROSS: Yes, okay. Anyone else in Sydney? No? In Melbourne?

PN410

MR S MOORE: If the Full Bench pleases, Moore, initial S. I appear for the SDA.

PN411

JUSTICE ROSS: Anyone else down there? No?

PN412

MR N TINDLEY: If the Full Bench pleases, Tindley, initial N, appearing on behalf of the ARA, NRA and MGA.

PN413

JUSTICE ROSS: All right. Look, there are four groups of preliminary matters that we're going to deal with at 9.30 and then I think we have the first witness at 11.30. The first of those is the objections to the Notices to Produce in relation to the expert evidence. That's the Rose, Lewis and Pazuelo.

PN414

In relation to those matters, it seems common ground, and I'm putting this to test the proposition, that the relevant authorities are Southcorp v Newcap(?) and what follows from them. And for our purposes, the question seems to resolve itself into this. Have the draft reports or communications over which privilege is claimed, influenced the content of the final report in a substantial sense? If they have, then it would give rise to an unfairness not to provide that material. If those communications either haven't influenced or have only influenced in a peripheral or formatting sense, then there'd be no unfairness and the privilege would be upheld.

PN415

Is that broad proposition the subject of any debate amongst any of you?

PN416

MR IZO: We're comfortable with that being the relevant test, your Honour.

PN417

JUSTICE ROSS: Anybody have a different view? Well, can I go to you, Mr Izo, for the moment, and can I express the general view that – and I don't say this in a critical sense – but the submissions aren't in a format are going to assist us much at the moment. In some cases, they don't clearly articulate what the objection is,

other than to assert in a bald way, the privilege without even advancing the argument that the material was prepared for the predominant purpose of litigation.

PN418

Now, that proposition's not contested in relation to ABIs by those who are interested in the Notices to Produce that you're objecting to, but in relation to Deloitte's, I think it's just the submissions made and that's it. So it's just an assertion that there's a privilege. Well, bearing in mind that those who want to rely on the privilege, bear the onus of persuasion that the privilege operates, in order to be upheld. We're going to need more than just a bare assertion that you're claiming legal professional privilege.

PN419

In relation to your material, Mr Izo, there's the Baxter statement, which has been the subject of some criticism that it doesn't go to quite the test. But it does seem to us that there's a broader issue and that is that, it seems that you're inviting us to, in effect, delegate our decision to Ms Baxter. That is, that the test is the one that I've articulated, and there's no dispute about that.

PN420

Well, Ms Baxter expresses an opinion, makes an assertion or a submission, that these communications have not influenced the final report or the findings in a substantial way. Now, I don't say this – it's no reflection on Ms Baxter and I'm not suggesting that she doesn't genuinely hold that view, but that's ultimately the question we have to decide. And it does seem to us that we would need to look at the material in order to form that view. So we would need to see the material, and I take it there'd be no objection to us viewing the documents for that limited purpose. And if we uphold the objection, then clearly we won't have any regard to them.

PN421

But if you look at what we would need to have in front of us, in order to answer the question that's posed in the authorities, it would seem that if the proposition is that, well look, these communications didn't influence the drafting or the final, then what you would need is some chronology that just shows when were the drafts prepared and when were these communications made? Clearly, if the communication's after the draft, well it wouldn't have influenced that draft. And then you need to look at the drafts themselves and the final, identify what changes have been made to those documents in different iterations.

PN422

Once you identify the changes in the communication, then we're able to make a decision about, well, did those communications influence the content of the final report in a substantial sense? But it does seem to us that without that material, how are we to make the decision? And we don't have that material at the moment. So we wanted to communicate that as a, you know, that's our provisional thinking in relation to it, but we want to test that, and it seems to us that if that's right, then you should produce the material and come along and put that argument. And we think that should be done at the end of the hearing tomorrow, is our current view.

PN423

So does anyone want to comment on those propositions? And of course, in the Deloittes, we don't have anything, we've just got the assertion that there's legal professional privilege. I don't think we've got a witness statement that even goes to the Baxter document. But that's probably been overtaken by events, because I think we would need to look at the material and how would we make the assessment.

PN424

And it seems that there are broader – that some of the material's been provided in relation to some of the Notices to Produce and the same material is objected to in the others. Some drafts have been provided and instructions in some, but that's objected to by other parties. And you look at the morass of the material that's come in in the last 24 hours or so and it's just difficult to unpick well, what exactly – and for example, the points taken against, I think Deloittes. Well, three of the draft reports have already been provided by Meridian, therefore privilege has been waived.

PN425

Well, I don't know if the proposition's been put that privilege is being waived in drafts generally or in relation to those three drafts or – so there's a bit more of the detail that we need to get to, and I think a bit more time, giving you a bit more time to do that would give rise to a better outcome. Mr Izo, is there anything you want to say?

PN426

MR IZO: Your Honour, firstly can I just make an inquiry? Has the Bench received the amended witness statement of Ms Baxter?

PN427

JUSTICE ROSS: Yes.

PN428

MR IZO: Thank you. Your Honour, if, on the basis – I take on board what's said about Ms Baxter's view that's been proffered and I accept that it doesn't take matters very far. The reality is that where Ms Baxter's statement adds assistance to the Commission is her description of the communications. And if the Bench forms the view that it's unable to make an assessment on privilege, based on those descriptions of the communications, then it would seem that the next step that has to be taken is for someone to – for a member of the Commission to look at the documents.

PN429

The question – the one question that does arise, however, is perhaps whether, if that process is going to be undertaken, whether that should be done by – whether that should actually be referred to a different member of the Fair Work Commission who is not a member of this Bench.

PN430

JUSTICE ROSS: Well it would only be necessary if you're going to take an objection.

PN431

MR IZO: That would probably be right, your Honour, and I suppose the concern we would have is if the privilege over the documents is maintained and the Bench nonetheless sees the contents of the documents, it may, in some peripheral way, have an influence over the decision-making in this case and that's the very reason why we're seeking to claim privilege. So I think, at this stage, my client would have to express that reservation.

PN432

JUSTICE ROSS: All right. Then we would have to get someone else to deal with it.

PN433

MR IZO: Unfortunately. I realise it's not ideal from a process – in terms of doing things efficiently, but I think I have to raise that reservation at this point.

PN434

JUSTICE ROSS: No, no, that's fine.

PN435

MR IZO: So that's all I would say in relation to that. If the Bench can't- - -

PN436

JUSTICE ROSS: Well see, in relation to the other objections, we don't even have a description and there's no statement describing them so, I'm not sure how we deal with- - -

PN437

MR IZO: That's in respect to the- - -

PN438

JUSTICE ROSS: - - -those at all, yes.

PN439

MR IZO: And I'll leave that to my friend from Deloitte, I think, your Honour, but we would be content to have a member of the Bench look at it, but our preference would be that it be a member of the Commission that's not sitting in these proceedings.

PN440

JUSTICE ROSS: That might be difficult.

PN441

MR IZO: Thank you, your Honour.

PN442

MS O'HALLORAN: Your Honour, just in relation to the position of Deloitte, I apologise, but submissions were prepared late last night in relation to some of the matters that you have raised this morning. I should say, in relation to the issue of privilege the objections that had been filed last week were on the basis that we understood that the instructors of Deloitte were claiming the privilege in respect of the draft reports and other correspondence.

PN443

After subsequent conversations with my friends, I understand that no longer to be the case, but they would be content to provide any drafts of the report to comply with the table that you have just indicated could be provided so that the drafts could be reviewed. In terms of Deloitte's current- - -

PN444

JUSTICE ROSS: When you say the drafts could be provided, you mean to us or to the unions?

PN445

MS O'HALLORAN: To the Commission.

PN446

MR SECK: Your Honour, can I just clarify the position of the Pharmacy Guild and the AHA. The position is this. Those two entities are prepared to provide to the Commission a copy of the draft reports and the relevant communications to make the relevant assessment as to whether or not a claim for client legal privilege exists.

PN447

There is also a table which highlights the various changes that have been made between the various iterations of those reports, for the convenience of the Commission, to make that assessment. So can I make it clear to the Commission, we're not seeking to waive privilege however we're content for the Commission to undertake the process which your Honour, the President, outlined at the very start.

PN448

JUSTICE ROSS: Look, I think, given Mr Izo's reservation, we'll get another member of the Commission to deal with it, rather than deal with it in piecemeal, deal with yours but not his.

PN449

MR SECK: Your Honour, we're- - -

PN450

JUSTICE ROSS: If there's any reservation, then I think it's not worth the risk because if the objection is taken and all five of us have to vacate the Bench, then there's trouble to get another five members. They'll probably be running from the building if I they go on the Bench.

PN451

Okay, look one of the issues I'm confused about is this question, Meriden's already provided three drafts to the unions.

PN452

MR SECK: Yes.

PN453

JUSTICE ROSS: How do you assess privilege in relation to those?

PN454

MR SECK: Your Honour, what we don't do is, we haven't provided this commentary which has gone with the various amendments which hasn't been provided to the unions, so we have provided the drafts without the commentary.

PN455

JUSTICE ROSS: Well, if you've provided the drafts, then how can you waive privilege on the drafts?

PN456

MR SECK: Your Honour, there might be an argument on that and can I make this point, we don't – the Guild and the AHA don't have anything to conceal because what will be revealed from reviewing the draft reports, that the amendments are quite minor and technical in nature. So we're keen to assist the parties in the Commission as much as we can in expediting the process because ultimately, we don't think there's anything which will be revealed from those drafts, so we've adopted a- - -

PN457

JUSTICE ROSS: Have you provided, I think it's the SDA who makes the observation that three of the drafts have been provided by Meridian to the unions. Is that the totality of the drafts that we're talking about here?

PN458

MR SECK: Yes, your Honour.

PN459

JUSTICE ROSS: Well, if you've already provided them, how is it that you've not waived privilege in relation to the drafts?

PN460

MR SECK: We don't say that – well, your Honour, because what we say, your Honour, is that there's commentary to go with the drafts and that- - -

PN461

JUSTICE ROSS: No, no, that's a separate question. The communications between the lawyers and the expert, put that aside. I understand that's what you're claiming privilege on and it's the same with ABI. ABI's not claiming privilege on the drafts though and you've provided the drafts, so why are we having a debate about the drafts when you've provided them to the unions already?

PN462

MR SECK: We provided the copies of those – we provided those drafts, your Honour, based on an assertion that it allowed them to make an assessment as to whether or not it was subject to privilege.

PN463

JUSTICE ROSS: It doesn't matter on what basis. Did you reserve privilege?

PN464

MR SECK: We did, your Honour. There was an express reservation made in the correspondence and what we were seeking to do was to assist the unions to

understand the basis for which we made a claim for privilege. So it wasn't as if it was provided without any reservation, that reservation was expressly led.

PN465

JUSTICE ROSS: All right, I see. Well, I guess there'll be the debate about the legal effectiveness of the reservation, but yes.

PN466

MR SECK: Absolutely, your Honour, but having said that, your Honour, our position remains the same, that we don't think it discloses anything which demonstrates undue influence, so we've sought to deal with the matter in a practical and commercial way.

PN467

JUSTICE ROSS: Yes, yes, I understand that. All right, does anything else wish to say anything? Where we're going at the moment seems to be that we've put forward the proposition about what it is that whoever is dealing with this is likely to require, in order to determine the privilege claims and given there'll be an objection to us or foreshadowed reservation to us looking at it, then we'll endeavour to find another member that would hear it tomorrow, after the close of the hearing. But we'll advise you as to the precise time and the where and the who later on today.

PN468

Anyone else wish to say anything at this stage?

PN469

MR MOORE: If the Commission pleases, might I deal with one matter, your Honour? As I understand it, a number of the employer parties have consented to the production of a number of documents, notwithstanding that there's plainly a controversy remaining around privilege attaching to some categories. In the interests of progressing the provision of documents, we wouldn't want the dealing with the matter tomorrow, as envisaged, to impede the production of documents which the employers have agreed to provide.

PN470

I note, for example, in paragraph 20 of Deloitte's submissions, which we saw this morning, Deloitte says that it consents to production of Ms Pazuelo's working papers and notes and to draft reports that were provided to her instructors for review. That's one class. I also note, I think, that ABOA has withdrawn an objection to one of the categories which it initially objected to so we would submit that those documents need to be produced as a matter of urgency, to not further delay the matter.

PN471

JUSTICE ROSS: Well, I think the notices are returnable on Thursday, aren't they, at 4 o'clock?

PN472

MR MOORE: I think that's so, your Honour, yes.

PN473

JUSTICE ROSS: And I take it there's no – there are two other aspects, Mr Moore. One is in your submission, you consent to a variation which may narrow the scope in relation to one of the categories?

PN474

MR MOORE: That's so, yes.

PN475

JUSTICE ROSS: Well I doubt if there'd be any objection to narrowing the scope, but you can take it that we would amend the notice accordingly.

PN476

MR MOORE: Yes.

PN477

JUSTICE ROSS: And there's also some discussion about, and we've had an issue with this in relation to some of the material that's been filed with us, that given the size of some of the files, it would be provided in a USB format rather than email. I take it there's no objection to that? No?

PN478

MR MOORE: No, your Honour. No.

PN479

JUSTICE ROSS: So in any event, look, we're only the notices are provided by 4 o'clock Thursday and I, you know, so I don't think there's going to be delay.

PN480

MR MOORE: Yes. Your Honour, that's fine, thank you for that clarification. And can I just deal with one other matter? In terms of the foreshadowed, if I can call it, hearing, to deal with the matters of privilege, can I inquire as to how your Honour might envisage that would proceed, in terms of I assume your Honour has in mind that the member of the Commission to whom the issue was assigned, that person would be the only person to have access to the documents?

PN481

JUSTICE ROSS: Yes.

PN482

MR MOORE: I've just – yes.

PN483

JUSTICE ROSS: That's right.

PN484

MR MOORE: Yes.

PN485

JUSTICE ROSS: Look, once that matter's allocated to that member, then it may be there is going to be no communication with that member about our view that we've provisionally expressed regarding the need to look at the documents. It

may be, Mr Izo, your point is that, well in the amended witness statement, is that descriptor sufficient? Well, the member might have a different view about that and, you know, so I do think – I think it would be of assistance if those objecting did file a short submission that clearly identifies – and don't do it by reference to the Notice to Produce. Set out the actual order and then say what you're objecting to, so it's all in the one submission and that can be provided to whoever's dealing with it.

PN486

We'll provide them with copies of all of the other submissions and material that's come in to date, but I think it's likely to give rise to more questions if you just rock up with those, because it's not clear to me in relation to some of them, precisely what's being objected to. There's not even a description of the documents in some of them. And there's the clarification we've had this morning in relation to who's claiming what and I think – the other thing that bemused me a bit was the, well I think it as the Pharmacy Guild, wanting access to any documents that were ordered to be produced before the union saw them. Well, you just need to talk to Deloitte.

PN487

I mean, I don't know why we need that two-step process, but the privilege is yours, you're the one asserting the privilege, so I wasn't sure where that was going. But - - -

PN488

MR SECK: We can do that your Honour.

PN489

JUSTICE ROSS: Yes, okay. All right, well, just to be clear, what is it that – I'd invite any comment about what should we communicate or give to the member that's going to deal with this? Do I say to them that it's common ground that, you know, on the *Southcorp Newcap* authority, the proposition that I put to you earlier, and the question is to resolve that in this case on these objections.

PN490

MR DOWLING: Yes, your Honour, we're content with that. Can we just foreshadow one issue, of course? In respect of that test, which is whether the draft reports influenced the content in the substantive sense, the person of course, that is perhaps in the best position to say is the expert and not, of course not Ms Baxter and not the member of the Commission.

PN491

JUSTICE ROSS: That's true.

PN492

MR DOWLING: So there's still a difficult faced by the member of the Commission and we don't want to be – we foreshadow that.

PN493

JUSTICE ROSS: Yes. The cases seem to go in two different directions. It's not uncommon for the expert to provide evidence about whether they were influenced and to what extent.

PN494

MR DOWLING: Yes.

PN495

JUSTICE ROSS: And there are other instances where the Tribunal, usually a court, where the judge looks at the material.

PN496

MR DOWLING: Yes.

PN497

JUSTICE ROSS: But no, I agree, it's usually evidence adduced from the expert, not from somebody else.

PN498

MR DOWLING: Thank you.

PN499

JUSTICE ROSS: Well, the parties who are taking the point can take that on board and do with it what they will. Can I ask that any short submission or any revision to any witness statement or material be filed by 1 o'clock tomorrow and served on the other parties, so that everyone's on notice? I mean, it's a short point. It would normally be dealt with in the running, but nevertheless, we are where we are and it's become a bit more complicated as time's gone on. Anything else anyone else wants to say?

PN500

All right, then we'll deal with it this way. The short submission identifying precisely the basis of the objection, I should say that Deloitte's ever made the assertion that these documents were prepared for this substantial purpose of litigation, so you just need to step out the – I mean, Mr Izo makes the point that it would seem obvious because it's been in response to directions, etc, but nevertheless, I think the steps need to be gone through. So, 1 pm tomorrow, if you can file that summary and any additional material and we'll endeavour to get a member at 4 pm tomorrow – if there's a change to that, I'll let you know during the course of today.

PN501

And Mr Moore, if there's a change and you're not here, I'll get my associate to contact your chambers directly and advise you as to the timing.

PN502

MR MOORE: I'd be grateful for that, your Honour.

PN503

JUSTICE ROSS: Anything else? We'll endeavour to deal with it that way, but obviously it depends a bit on member availability and we'll do what we can. Anything else on that issue at this stage? No?

PN504

Can I go then to the Notices to Produce in relation to the lay evidence? This is United Voice, I think. Well, there are, I guess, three preliminary things I'd put to you. The first is, there was a timetable for the filing of these notices. It's 16 days out of time, a point Restaurant and Catering takes. These witnesses aren't proffered as experts and yet, that seems to be the pattern behind the Notices to Produce.

PN505

And speaking for myself, I would have thought that the survey evidence is going to rise and fall on the survey itself, that is, to the extent it's sought to be extrapolated to the general population, then it will depend on the nature of the sample. To the extent that it's validity is challenged, that might be based on sample size, and those questions can be put.

PN506

So having regard to the fact it's out of time and the witnesses aren't proffered as experts, they're simply who have been involved in the development of it or the running of the survey, and the survey rises and falls on its own, why should we not uphold – well, why shouldn't we uphold the objection and set aside the Notices to Produce?

PN507

MR DOWLING: Your Honour, taking on board what your Honour's just said, we unfortunately don't know the sample size because we don't have the full set of answers. We don't have a full set of questions. There are three categories of documents we've sought.

PN508

JUSTICE ROSS: That's not – that doesn't help you on sample size. Sample size helps you on – you need to know how many people was the survey sent to and you can ask the witness these questions in cross-examination.

PN509

MR DOWLING: We can, your Honour, but fairness, in our view, would be assisted by having some advance warning of the breadth of the survey, the number of answers to the survey, the number of incomplete numbers to the survey. We're not able to test any of that, other than on the run in cross-examination. And none of it, in our submission – we accept it was late.

PN510

Unfortunately these people are in a slightly odd category in the sense that they're not lay witnesses of the character of the majority of them and they're clearly not experts. But this – the only thing that it sought were the full answers, the full questions and the instructions. We hear what you say about the instructions and that might not advance matters. But in respect of the full answers- - -

PN511

JUSTICE ROSS: What do you mean by the full answers?

PN512

MR DOWLING: Well, we don't have – all we're given is, or all that is deposed to or put in the statement, is some of – some description of some of the answers. Now, that makes it very difficult for us to test.

PN513

JUSTICE ROSS: So, must refresh my memory. There's no – so the statement doesn't detail how many people were asked the questions, what the survey size is?

PN514

MR DOWLING: That's my understanding, your Honour.

PN515

JUSTICE ROSS: And it doesn't detail the response rate?

PN516

MR DOWLING: Not per question. And we would need to know per question.

PN517

JUSTICE ROSS: Well, it's only the answers they're relying on that you need to know, isn't it?

PN518

MR DOWLING: Well that might not be so, your Honour, in the sense that if there is a very regular response rate to one question and not to others, that might be probative.

PN519

JUSTICE ROSS: But if they're only relying on the response to certain questions, why would you be entitled to know what the answers to the others?

PN520

MR DOWLING: Well, only to test the veracity of the figures in respect of those questions that are relied upon. It's said there's a response rate of 95 per cent to this question, for example, and every other question, if we discover has a response rate of 10 per cent, it might undermine the veracity of the 95 per cent return rate.

PN521

JUSTICE ROSS: Well, it might, but it might also mean that they're more interested in that question.

PN522

MR DOWLING: It might, and we appreciate that that's at the edge of probative information. But certainly, in respect of – we're given the question, we're given some response data and we're given response percentages that don't appear entirely logical, in our calculations of them. So we don't know total numbers that were asked and the total numbers that were answered.

PN523

And we were only given, of course, some questions, we're not given all of the question. We don't know whether the preceding question might have influenced the answer to question 15, for example.

PN524

JUSTICE ROSS: Yes. All right.

PN525

MR DOWLING: Can I just say, in respect of the delay, we accept that. We take the responsibility for that. Against that, we don't understand there to be anything put that there's some oppression in providing it or that there's some prejudice in providing it or there's some genuine unfairness in providing it. Which would – what we would expect to see, if the lateness is being relied upon, are things put of that sort. Thank you, your Honour.

PN526

JUSTICE ROSS: Right. Anything from Restaurant and Catering?

PN527

MR CLARKE: No, your Honour.

PN528

JUSTICE ROSS: We're proposing to put questions to Restaurant and Catering, so there's material that we want you to produce. We'll set aside the Notice to Produce, but what we want produced to the Commission and we'd provide it to the parties and we would have asked these questions of the witness in any event.

PN529

We think it's a valid point that the preceding question may influence a subsequent question, so we wanted to see the list of questions that was asked. We want to know what the sample size was, that is, who did the survey go to and what the response rate was in respect of each of the questions. Okay?

PN530

And those matters will, it seemed to us, be relevant to the validity of the survey or the extent to which – how much weight we might give it and the extent to which you're able to extrapolate to the general population on the basis of it. When do you think you'll be able to provide that material?

PN531

MR CLARKE: Close of business tomorrow, your Honour.

PN532

JUSTICE ROSS: All right. That material will go on the website and you'll have access to it then.

PN533

MR DOWLING: Thank you, your Honour. I understood from that, that that's in respect of the three surveys that are identified.

PN534

JUSTICE ROSS: That's right, yes. All right, that deals with that matter. Can we deal now, with the objections to the lay evidence? Can we deal with United Voice's first? And there's been a resolution of most of the objections in relation to Restaurant and Catering Industrial. Can I ask about a couple of those? Do I take it that Mr Parkes is not agreed to at the moment? Is that where we're up to? Is his is the only outstanding one?

PN535

MR DOWLING: Mr Hart.

PN536

JUSTICE ROSS: Sorry, Mr Hart, yes. Sorry, Mr Parkes, I didn't mean to put you into it. So it's Mr Hart's evidence that remains in contention. Mr Parkes, we did receive correspondence from you saying that the correspondence wasn't to go on the web site. I need to let you know that all correspondence is going to go on the web site, unless you're claiming some commercial privilege or you want a confidentiality order, and I can't see why this wouldn't go on the site.

PN537

MR PARKES: Thank you, your Honour. There were some attachments to some documents that had some employee details, and we have given some undertakings to our members that that would not be placed.

PN538

JUSTICE ROSS: Perhaps if you just identify precisely what – I thought you were just talking about the correspondence that you'd reached a settlement on certain bases, but okay, well, if you could take that on board. Can we make some provisional observations – we'll come to how we propose to deal with all of these objections in a moment – some provisional observations in relation to Mr Hart's statement? We'd make the point that the ABS and the industry profile material it seems to us could be tendered separately by RCI and be the subject of submissions, and perhaps the same observations may be made about the surveys that are referred to. Indeed Mr Hart refers to one of the surveys that is then the subject of more detailed evidence by a witness who was involved in the survey, so we'd encourage you to revisit those issues. We'd also encourage United Voice and RCI to have further discussions in relation to Mr Hart's statement.

PN539

In relation to those objections that have been resolved, how we'd give effect to that would be you would file amended statements, and when the witness is called it would be the amended statement – if you're not able to file it before then, then it would be the amended statement that would be tendered and put into evidence. I'll come back to when we're going to resolve Mr Hart's issue in the event that there are still some issues between you all, and we're interested in the submission put by RCI that a similar statement was admitted without objection in the transitional hearing, and we'd probably want a bit more detail about that, depending on where you end up to.

PN540

In relation to United Voice's objections to Clubs Australia and the AHA, we direct the parties to confer on those objections. Can we make the provisional

observation that it seems to us that the agreements that have been reached with the Restaurant & Catering Industrial seem to us to be appropriate and should guide your discussions? That's United Voice's objections. I'll come to how we're going to land on all of these matters in a moment.

PN541

In relation to the AHA's objections, can we make a provisional observation about your objections to paragraph 38 of the Petrov statement and paragraph 28 of the Davis statement? This is where each of the witnesses are talking about the health effects on them of working particular patterns. The point's taken that well it's expert opinion evidence; well it's really them saying how it impacts on them, they're not - - -

PN542

COUNSEL: They're not pressed, your Honour.

PN543

JUSTICE ROSS: Can we also make the provisional observation that Mr Harvey's statement, it does have a look of a submission, and there'd be nothing to stop the union advancing exactly the same points by submission, and it seems that there's a similarity with parts of Mr Hart's statement in that regard. That's the early version. We've not fully looked at where you've landed on that, so we ask you to take that on board in your discussions, and we'd ask that the AHA and United Voice confer, similarly with ABI and United Voice. I'm not sure – look, we take the point about some of the propositions being hypothetical, but we're conscious of how much time do we want to spend resolving the objection when it is hypothetical and can be put to the witness it's hypothetical, and then what weight we would give it is the question that arises from that.

PN544

So having regard to those observations and the provisional view we've expressed in relation to the agreed position with RCI and our hope that that will guide the discussions between the parties, we ask you to have those discussions. We'll resolve any remaining issues at 9 am on Thursday. For those witnesses who we're dealing with before then, we'll resolve those objections when the witness is in the box. For statements tendered, we'll just deal with them as we go through, rather than delay them. We'd encourage you to reach an agreement, bearing in mind that at the end of the day even though some of this material might be admitted it will then be an argument about weight as well. If you can advise us at the close of the proceedings tomorrow where you're up to in relation to those discussions and the extent of any agreement? Anyone have any questions about any of that? Yes, Mr Warren?

PN545

MR WARREN: Other than we don't know how the issue with Mr Hart was resolved I'm sure we can deal with that.

PN546

JUSTICE ROSS: No, that was the issue about – no, we'll break shortly, because I think the first witness is scheduled at 11.30. I don't suppose – yes, bear with me for a moment – now, Mr Hart, I've got a copy of the correspondence – your

covering letter and then the two pages, which sets out the extent of the agreement. There's no issue about that, is there?

PN547

MR CLARKE: No, there's no issue about those contents.

PN548

JUSTICE ROSS: All right. Well, I'll just ask the associates if they can copy that, and that can be provided to anyone that's interested during the break.

PN549

MR CLARKE: Thank you, your Honour.

PN550

JUSTICE ROSS: So no other questions about that?

PN551

MR DOWLING: One other matter, your Honour. There is a second statement of Mr Hart. An objection has been taken to it in communications between the party, and that's the statement of Mr Hart that does nothing other than attach the draft Productivity Commission report.

PN552

JUSTICE ROSS: Yes. Look, on the face of it, and you note in your material you can simply seek to – you can put it in as material you want to rely on. There'll be an issue about the weight which you give to it and all of those things.

PN553

MR DOWLING: And its admissibility, your Honour.

PN554

JUSTICE ROSS: I'm sorry?

PN555

MR DOWLING: And its admissibility, your Honour.

PN556

JUSTICE ROSS: Yes, we can deal with that when you seek to tender it.

PN557

MR CLARKE: I'd see that as something that would form part of our discussions, your Honour.

PN558

JUSTICE ROSS: Sure, yes, and to the extent that you abstract from Mr Hart's material certain of those reports, we can deal with the admissibility questions at 9 o'clock on Thursday when we deal with the balance of the issues.

PN559

MR CLARKE: Yes.

PN560

JUSTICE ROSS: Anything else? No? I think the fourth issue was the scheduling of the witnesses, and there was a bit of to-ing and fro-ing between you about that. I think that issue's probably best revisited once we've resolved the objections to the lay evidence and once we see how the first few days goes. We note the – I think it was the AHA's offer to bring forward some its witnesses from the third week to the second to fill in some gaps, and we'd certainly encourage you to do that to the extent it can free up some time in the third week to deal with as much of the expert evidence as possible. I'm not sure where you've landed on whether any further experts are available in that week, and I'm not sure where – there was a foreshadowed objection to one the Guild's witnesses. That's the Pazuelo – I'm not sure where that's – is it later this week that the objections to the expert evidence come in?

PN561

MR MOORE: Your Honour, I think Ms Pazuelo flagged that objection is intended to be made to the receipt by the Commission as evidence of her two reports.

PN562

JUSTICE ROSS: Yes.

PN563

MR MOORE: I think that remains the intention. I think the objections are due in a few days. I don't have the date - - -

PN564

MR DOWLING: Tuesday of next week, yes.

PN565

MR MOORE: Yes, and I think there's a hearing – well, I think there's a need to make provision for the hearing of those objections, which I don't think there's provision for in the current timetable, your Honour.

PN566

JUSTICE ROSS: There is, isn't there? Aren't we dealing with that on Thursday?

PN567

MR DOWLING: Friday.

PN568

JUSTICE ROSS: Friday, yes.

PN569

MR DOWLING: Friday week.

PN570

JUSTICE ROSS: Yes. I think that's on the schedule that was put out. All right, so we'll revisit the scheduling once we get an idea of – and it may be that the resolution of the – by agreement or by determination of the objections to the lay witness evidence might shorten the cross-examination of some of these witnesses

such that we're able to fit more lay witnesses in next week, but we'll wait and see how that develops.

PN571

MR DOWLING: Just two short matters, your Honour. We are happy for witnesses to be interposed out of order, we just ask if we could be given some notice.

PN572

JUSTICE ROSS: Yes.

PN573

MR DOWLING: We're the ones doing the cross-examination and it would be much appreciated.

PN574

JUSTICE ROSS: Can I suggest that you have a discussion with the AHA and they look at what – because they've made the offer to bring forward some of their witnesses in that third week into the second week - what that might look like, and then we can revisit that later this week.

PN575

MR DOWLING: And secondly, in respect of the experts, can we just foreshadow this, your Honour? The expert material in reply is due on 16 September, so it will come in of course while we're in the running in this matter. We are concerned that we'll have to deal with that and then cross-examine them a few days shortly thereafter.

PN576

JUSTICE ROSS: Well if we can move the AHA week of lay witnesses to the second week, then that may provide at least – at the moment they're scheduled over two days I think, in the third week, the Monday and Tuesday; we're able to at least provide that time.

PN577

MR DOWLING: Thanks, your Honour. And the last issue with respect to experts is two of our experts - Professor Quiggin and Professor Ballen - had some limited availability, and we appreciate that this is an evolving timetable but we note also that the 30th of September, the 1st and the 2nd of October has been allocated, because we put in a bid for the 1st and 2nd of October for Professors Quiggin and Ballen, so as to arrange as much as we were able to their availability.

PN578

JUSTICE ROSS: Mm. I mean once we know which experts will be dealt with in this tranche, certainly within this 3-week period, we'll settle the hearing times in relation to the balance of the experts, because there's also – there's the outstanding – I think it was the Restaurant & Catering or it may have been the AHA have raised the need to adjust the directions for the filing of submissions as well, having regard to the timing of the expert evidence, so those are matters that we'll revisit in the course of this next two-and-a-half weeks or so.

PN579

MR DOWLING: Thank you, your Honour.

PN580

JUSTICE ROSS: Look, we'll also, probably next week - and probably it will be outside of the sitting times - we want to crystallise the discussions in relation to the retail tranche of the case. On the last occasion I think the SDA and the retailers were having discussions about draft directions for objections to lay evidence et cetera and timetabling, but we're not sure where that's up to, and we don't want it to drift very much further than next week, so Mr Moore, can you tell us where any of that's up to at the moment?

PN581

MR MOORE: Your Honour, I don't believe there's been any further discussions about the detail of the timetabling, but I can indicate that we will get on to that and ensure that we correspond with the employer representatives about some proposals as a priority.

PN582

JUSTICE ROSS: Okay. Can I ask if you can provide an update by the end of the week as to where you're up to in relation to it so that we don't let it drift, and if there's a need for us to make any decisions about it then we can make them next week?

PN583

MR MOORE: Yes, certainly, I will do that, your Honour. Might I just go back to the question of the objections to expert evidence? Can I just clarify, I think in the directions of the 25th of August, provision was made for the objections to – as amended, I'm sorry - the 27th of August, as I understand it, the hearing of the objections, what we dealt with at the commencement of the proceeding on the 17th of September? I had wondered whether there might be utility in that occurring on the 18th, given that the timetable which has been flagged or set out provides – there seems to be time on the 18th, and the hearing of objections might take up some time?

PN584

JUSTICE ROSS: Yes, the time on the 18th would be after the evidence of Karen Greentree, is that right? Is that when you're envisaging it?

PN585

MR MOORE: Yes. I think I had in mind that one of the more recent proposals, an exchange between the hospitality parties, which I understood was agreed between them, provided for a gap in that time, that is, in the whole of the afternoon of the 18th of September, but I see that that's not reflected in the terms of the current directions issued by the Commission.

PN586

JUSTICE ROSS: Okay. Is it the case that there's nothing scheduled on the 18th at the moment?

PN587

MR DOWLING: 18th of September, the parties – you might remember Ms Wellard filed a timetable.

PN588

JUSTICE ROSS: Yes.

PN589

MR DOWLING: There was some dispute about it. But as I understand it the parties are agreed that the 18th will be used for a number of matters, one of which is this - the matter that Mr Moore raises - so as I understand it, the 18th has by agreement between the parties been allocated to this issue.

PN590

JUSTICE ROSS: Right. Anyone object to that? No. All right. Well we're still going to want to look at some of the AHA witnesses filling in the spots on Thursday afternoon and at least some time on the Friday, so that's when we'll deal with the objections to the expert evidence, at 9.30 on the 18th, okay?

PN591

MR MOORE: Your Honour, it also seemed that the 18th being the time in which the objections to expert evidence will be dealt with, it would seem that that might also be a timely occasion to deal with any other procedural and timetabling issues. I'm conscious that it's not the SDA's intention to appear, with the leave of the Commission of course, in the hearings of the hospitality group between now and whenever it might be listed, but there are a number of issues that are looming beyond objections to expert witnesses.

PN592

JUSTICE ROSS: What are they?

PN593

MR MOORE: There are questions of scheduling of experts, questions of scheduling of retail, lay evidence and - - -

PN594

JUSTICE ROSS: Yes, okay, but all the retail stuff will be dealt with just with the retail parties, and it will be dealt with – you're having the discussions with the retailers, and then at some time next week after the hearings conclude a member of the Bench will convene a mention and directions in relation to the retail matter. But what issues remain? As for scheduling issues, to the extent that they apply, they deal with the week following, then they'll be dealt with towards the end of this week. To the extent they deal with the experts that are not dealt with in these three weeks' of sittings, we'll revisit that once we've heard the evidence from the experts that are to be dealt with. Until we know where all that's up to – but towards the end of the 3-week period we will deal with when the other experts are to give their evidence, but not until we've heard the experts that are to be called.

PN595

MR MOORE: I understand, your Honour. The question then on that, following your Honour's observations, then is the determinations made as to the listing of experts in the last week of the September sittings and is it your - - -

PN596

JUSTICE ROSS: I thought you had agreed on that.

PN597

MR MOORE: No, that was a matter not agreed between the parties and the correspondents. The position which SDA and United Voice have submitted in correspondence was that the last two days of the last week of the hearings, that is the 24th and 25th, be allocated to hear the evidence by Ms Pazuelo - assuming any objection is refused - and Dr Sands, those two witnesses, on the basis - - -

PN598

JUSTICE ROSS: Why can't Professor Lewis and Professor Rose be dealt with?

PN599

MR MOORE: Because at the moment my estimate of time in cross-examination for Ms Pazuelo is a day-and-a-half. That's the basis of the way it's put, your Honour. On the material that we have, Ms Pazuelo is the author of two reports; they are substantial documents, and there may be reply material, and without seeing that reply material I don't know what the boundaries of it - - -

PN600

JUSTICE ROSS: When is the reply material to be filed?

PN601

MR MOORE: The 16th. That was a further reason why it was thought at least in my mind that dealing with procedural matters including a listing of expert materials could perhaps be usefully dealt with on the 18th because by that time we will see what the compass of the reply material is, which will have a major effect obviously on framing the extent of cross-examination. As I understand it, the employers have proposed that all four of the employer expert witnesses give evidence over those two days.

PN602

JUSTICE ROSS: Yes, they have.

PN603

MR MOORE: We have indicated our position that as the materials stand at the moment, we've - - -

PN604

JUSTICE ROSS: No, that's fine. I understand that position. Does anyone else want to say anything about this?

PN605

MR SECK: Just on the issue of the availability of Ms Pazuelo, Your Honour, if one and a half days is required for cross-examination of Ms Pazuelo, what we can do - as I understand it, there are times on the afternoon of 23 September which are available, so we could start Ms Pazuelo that afternoon and we can go into the 24th. As I understand it, Professor Rose and Professor Lewis may be able to move to the 25th.

PN606

MR IZO: Just to clarify, Professor Rose can move to the 25th. Professor Lewis is only available on the 24th.

PN607

JUSTICE ROSS: So if, on the estimates, and yes, it depends on how we deal with the objections to Mr Harvey's evidence, but it would seem that the afternoon of the 23rd could be available. That would still take the afternoon of the 23rd and the 24th to deal with Ms Pazuelo's evidence assuming her evidence isn't knocked out by the objection stage. That then would leave a day. Dr Sands is not available on the - who would you propose to call to use the time on the 25th?

PN608

MR SECK: Dr Sands and Professor Rose.

PN609

MR MOORE: Your Honour, just in relation to Dr Sands, he is availability has opened up so we have some more flexibility with the timing of his evidence.

PN610

JUSTICE ROSS: Yes, but in any event, you've got a day on the estimates. So is it the employer position that Professor Rose and Dr Sands could be called on Friday the 25th?

PN611

MR SECK: Looking at the timetable that's so, your Honour.

PN612

MR IZO: Your Honour, we can accommodate Professor Rose on the 25th. The one thing I would say with respect to Professor Lewis, his available dates are shrinking if he is moved from the 24th. All Professor Lewis would have left is 30 September, 1 October and 2 October. So he could still do that in the first week of October, but that's all I have in terms of availability for Professor Lewis.

PN613

JUSTICE ROSS: Well, then he would, on that basis, get some priority on those dates. What is the estimate for cross-examining Professor Rose and Dr Sands? Dr Sands, I thought, was half a day. Is that right?

PN614

MR MOORE: That is the current estimate, Your Honour.

PN615

JUSTICE ROSS: All right. Professor Rose?

PN616

MR MOORE: I would estimate half a day.

PN617

JUSTICE ROSS: On the rough estimate we have got, do we need any further discussion about this? We would look to schedule Ms Pazuelo on the afternoon of the 23rd and then on the 24th and we would schedule - the parties can advise as to

what order suits them, but on the 25th Professor Rose and Dr Sands. Do we need any further discussion about any of that? On the indication - we will revisit - once we have concluded the expert evidence or at least at some point during the hearing on the 25th we will revisit the scheduling of the other experts and I would encourage you to have a discussion with the other parties to try and accommodate the availability of all of them if we can in the time we have got. Do we need any further discussion about any of that?

PN618

MR MOORE: Your Honour, the only matter to clarify, in light of some indications given by your Honour at previous mentions, we are proceeding on the basis that in the September hearings we won't reach the union experts.

PN619

JUSTICE ROSS: I don't know.

PN620

MR MOORE: If that's an unsound assumption, we would appreciate an indication from the Commission.

PN621

JUSTICE ROSS: How do I know any of that until - let's just deal with the experts we have got. As I have said, on the 25th we will revisit when everyone else has been scheduled and have a discussion amongst yourselves about availability. There may not be an issue about interposing. If those are the only dates that people are available, then try and accommodate that amongst yourselves. We are not able to say anything useful about the scheduling of expert witnesses at this stage when we haven't heard any of them. We don't know how reliable any of the estimates are on cross-examination and we just want to see how it goes.

PN622

MR MOORE: Yes, your Honour.

PN623

JUSTICE ROSS: Yes. Anything else on that? Mr Dowling?

PN624

MR DOWLING: Can I raise one last issue about the dates of the 30th and the 1st or 2nd which have been discussed in this exchange? I don't think it has been mentioned by the Commission as to where those sittings will be. Is that - - -

PN625

JUSTICE ROSS: That depends on where the experts are. I mean we want to try and - - -

PN626

MR DOWLING: I accept that, yes.

PN627

JUSTICE ROSS: And where the preponderance of representation is, really. From our perspective, what is the most convenient place to sit as far as the parties

collectively are concerned? We know there's not going to be an ideal circumstance, but we also want to minimise the inconvenience to the experts and across to the parties, so - - -

PN628

MR DOWLING: There is a public holiday in there too in Victoria at least, your Honour.

PN629

JUSTICE ROSS: Yes. Well, this is the Grand Final Eve one.

PN630

MR DOWLING: That's 2 October. I only bring that to the Commission's attention so you are aware of that.

PN631

JUSTICE ROSS: Well, that might mean we're sitting in Sydney. It might depend on who is in the Grand Final, I might say. To the extent - well, I think we have got the problem we've got. We've got a limited amount of days and we're just going to have to make the best that we can of them. Speaking for myself - and it maybe that not all members of the Bench are available on those days - I don't mind if we sit on a Saturday if that means we're going to try and get through it, or a Sunday in the interests of being even handed, given the nature of the claim, but if that - if we get caught - and the nature of some of the experts is that they may not be in the country for large periods of time or be unavailable - then I think we just need to work out how we are going to accommodate that so we can deal with the evidence as best we can. We will be revisiting that issue. At this stage, until the material is in - well, I'm not sure what the employer parties could usefully say about how long the cross-examination is going to take at this point.

PN632

MR IZO: We would need to read the reports first, your Honour.

PN633

JUSTICE ROSS: Exactly right. So until we get to that point certainly some of it is directly - it's been foreshadowed, but it's directly referable to some of the employer experts, so you know the nature of it, but as you say, Mr Izo, the how long question. It's not unreasonable that you have a look at the report before you get asked to provide - - -

PN634

MR IZO: It's just that we need to print the reports first, then read them, your Honour.

PN635

JUSTICE ROSS: All right. Is there anything further? I think our first witness then is scheduled at 11.30. This is Ms Ferguson. Can I just indicate that although we have the documents, I think for each of the witnesses - and look, try and accommodate this as best you can - that when they're put in, if you can tender the statement and the supplementary statement. If you can have - and I appreciate this is short notice for Ms Ferguson - but copies for each member of the Bench. The

reason I raise that is this, that when I look at United Voice's objections and I try and match them up with the paragraphs in the statement I couldn't find them. Now, that might be that I was just doing this quickly this morning and I'm not sure whether the objection is to the supplementary or the main statement. As I say, that might just be my fault because I was doing it quickly, but I just want to make sure we've got the right document.

PN636

UNIDENTIFIED SPEAKER: Just to clarify, copies are required for each member of the Bench of each of the statements? I'm not suggesting we can't do it. We just need to - - -

PN637

JUSTICE ROSS: No, no, no, let me withdraw that. I'm just thinking of some of the witness statements with a telephone book of attachments. Just one would be sufficient and you just need to confirm that that's the document that was filed on a certain date and do it that way. Let's do it that way. It's just that it's a different position, I might say, in relation to RCI only because you have amended by agreement the statements and to the extent the rest of you do that as well, then we would ask you to file the amended statement and we can print that out for ourselves and also then tender the amended statement. One copy when the witness goes in the box. If the amended statement - it will obviously be dated. That will also provide an identifying feature. You look puzzled?

PN638

UNIDENTIFIED SPEAKER: No, I've worked it out.

PN639

JUSTICE ROSS: No, no, ask the question. So let me just recap. Always dangerous. So when the witness comes in - let's take Ms Ferguson, first witness. You'll tender a copy of the statements. One copy and they will be marked as exhibits. Objections are going to be taken to some parts of it probably before the marking, but let's not worry too much about that, and we will hear the argument on the objection and we will rule on the objection. Then subsequently for other witnesses the same process. You'll hand up one copy of the statements of the witness, we will mark them and deal with it that way. Where you reach agreement with United Voice on their objections to some of the lay evidence as the RCI has, then you should file electronically an amended statement of that witness which - don't redact them and cross them out. Just file a new statement which reflects the agreement between you and then when that witness comes in you will say - you will put the amended statement to the witness, the witness swears up to it, you tender the amended statement, one copy, and it will be marked. So the only difference to the amended statements is you will electronically file them as well so we can print them out before. All right?

PN640

UNIDENTIFIED SPEAKER: Thank you. I appreciate that.

PN641

JUSTICE ROSS: Anybody else? No. So just bear with me for a moment.

PN642

MR IZO: Your Honour, could I just raise one matter as a courtesy to the Bench in terms of appearances for the proceedings over the next couple of weeks?

PN643

JUSTICE ROSS: Yes.

PN644

MR IZO: This is a matter that I raise on behalf of my clients, but it may be that other employer or union parties are in a similar position. The New South Wales Business Chamber and ABI have witnesses that they take interest in the restaurant industry where we will be seeking to cross-examine and we have our own experts obviously that we have an interest in leading evidence, et cetera. We intend to have someone attend the hearing on those days where hospitality evidence will be heard matters not relevant to our claims. They will be present but it won't be necessarily the same advocate because they will simply be observing, but continuing in appearance. It may be, from what I understand, that there is other employer parties in the same position, so we just thought we would just notify you of that.

PN645

JUSTICE ROSS: No, that's fine. I had taken it because of the scheduling of the witnesses that you might be in and out of the proceedings. That's fine, you don't need leave to do that or if you are changing representation, that's fine too. The transcript will be ordered in the usual course. I think in the statement last week it identified the mini website. The idea is that anything that comes in would be posted on that. Ultimately we would have the list of exhibits with links to each of the exhibits tendered in the proceedings on that site as well. You look puzzled, Mr Dowling?

PN646

MR DOWLING: No, your Honour, it's all clear.

PN647

JUSTICE ROSS: Well, we will come back at 11.30 to deal with Ms Ferguson's evidence.

PN648

MR MOORE: If the Commission pleases - - -

PN649

JUSTICE ROSS: I'm sorry, Mr Moore.

PN650

MR MOORE: Sorry, your Honour.

PN651

JUSTICE ROSS: No, that's all right, yes.

PN652

MR MOORE: As a courtesy, I seek permission to leave the Commission and return at the next scheduled date.

PN653

JUSTICE ROSS: No problem. Thank you. Now we will adjourn.

SHORT ADJOURNMENT [10.45 AM]

RESUMED [11.40 AM]

<KASIE ANN FERGUSON, AFFIRMED [11.41 AM]

EXAMINATION-IN-CHIEF BY MR STANTON [11.41 AM]

PN654

Your name is Kasie Ferguson?---It is.

PN655

You are the owner and manager of The Railway Hotel located in May Street in Parkes?---Yes.

PN656

How long have you held that position? That is owner and manager of that hotel?---It will be five years in December.

PN657

How long have you worked in the hospitality industry?---Ten years.

PN658

You have made two statements - - -?---Yes.

PN659

- - - for the purpose of these proceedings?---Yes.

PN660

Do you have - have you brought your statement with you into the witness box?---No, I don't have it in front of me, sorry.

PN661

All right. Well, I'll show you these documents. Ms Ferguson, I have shown you firstly a stapled document of three pages?---Yes.

PN662

Is that a copy of the statement you have made in these proceedings?---Yes, it is.

PN663

And I have shown you a single page document. Is that a copy of a supplementary statement that you have made in these proceedings?---Yes, it is.

*** KASIE ANN FERGUSON

XN MR STANTON

PN664

In relation to the first of those statements which you have made, I understand - is there any correction to that statement?---Yes. We made a correction on number 13.

PN665

Is that paragraph 13?---Paragraph 13, yes.

PN666

Could you just indicate the nature of that correction?---The line is, "Due to the cost of wages we never used to open the hotel on a Sunday." The correction is that the bistro part of the hotel wasn't open on a Sunday.

PN667

So to be clear, the word "hotel" is to be replaced with the word "bistro"?---Bistro, yep.

PN668

With that correction, do you say that the statement is true and correct to the best of your knowledge?---Yes.

PN669

Do you say that in relation to the supplementary statement that that is true and correct to the best of your knowledge?---Yes.

PN670

I will seek that those statements be entered into the proceedings as Ms Ferguson's evidence.

PN671

MR DOWLING: Thank you, your Honour. There are five objections in respect of Ms Ferguson's statement and can I tell you they fall into - if the Bench has seen the - we have made a valiant effort to - - -

PN672

JUSTICE ROSS: We have.

PN673

MR DOWLING: To simplify the submissions. All of the five fall into what we call one of the two hearsay categories. There were two hearsay categories, those that sought to express the views of employees and those that sought to express the views of members or community members. The first is that part of the first sentence at paragraph 8 from the words "as I feel" to the end of the sentence which purports to give some evidence about community views or expectations.

PN674

JUSTICE ROSS: Yes.

PN675

MR DOWLING: The second is the second sentence of paragraph 11.

*** KASIE ANN FERGUSON

XN MR STANTON

PN676

JUSTICE ROSS: Why is the first bit objectionable? "Casuals will generally volunteer for those shifts." That's based on past experience.

PN677

MR DOWLING: The word "volunteer" certainly suggests that - gives some evidence about the freewill or otherwise of the person seeking to do the shift.

PN678

JUSTICE ROSS: Why couldn't the witness be cross-examined about what does she mean by volunteer? It may be that they have volunteered. They've expressed, "Well, I would like to work on that day." I mean I take the point in relation to the next reference where it seeks to impute into the casuals, their motivation, due to the money they earn working on a public holiday.

PN679

MR DOWLING: In our submission, giving evidence about the voluntary nature of the person who makes the request is not properly admissible. True that she can be cross-examined on it, but that doesn't make the sentence admissible.

PN680

JUSTICE ROSS: Yes, all right. And 14 is the same objection as 8.

PN681

MR DOWLING: That's evidence of the community views. The next is the last sentence of paragraph 15 which is again giving evidence about the voluntary nature of the offer.

PN682

JUSTICE ROSS: No, it just says "will offer to help out".

PN683

MR DOWLING: We appreciate this is at the periphery of this category but again, in our submission, it's a view about the willingness or otherwise of doing it.

PN684

JUSTICE ROSS: All right.

PN685

MR DOWLING: The last is from the word - in paragraph 17, the words "so that is the best time for them" et cetera, et cetera, again giving some evidence about their own views or their own - - -

PN686

JUSTICE ROSS: Anything you want to say about that?

*** KASIE ANN FERGUSON

XN MR STANTON

PN687

MR STANTON: Yes. On what principle is it inadmissible? If it's said that it's inadmissible because of the application of the Evidence Act, and that is apparent

from the submissions that have been filed, that's easily resolved because that Act doesn't apply.

PN688

JUSTICE ROSS: No, it doesn't. It is sought to be excluded on the basis that it is hearsay and while we are not bound by the rules of evidence, we can apply the rules and we indicated earlier that parties should make an effort to exclude hearsay statements, submissions and arguments from their witness statements.

PN689

MR STANTON: Submissions and opinion I think were referred to in an earlier direction in March of this year.

PN690

JUSTICE ROSS: That's true.

PN691

MR STANTON: But there was no direction. There was no direction that any of this material - - -

PN692

JUSTICE ROSS: No, but the point - - -

PN693

MR STANTON: - - - had to comply with evidentiary Act principles.

PN694

JUSTICE ROSS: But the objection can be taken on hearsay grounds.

PN695

MR STANTON: Well, I press all of them. The witness is in the box and can be examined and for the most part this material explains the evidence. Further to that, it really can't be controversial that people want to work shifts on weekends. That's the nature of much of the material that has been filed by lay witnesses on behalf of the union, particularly Ms Greentree at paragraph 17 or 18. I don't take the Bench to that suffice to say that really isn't a controversy in my submission on those points, but Ms Ferguson is a member of a community, a substantial member of a community operating a business within the community. Expressing a view about community expectations I submit is logically probative. She can be questioned on those matters. May it please.

PN696

JUSTICE ROSS: Anything further? Can we just adjourn for a couple of minutes and come back with a ruling, thank you.

SHORT ADJOURNMENT

[11.48 AM]

RESUMED

[11.52 AM]

*** KASIE ANN FERGUSON

XN MR STANTON

PN697

JUSTICE ROSS: In relation to the objections taken to paragraphs 8 and 14, we dismiss the objection. The evidence is limited to the community in which the witness operates a business and on that basis, we will allow it and she can be cross-examined about it.

PN698

In relation to the objection on paragraph 11, we would uphold the objection in part. We would delete the words "due to the money they earn working on a public holiday" as it seeks to impute motives to the employees who work on those days. For the same reason, we would uphold the objection in relation to paragraph 17 insofar as we would delete the words at the end of that sentence "and so the best time for them to work is during the evening." We dismiss the objection in relation to paragraph 15. Cross-examination?

PN699

MR DOWLING: Thank you, your Honour.

PN700

JUSTICE ROSS: Yes, I should mark, I'm sorry, the first statement as exhibit AHA1 and the supplementary statement as exhibit AHA2.

EXHIBIT #AHA1 WITNESS STATEMENT OF KASIE FERGUSON

EXHIBIT #AHA2 SUPPLEMENTARY STATEMENT OF KASIE FERGUSON

PN701

MR DOWLING: Your Honour, I should have raised this earlier and there has been some discussion between some of the parties but not between all, so for completeness, we seek an order that witnesses remain outside the courtroom.

PN702

JUSTICE ROSS: Yes, so ordered. Are there any witnesses that are scheduled to appear?

PN703

MR DOWLING: None of ours. I believe the AHA witnesses are outside.

PN704

JUSTICE ROSS: Well, let me just ask the question. Is anyone present a witness? No, good. No one interstate? No. All right.

PN705

MR DOWLING: Thank you, your Honour.

CROSS-EXAMINATION BY MR DOWLING

[11.55 AM]

PN706

Ms Ferguson, your evidence is you are the owner and manager of The Railway Hotel in Parkes?---Yep.

*** KASIE ANN FERGUSON

XXN MR DOWLING

PN707

I think you said earlier this morning that you have held that position for five years?---Yep.

PN708

And worked in the hospitality industry for 10?---Yep.

PN709

I take it, having held that position for five years, you are familiar with the wages and other costs of the hotel on particular days?---Yes.

PN710

And your turnover on particular days as well?---Yes.

PN711

If I can just ask you some questions about Sunday trading firstly, should we understand from your statement that you have calculated the amounts that you pay on that day in penalty rates?---Sorry?

PN712

Should we understand from your statement - - -?---Yes.

PN713

- - - that for the purposes of your evidence you have calculated the component of wages that you pay on a Sunday that is attributable to penalty rates under the award?---Yes.

PN714

You have done that exercise?---Yes.

PN715

You have not set that out in your statement. Is there a reason you haven't set it out in your statement?---No.

PN716

When you did that exercise did you do it in a document?---No.

PN717

Did you do it in your head?---Yes. Just in general conversation with my business partner we have established the wage costs on a Sunday.

PN718

Now, just to be clear, I'm not talking about the wage cost only. I am talking about the proportion of that wage cost that is attributable to penalty rates. Is that a calculation that you have made?---I don't really understand, I'm sorry.

*** KASIE ANN FERGUSON

XXN MR DOWLING

PN719

Let's say you have a total wage bill, to make things simple, of \$100 and it's a Sunday and let's say for the particular Sunday there might be a penalty rate of 150

per cent. So on a Sunday you might pay \$150, so for that particular day, that portion that is attributable to penalty rates is the \$50 of the \$150?---Okay.

PN720

Do you understand that exercise?---Yes.

PN721

Is that an exercise that you have performed for Sundays and public holidays?---No, not like that.

PN722

The AHA on whose behalf you are giving evidence, they propose some variations to the penalty rate regime?---Yes.

PN723

Have you made a calculation similar to what I have described as to what would be payable in penalty rates under the variation as proposed by the AHA?---Not via a document like you - - -

PN724

In any way in the manner that I have described?---Just in general conversation and understanding the difference in penalty rates that they propose.

PN725

Again so we can be specific, have you calculated under the AHA proposal what proportion of the wages you will pay on a Sunday or a public holiday is attributable to penalty rates?---No.

PN726

Because you give some evidence about additional things that you might do if there was to be a variation in the penalty rates. Do you recall that evidence?---Yep.

PN727

How is it that you are able to make a calculation or make an assessment of additional things you may do if you have not made a calculation as to what proportion is payable in penalty rates under the existing scheme and you have not made a calculation as to what penalty rates are payable under the variations proposed? How were you able to do that?---Just in general, my understanding is what we pay now in penalty rates and then the proposed difference in penalty rates would be slightly lower, so I would be able to afford to, say, put one casual person on a Sunday or a public holiday more than what I am able to at the moment and therefore I would be able to expand my business quite considerably in some cases more so than what I am able to do at the moment.

PN728

But when you say the penalty rates under the AHA proposal would be slightly lower, you haven't calculated how much lower they would be, have you?---Not the exact amount, no.

*** KASIE ANN FERGUSON

XXN MR DOWLING

PN729

Not at all, I am putting to you, have you?---Not at all.

PN730

So you can't really make a proper assessment of what the difference will be for you in terms of your trading cost on any particular - your wages costs on any particular day under the AHA proposal, can you?---No.

PN731

Therefore, you can't make a proper assessment about what changes you would make in terms of additional services or additional labour, can you?---No.

PN732

You have given some evidence about public holidays and I think part of your evidence is that people leave town in Parkes on public holidays and they do things such as camping and skiing. Is that right?---Yes.

PN733

People leaving town on public holidays is one of those things that affects your profitability on those days. Is that right?---Over some public holidays, yes.

PN734

You have also given some evidence that one of the potential consequences, at least, of the variation sought by the AHA would be that you yourself would not have to work on a Sunday and a public holiday?---Yes.

PN735

I take it you work quite hard in your position?---Yes.

PN736

It would be important for you to have a Sunday or a public holiday off so that, amongst other things, you could rest, I imagine?---Yes.

PN737

And you could see family?---Yes.

PN738

Friends?---Yes.

PN739

Or other - catch up on housework?---Yep.

PN740

Recreation?---Yep.

PN741

Sundays and public holidays are important to you for those reasons?---Yes.

*** KASIE ANN FERGUSON

XXN MR DOWLING

PN742

You have also given some evidence that one of the potential consequences in respect of the AHA variation would be in terms of rostering your casual employees. I think there is a typographical error in paragraph 20 where you say "causal employees". I take it you mean "casual employees"?---Yes.

PN743

Should we understand that although you have not done the calculations we have described, if there was some additional hours to be worked, the people that it would be allocated to are an existing part of your casual workforce?---Yes.

PN744

They're the casual employees that you identify in AH2 as your six casuals?---Yes.

PN745

Nothing further.

PN746

JUSTICE ROSS: Re-examination?

PN747

MR STANTON: There's nothing.

PN748

JUSTICE ROSS: Thank you very much for your evidence, Ms Ferguson. You are excused?---Thank you.

<THE WITNESS WITHDREW [12.03 PM]

<PHILIP TUDOR, SWORN [12.04 PM]

EXAMINATION-IN-CHIEF BY MR STANTON [12.04 PM]

PN749

Sir, you are Philip Tudor, the owner of the Hotel Canobolas?---Yes.

PN750

You will have to speak up?---Sorry. Yes, I am.

PN751

That's in Orange, isn't it?---That's correct.

PN752

How long have you had the hotel?---2002. So 13 years we've been in that hotel.

PN753

How long have you been in the hospitality industry?---Since I was 21, so 26 years.

PN754

For the purpose of these proceedings, you have made statements?---Yes.

*** PHILIP TUDOR

XN MR STANTON

PN755

I will show you these documents. Mr Tudor, I have shown you firstly three pages stapled. Is that a copy of the statement which you have made in these proceedings?---Yes, it is.

PN756

And I have shown you - the Commission officer has shown you a single page. Is that a copy of a supplementary statement which you have made in these proceedings?---Yes sir.

PN757

Do you say that those statements are true and correct to the best of your knowledge?---Yes sir.

PN758

If those statements could be entered in the proceedings as the evidence of Mr Tudor.

PN759

JUSTICE ROSS: Thank you. Objections?

PN760

MR DOWLING: The first one comes at paragraph 7, your Honour. The second sentence beginning with the words, "They are keen" to the balance of that sentence. The next comes at paragraph 10. It's speculation of what the customers would and wouldn't do. The next comes at paragraph 14, the sentence beginning, "It suits the employee". The balance of that sentence. The next is the second sentence of paragraph 15, "In regional centres", and the last, your Honour, is paragraph 20 which falls into a slightly different category of those we have previously been discussing as something that is self-evidently a submission in our view.

PN761

JUSTICE ROSS: Anything in reply?

PN762

MR STANTON: I'll deal with the easy bits. I don't think paragraph 20 is capable of me defending. I won't press that. In terms of the others, in particular 7, it is said to be hearsay. Well, again, Mr Tudor is here. He has 26 years in the industry. I imagine that he does have discussions with his staff from time to time but that's a matter for him. He is here to be examined. He is an experienced hotelier to the extent that the statement, for instance, at 10 says, "We cannot have a surcharge on drinks as customers would not agree to pay." I don't know that there is any controversy about that or that it's a matter really in dispute. I guess - -
-

PN763

JUSTICE ROSS: But in any event, he can be asked questions about the basis of the belief.

*** PHILIP TUDOR

XN MR STANTON

PN764

MR STANTON: He could be asked questions, yes, your Honour. In terms of 14, again - - -

PN765

JUSTICE ROSS: What do you say about the second part of 14, "I do not like paying a portion"? Is that relevant to - - -

PN766

MR STANTON: I won't defend on relevance, but I would seek that the first part remain. In terms of 15, I think is the only paragraph, if I've understood it, it's the last sentence.

PN767

JUSTICE ROSS: Yes, I think that's right.

PN768

MR STANTON: Mr Tudor, is a member of the community. He could be asked questions about this. Not only is a member of the community, he is the operator of a hotel. I take it as confined to Orange and not expressing a view wider than that.

PN769

JUSTICE ROSS: No, that's - yes.

PN770

MR STANTON: It seems fair.

PN771

JUSTICE ROSS: It says "such as Orange" so it is really - if it was - if you deleted "regional centres such as" and if it said "in Orange" - - -

PN772

MR STANTON: Yes, your Honour.

PN773

JUSTICE ROSS: Yes, all right. Is the objection pressed if that excision is made?

PN774

MR DOWLING: No.

PN775

MR STANTON: I think they are the only matters.

PN776

JUSTICE ROSS: All right. So what we are left with is the objection to the second sentence in paragraph 7, the objection to 10, the objection to what is now the last sentence of 14, "It suits the employees as they are able to make good money on that day," and 20 has been excised and 15 has been amended. So that deals with those. Is that where we are up to?

*** PHILIP TUDOR

XN MR STANTON

PN777

MR STANTON: I believe that's a correct assessment, your Honour.

PN778

JUSTICE ROSS: Just bear with us one moment. We uphold the objections in relation to the sentence in paragraph 7 which says, "They are keen to obtain work as it fits around their lifestyle," and we uphold the objection in paragraph 14 where the sentence says, "It suits the employees as they are able to make good money on that day," as those statements seek to impute motives to the employee. We exclude those and we dismiss the other objections. The witness can be asked questions about the basis of the belief expressed in paragraph 10.

PN779

MR STANTON: May it please.

EXHIBIT #AHA3 WITNESS STATEMENT OF PHILIP TUDOR

EXHIBIT #AHA4 SUPPLEMENTARY STATEMENT OF PHILIP TUDOR

CROSS-EXAMINATION BY MR DOWLING

[12.11 PM]

PN780

Mr Tudor, your evidence this morning was that you have been the owner of the hotel since 2002. Is that correct?---Correct.

PN781

I take it as a result of that ownership for that significant period of time you are familiar with the finances of the hotel?---Yes.

PN782

And the earnings and wages on particular days?---Yes.

PN783

Sundays and public holidays included?---Yes.

PN784

You say at paragraph 16 of your statement that if you closed the pub on a Sunday you would save between \$1000 and \$3000 in the weekly gross wages of the hotel?---Yes.

PN785

That, should we understand, would be your total gross wage bill for that Sunday?---Would that be the total?

PN786

Yes?---Yes, but also the wages that we would save by putting the staff back into the week - the permanent staff to work on that Sunday, so therefore casuals wouldn't work on the week because the staff will get two days off, one of them being that Sunday that we would shut.

*** PHILIP TUDOR

XXN MR DOWLING

PN787

Perhaps I will separate the question so I am clear. What you are talking about - well, what you describe there is saving between \$1000 and \$3000 in the weekly gross wages. Is it your evidence that that saving is not just the saving from wages for that day?---No, that's - - -

PN788

It's potential consequences - - -?---Of the week. If we shut the Sunday we wouldn't have to work any staff, so therefore the casual staff that work that Sunday, we wouldn't have to pay and the permanent staff that work that Sunday, that would become one of their days off because they get two days off a week. So those staff would then work back and cover some casual shifts that casual wages earn, work during that week. So then we wouldn't have to pay the casuals during the Monday to Saturday, the week.

PN789

Well, let us just concentrate for the moment then on the casuals and I think you described the savings that you make in respect of those casuals is you just - on Sunday you just don't have to pay them?---That's right.

PN790

Do you understand the savings to be that proportion - that entire wage bill that is payable to those casuals?---Yes.

PN791

Have you calculated for the purposes of the your evidence what proportion of their wage bill is penalty rates?---Yes - yeah?

PN792

On a particular day - let's concentrate on Sunday for a moment?---Okay. On a Sunday - on an average Sunday there might be about 50 hours of casual staff, so out of that roughly it's about \$10 more per hour between a normal Monday to Friday rate and a Sunday rate. So therefore you're looking at probably \$500.

PN793

Should we understand then that you have also calculated what you would be paying under the AHA proposal?---No, I haven't even - I haven't worked that out.

PN794

Because you are here in support of the AHA's variation application, aren't you?---That's right.

PN795

And you understand that it seeks a variation to the penalty rate?---That's right.

PN796

To make it slightly less or to - sorry, I withdraw that. To reduce the penalty rates that would be payable?---That's right.

*** PHILIP TUDOR

XXN MR DOWLING

PN797

You give some evidence about the consequences for the AHA variation. What you might be able to do and who you might be able to employ?---That's right.

PN798

But is your evidence that you haven't calculated what you would be paying those same casualties in penalty rates under the AHA proposal?---No, I haven't worked it out.

PN799

So does that mean all of your evidence about changes that you might make are on the assumption that you won't be paying any penalty rates?---No, the - the evidence I give now is what is actually happening today, this week.

PN800

Sorry, perhaps my question wasn't very clear. I think in terms of the mental calculation you did a moment ago you said, "The penalty rate to me might be \$500 on a particular Sunday"?---That's the difference between a Monday to Friday rate and a Sunday rate, sir.

PN801

So in terms of the consequences for a Sunday, your evidence is the difference might be \$500. So when you are giving evidence about the changes you might make to Sunday trading and the things you might do, were you doing that on the basis that, "That \$500, I won't have to pay"?---(No audible response.)

PN802

Is that right?---I don't quite understand the question, sorry.

PN803

There are things you say you can't do because of penalty rates. You would like to offer cheaper food promotions and you would like to provide live music. They're things you want to do?---We've done it in the past and what has happened is - I'll give an example with live music.

PN804

Hang on?---Okay.

PN805

Perhaps I'll - - -?---Okay.

PN806

I'll ask some questions and I'll get you to answer them one at a time so that we are clear. Having done that in the past, they are things you would like to continue to do on a Sunday. Is that right?---Certainly in the future there could be a market for it again, yes.

PN807

You've got no immediate plans to do it or no immediate desires to do it. Is that right?---Have I?

*** PHILIP TUDOR

XXN MR DOWLING

PN808

You as the owner?---Yeah. If it - if it becomes a profitable situation, certainly. If it makes the hotel busier we will definitely look at it.

PN809

Is it your evidence that one of the things holding you back from doing those things is the mental calculation you have done in terms of the penalty rates that are payable on that day or is that just one of the many factors?---That's one of many factors.

PN810

You have also given some evidence about endeavouring to, if you were able - if one of the consequences of any variation in the AHA proposal enabled you to roster more casual employees, it would enable you to give your permanent employees a day off. Do you recall giving that evidence?---Yes.

PN811

I think you describe it as a well-earned day off?---Yes.

PN812

So you work them hard?---All my permanents get two days off a week and that leaves five days and they work between sort of eight and 10 hours a day, so anywhere between sort of 40 and 50 hours and it's a busy hotel, so when they're there they do work hard.

PN813

As a result of them working hard and it being busy, they earn a day off and you would like to be able to - by rostering more casuals you would like to be able to give them another day off or accommodate their day off?---It would make it easier for me to give them a Sunday off.

PN814

Is a Sunday something that is important to them?---Some of them have family. Yes, it is.

PN815

You mention family. Is that that you see Sunday as a day that you would like to give them an opportunity to be with their family?---Some of them. Actually, some of them suit to have days off during the week, but certainly Sundays is a great day to catch up with people, yeah.

PN816

With people?---And family, yep.

PN817

And rest?---Yeah, and they rest on their two days too.

*** PHILIP TUDOR

XXN MR DOWLING

PN818

Should we understand from your evidence also that in respect of any additional hours that might be available as the result of any variation in penalty rates, the

people that you would be asking to do that work is your existing casual workforce?---Yes, it is.

PN819

Can I also ask you, please - you have given some evidence - you give some evidence that in terms of a Sunday it is cheaper for you to roster a salaried chef than an apprentice because for the apprentice you would pay penalty rates. Is that right?---That's correct.

PN820

And the salaried employee, I take it he's covered by an award? He or she, she or he?---Yes, both.

PN821

Both, right. They're covered by an award also?---Yes.

PN822

But they are in the category of employee that you have decided and agreed with them that they will receive an annualised salary?---That's correct.

PN823

Are you aware that in respect of those people on an annualised salary that you are required to keep a record of all of the hours that that person works?---Yes.

PN824

And that that person is required to sign it on a weekly basis?---Correct.

PN825

You do that?---Yes. They fill out a timesheet every day that they work.

PN826

The purpose of that is so that at the end of a year you can reconcile the number of hours they worked?---I didn't know that, but we could, yes.

PN827

The purpose of being able to reconcile is that the award obliges you in respect of those people on annualised salary not to pay them any less than they would have earned in the year had they been paid all of their penalty rates and all of their overtime? Did you - - -?---Yep.

PN828

Were you aware of that obligation?---Yep.

PN829

So can I take it from your answer a moment ago that that's not a reconciliation process you perform at the end of every year?---No, we don't.

*** PHILIP TUDOR

XXN MR DOWLING

PN830

Can I suggest to you that if you performed that reconciliation and, in fact, that employee, once he or she calculates the penalty rates and the overtime that they

worked - if that comes out above their annualised salary, you are obliged to pay the additional difference. Is that something you have ever done?---No, we haven't.

PN831

And if you performed that reconciliation and work out that, in fact, they should have been paid more than their annualised salary, that would mean in your example at paragraph 12 you wouldn't have saved any money at all, would you, because ultimately you would have had to make up the penalties and the overtime that that person would have been entitled to. Do you agree with that?---I agree with that, yep.

PN832

Thank you. Nothing further, your Honour.

PN833

JUSTICE ROSS: Any re-examination?

PN834

MR STANTON: There's nothing arising from that.

PN835

JUSTICE ROSS: Thank you for your evidence and your time, Mr Tudor.

<THE WITNESS WITHDREW

[12.25 PM]

PN836

JUSTICE ROSS: Just before we adjourn, can I raise something with you, Mr Stanton? I know this is short notice and it's a bit on the run, but having regard to the extent of cross-examination to date, can you make some inquiries to see whether Ms Cameron, who is currently scheduled for 3.15, might be available earlier?

PN837

MR STANTON: Yes.

PN838

JUSTICE ROSS: Bearing in mind we have got Mr Waller at 2.00 pm, if Ms Cameron was available, I would like to interpose her between Mr Waller and Helen Sergi. I don't want to move Helen Sergi because it's a video link to Canberra and that usually creates a bit of chaos, so we will keep that at 2.45 but see if we could bring Ms Cameron forward. If you wouldn't mind making that inquiry, that would be helpful.

PN839

MR STANTON: Yes, we'll make that inquiry, your Honour.

PN840

JUSTICE ROSS: Thank you. We will adjourn until 2.00 pm.

*** PHILIP TUDOR

XXN MR DOWLING

LUNCHEON ADJOURNMENT

[12.25 PM]

RESUMED

[2.02 PM]

PN841

JUSTICE ROSS: Just before you launch off, Mr Stanton, can I raise a couple of things? The first is that the objections to the notice to produce will be heard by Commissioner Johns at 4.30 tomorrow. The Commissioner will be based in Melbourne but there will be a video link to Sydney and my associate will be here at 4.30 just to make sure the link works.

PN842

The second thing is the hearing on 18 September which was to commence at 9.30 and to deal with the objections to the expert evidence, given that written submissions will have been filed in advance, we want to indicate that we anticipate that hearing will be over by 11.00 and some Bench members have got matters listed from 11.30 on. Now, bearing in mind you will have made the submissions you want to make and I think the directions provided for you to make them identifying with some precision the nature of the objection, we don't think that will be a problem. We don't think the objectors will need to say very much. Those calling the experts will want to say something in reply and then the objectors will have an opportunity to comment on that. Is there any indication that that is not going to be sufficient? We can start at 9.00.

PN843

MR DOWLING: I am conscious that my friend, Mr Moore, is not here from SDA and there has been a discussion that we have had that leads me to believe that might not be adequate, but I wonder if I could just undertake to - - -

PN844

JUSTICE ROSS: Well, bearing in mind that we can convert the directions to full written submissions, then it will be sufficient.

PN845

MR DOWLING: Yes.

PN846

JUSTICE ROSS: So you have a discussion with him about - it will really be a question whether we start at 9.00 and it's full written submissions.

PN847

MR DOWLING: Yes, I will undertake to speak to him.

*** PHILIP TUDOR

XXN MR DOWLING

PN848

JUSTICE ROSS: Thank you. Mr Stanton, can I just raise tomorrow? I know the morning might be a bit more difficult because I think we've got some video links and also the nature of the evidence of two of the witnesses is that cross-examination may go longer than it has to date, but in relation to the three witnesses in the afternoon, can you see what can be done about the timing there? It may be preferable to have Ms Booth who is in Melbourne dealt with first and

then the Sydney-based witnesses available to follow shortly after rather than at nominated times.

PN849

MR STANTON: Yes.

PN850

JUSTICE ROSS: If you could make some inquiries about that, I just think there's not much point in keeping all the parties here to hit a 3.15 if, in fact, the other evidence concludes at 2.30, that's all.

PN851

MR STANTON: Yes, we'll make those inquiries.

PN852

JUSTICE ROSS: I'm just conscious of trying to - not that it will keep counsel's costs down because, of course, briefed for the day but there will be others involved that may need to do other activities. It will also give you an opportunity to confer in relation to the outstanding objections for those parties. We could have it as a report back at 4.00, and that can just be before one member of the Bench, to let us know where you are up to with the discussions on the objections.

PN853

MR STANTON: Did your Honour have in mind, say, for example, Ms Walder, who is a Sydney-based witness, going in the morning? Is that - - -

PN854

JUSTICE ROSS: Well, I'm relaxed about how you can do it. I had in mind really trying to bring Ms Booth forward because she is sort of pencilled in as the last one by video link. If she can go at 2.00, then the advantage with that is that we can certainly see Ms Walder's availability late morning and it's likely that her evidence won't take long and then you would only have Ms Booth to be followed by Ms Blair in the afternoon, but look, I am conscious that their availability might be an issue. It's really make the inquiry and let's see if we can compress the hearing day a little bit.

PN855

MR STANTON: Yes, we'll make those inquiries, your Honour.

PN856

JUSTICE ROSS: Thank you.

PN857

MR STANTON: Also I understand - I'm instructed that Ms Cameron is actually in the premises, so if that assists - - -

PN858

JUSTICE ROSS: Good. All right.

PN859

MR STANTON: Not in the room, I should stress.

PN860

JUSTICE ROSS: No, no, certainly. Well, let us deal with Mr Waller and then see if we can interpose Ms Cameron before we get to the Canberra witness.

<COLIN WILLIAM WALLER, SWORN [2.08 PM]

EXAMINATION-IN-CHIEF BY MR STANTON [2.08 PM]

PN861

Sir, you are the owner and licensee of The Heads Hotel Motel Pty Ltd?---That's correct.

PN862

And that trades as The Heads Hotel?---That's correct.

PN863

At 51 River Road, Shoalhaven and you have been in the industry for 31 years?---That's correct.

PN864

For the purpose of these proceedings have you made statements?---Yes, I have.

PN865

I understand a statement of - what I will do is I will show you these documents and, sir, if I could just take you to the first of those which is the stapled document of three pages?---Yes.

PN866

Do you recognise that?---Yes, I do.

PN867

Is that a statement you have made for the purpose of these proceedings?---Yes, I have.

PN868

Sir, I understand that there are two paragraphs that have some corrections?---That's correct.

PN869

Could you identify which and the nature of the corrections?---Yes, paragraph 10 which says, "Currently 55 percent of my employees are students," that should be corrected to "are students or females."

PN870

So the words, "or females"?---"Or females".

PN871

Yes, anything further?---Paragraph 15, "I receive in excess of five applications per week", that should read, "I receive on average five applications per week".

*** COLIN WILLIAM WALLER

XN MR STANTON

PN872

So should the words "in excess" be replaced with "on average"?---That's correct.

PN873

With those corrections, do you say that the statement is true and correct to the best of your knowledge and belief?---Yes, it is.

PN874

You've made a further statement, a supplementary statement, a one page document?---That's correct.

PN875

Do you say that that is true and correct to the best of your knowledge and belief?---Yes, it is.

PN876

Thank you. I seek that the statements be entered into the proceedings as Mr Waller's evidence in-chief.

PN877

JUSTICE ROSS: Thank you. Any objections?

PN878

MR DOWLING: Yes, your Honour. The first is at paragraph 15, your Honour, in the first sentence commencing with the word, "Because it suits" to the end of that sentence. The next paragraphs 16 and 17, on the basis that they're really argument.

PN879

JUSTICE ROSS: Mm-hm.

PN880

MR DOWLING: The last is the last sentence of paragraph 24, "This would provide the benefit", to the end of that sentence.

PN881

JUSTICE ROSS: 23.

PN882

MR DOWLING: Thank you. My apologies, 23, with the words there, "By giving back to the community" for the reasons previously described.

PN883

JUSTICE ROSS: Mr Stanton, what do you say about 16 and 17?

*** COLIN WILLIAM WALLER

XN MR STANTON

PN884

MR STANTON: I won't press those. In relation to 15, those words, well Mr Waller has knowledge, he comes before this Commission as a man of 31 years' experience in the industry. He can be asked about this. He can be asked about this. In fact I'd seek leave to ask him about that and just clarify the basis on which

he makes that statement, if that would assist. He can certainly be examined on it, he's required here for examination. In terms of what I understand to be 24, well your Honours, I don't know that there's anything controversial about that, it seems to be a statement that one is capable of making.

PN885

JUSTICE ROSS: Well it's sort of a statement of the bleeding obvious isn't it, that if you provide additional hours it will provide additional income.

PN886

MR STANTON: Yes, and statements of the bleeding obvious can be - have probative value, your Honour. So I'd press that and similarly with 23, there can't really be any controversy about those words. It doesn't divert this tribunal from its purpose but with that, if I had leave to examine on the statement at 15.

PN887

JUSTICE ROSS: Right.

PN888

MR STANTON: Now, Mr Waller can I take you to your statement at - - -

PN889

JUSTICE ROSS: Just a minute.

PN890

MR STANTON: I beg your pardon, I'm sorry. I'm getting ahead of myself.

PN891

JUSTICE ROSS: We'll grant leave to ask questions as to the basis for the belief.

PN892

MR STANTON: May it please.

PN893

JUSTICE ROSS: We're not persuaded to uphold the objections in relation to 23 and 24, and paragraphs 16 and 17 will be excised from the statement.

PN894

MR STANTON: May it please. Mr Waller, can I just take you to your statement, that's the first statement, at - should that be marked?

PN895

JUSTICE ROSS: Well let's deal with the - well yes, we'll mark that exhibit AHA5 and the supplementary statement is exhibit AHA6.

PN896

MR STANTON: May it please.

EXHIBIT #AHA5 WITNESS STATEMENT OF COLIN WALLER

*** COLIN WILLIAM WALLER

XN MR STANTON

EXHIBIT #AHA6 SUPPLEMENTARY STATEMENT OF COLIN WALLER

PN897

JUSTICE ROSS: We're still to deal with the objection on 15 but we can deal with that and mark this statement.

PN898

MR STANTON: I'm sorry, we may have got ahead of ourselves again.

PN899

JUSTICE ROSS: No, that's all right. Well let's hear what he says about the basis.

PN900

MR STANTON: Yes. Mr Waller, you've stated at 15, you'll see the words, "Because it suits their other commitments". Now can you just indicate how it is that you've come to make that statement, that part of your statement?---Well over the years of working in the industry I have employed probably on average four or five students at any given time. So in relation to students you certainly talk to them, you know that they have university commitments and then they have exam commitments, but in general they want to work at weekends and at night time and so that's why I make that statement in relation to students. In relation to female applicants, a lot of the ladies that come - they admit to me that they have children and that they usually have to have commitments or they have to have grandparents or, you know, fathers looking after the children at weekends, so they ask for certain rosters and we try and work within that if they are suitable for the position.

PN901

Just in terms of the people you've described as students, do you take their commitments into account when you roster?---Most certainly, yes. Generally it suits us because I think somewhere in the statement I've made a statement that 60 per cent plus of our or 64 per cent plus of our income is derived from the Friday through to Sunday during school holidays, and also public holidays et cetera. So that's when the students aren't at university, so they suit our model, so they can work on those, you know, during the day on those holiday periods.

PN902

Yes.

PN903

JUSTICE ROSS: Mr Stanton, I think one of the difficulties is that the comment "because it suits their other commitments" is related to the applications and that's a different point to the one you've been asking the witness about. That is it says:

PN904

I receive on average five applications per week looking for weekend or night work because it suits their other commitments.

*** COLIN WILLIAM WALLER

XN MR STANTON

PN905

So it's a comment about the applications.

PN906

MR STANTON: Indeed it is, it is.

PN907

JUSTICE ROSS: To that extent if we struck out those words, the witness has said what the witness has said in response to your questions.

PN908

MR STANTON: Yes.

PN909

JUSTICE ROSS: Well that would seem to deal with the issue, doesn't it?

PN910

MR STANTON: Yes, well there's only this that insofar as it goes to why that comment is made in relation to applicants. I confess I hadn't explored that, hadn't pursued that.

PN911

JUSTICE ROSS: But haven't you really dealt with the issue? I mean - - -

PN912

MR STANTON: I think we've dealt with the substantive issue on commitments.

PN913

JUSTICE ROSS: Yes.

PN914

MR STANTON: Of existing employees.

PN915

JUSTICE ROSS: Yes. So unless the applications state that - - -

PN916

MR STANTON: Yes. So I take it those words will be excised. Is that the rule?

PN917

JUSTICE ROSS: Yes, and we've heard the witness's evidence about that and he can be cross-examined in relation to that.

PN918

MR STANTON: To clarify the position. May it please. Nothing further.

PN919

JUSTICE ROSS: Thank you.

CROSS-EXAMINATION BY MR DOWLING

[2.18 PM]

*** COLIN WILLIAM WALLER

XXN MR DOWLING

PN920

MR DOWLING: Sorry, your Honour, I was waiting for you and you were waiting for me.

PN921

JUSTICE ROSS: No, I'm sorry.

PN922

MR DOWLING: My apologies.

PN923

JUSTICE ROSS: It's a good thing one of us noticed, we might be here all afternoon.

PN924

MR DOWLING: Thank you, your Honour. Mr Waller, can I firstly ask you some questions about paragraph 15, which is the questions my friend was just asking you about. You have there in the first sentence changed the words from "in excess of five applications per week" to "on average of five applications per week". I take it you're aware that my client sought from the AHA and was granted an order asking you to provide copies of those applications. Are you aware of that?---Yes, I am.

PN925

You provided a number of documents in response to that request, didn't you?---That's correct.

PN926

What you provided were eight applications that you'd received, is that right?---I believe so, yes.

PN927

What was sought was copies of those applications that you've referred to in paragraph 15 for the six month period 1 January 2015 to 30 June 2015. Is that your understanding?---It is now. I've been explained by counsel that the applications you sought were that period 1 January to 30 June, and I don't believe the applications you received may not be in that period because I've only advertised for two jobs. One was in November 2014 and one was about two weeks ago, just at the end of August. So the applications that I have received formally were in response to those two ads and they may not fit in that period 1 January 2015 to 30 June 2015. So - - -

PN928

But is it fair to say - sorry, my apologies, I didn't mean to cut you off?---No, no.

PN929

Is it fair to say that you've given us everything you thought you had in response to the inquiry and in response to the order?---I have no other documents that relate to that period 1 January 2015 to 30 June.

*** COLIN WILLIAM WALLER

XXN MR DOWLING

PN930

Is it fair to say that your statement in paragraph 15 looks like a bit of an over-statement in those circumstances?---No, it's not because quite often people come in and ask for jobs. If we haven't got one available we just don't take it any further, so when that happens we don't keep the resumes or CVs.

PN931

Five applications per week in that six month period, that would be 250 applications. Do you agree?---Of people walking in. The main - the main - - -

PN932

Well sorry, perhaps I'll ask my questions carefully so that it makes it easier for you to answer. If you were to receive - you agree with me firstly on the maths, if you were to receive five a week in that period, you would have received 250 applications?---Yes, but I didn't say it was in that period. That's an average through the year.

PN933

JUSTICE ROSS: Is your maths right?

PN934

UNIDENTIFIED SPEAKER: 26 weeks, it's not 250.

PN935

JUSTICE ROSS: 130 isn't it?

PN936

MR DOWLING: Sorry, my apologies, thank you. Just checking your Honour's awake.

PN937

JUSTICE ROSS: Yes. I'm still with you.

PN938

MR DOWLING: I'll go back a step because I've been unfair. Five a week on average is 250 a year?---That's correct.

PN939

So half that for a six month period and for the six month period we were looking at you produced eight. Are you saying you expect that the balance would be made up from walk-ins?---On average, yes.

*** COLIN WILLIAM WALLER

XXN MR DOWLING

PN940

So we should understand that in the six month period there's about 120 walk-in applications. Is that seriously your evidence?---Well the main period we probably get 12, 14 a week or more is after university finishes, because I have a reputation that I have about three or four university students. The word gets around and also in our town or in our district there's 15 per cent - 15.6 per cent youth unemployment, so there's a high application in those periods. But mainly, this time of year there's probably only one, if that, walking in a week but come

university completion time we could have 10, 20 people walking in a week. I don't keep records unless they strike me as a suitable applicant.

PN941

It's fair to say it's a bit of a guess on your part, that average?---I think it's a fairly calculated guess, yes.

PN942

At the moment we're looking at one a week?---At the moment.

PN943

In terms of writing - in terms of in writing we've looked at - you've given us eight?---That's correct, because that was - I was uncertain at the time about the 1 January to 30 June. To make a statement I advertised a job in November, I also advertised a job two weeks ago. I've had 96 formal applications that we've kept in relation to those two positions but it doesn't come into that period so it wasn't tabled.

PN944

Just so I can be clear, in the period itself there's nothing else you had. Now that you know the period, there's nothing else you had?---That's correct.

PN945

Now you've talked about some positions you were advertising. Is it correct to say that you are still currently advertising for some positions?---That's correct.

PN946

If I suggest to you that you're still currently advertising for a bar attendant and a kitchen hand, is that correct?---That's correct.

PN947

Are you doing that on a website, amongst other places?---Yes.

PN948

Something called Career One?---That's it.

PN949

In respect of the kitchen hand, you are seeking someone that is available for rotating shifts, days and nights, covering weekdays, weekends, holidays and public holidays. Is that right?---That's correct.

PN950

That's to commence immediately?---Yes.

PN951

That's, you understand, you'd be obliged to pay that person on the penalty rates as they are currently prescribed in the relevant award?---Most certainly.

*** COLIN WILLIAM WALLER

XXN MR DOWLING

PN952

So you're engaging knowing that and on the basis that you're going to pay them the penalty rates they're presently due?---Exactly.

PN953

The evidence you give in support of the AHA's application, is that right?---That's right.

PN954

Do you hold an office with the AHA?---Yes, I do.

PN955

What office is that?---Secretary treasurer.

PN956

Is that the national organisation?---That's the national organisation and the state branch New South Wales.

PN957

You hold an office with both?---Both, the same roles.

PN958

In that role have you sought support from AHA members for the reduction in the penalty rates that's part of this application?---I've had nothing to do with that role as secretary treasurer.

PN959

Sorry, I didn't quite catch that last bit?---As secretary treasurer my role at AHA, I've had nothing to do with this application or sorry the question you asked, in relation to this matter.

PN960

Yes?---I've played no role.

PN961

Do you sit on the executive?---Yes, I do.

PN962

Does the executive make decisions about this application?---The national office did, yes.

PN963

You were part of that executive?---That's right.

PN964

But it was something that you thought you should put in your statement that you're an office holder as the applicant in this proceeding?---No, never crossed my mind. I'm here as a hotelier.

*** COLIN WILLIAM WALLER

XXN MR DOWLING

PN965

MR STANTON: Your Honour, just a point of objection here. This is a review. Now in a sense we have all be referred to - we are referred to, that is the employer side of things, as applicants because - it would appear because we propose a variation.

PN966

JUSTICE ROSS: Well you're the proponents of the change.

PN967

MR STANTON: Yes.

PN968

JUSTICE ROSS: They're questions that can go to credit, so there's no objection can be taken to it. We're entitled to know the allegiance or otherwise and test that with the witness.

PN969

MR STANTON: Well I only raise it because it is a review, a mandatory review conducted with the Commission, with parties participating. I see the union participating as much the same way as employer groups.

PN970

JUSTICE ROSS: Yes, but just because you're not a party principal doesn't mean you're not proposing and advancing a particular proposition, and that's what's sought to be explored. The witness has indicated that - my understanding of the evidence is that whilst you're a member of the executive and the executive took the decision to prosecute the claim, he's given evidence that he's hasn't had any involvement in seeking to organise others to support the claim et cetera.

PN971

MR STANTON: Thank you, your Honour.

PN972

JUSTICE ROSS: So it doesn't seem to be an extensive involvement at this stage anyway.

PN973

MR STANTON: May it please, thank you.

PN974

MR DOWLING: Now you say at paragraph 19 of your statement that you work on weekends?---That's correct.

PN975

I think your evidence is that you'd prefer not to and you'd prefer to - you would prefer to engage casual employees on those days?---That's correct.

PN976

Should we understand from that that it's your evidence that if this variation was successful, that is one of the things that you would do?---Exactly.

*** COLIN WILLIAM WALLER

XXN MR DOWLING

PN977

Should we also understand from your evidence that you have calculated the amount that you currently are required to pay in penalty rates to those casual employees on a Saturday or a Sunday?---That's correct.

PN978

You have done that?---Yes, I have. I keep permanently records, yes, permanent records.

PN979

Sorry, you may have misunderstood me?---Sorry.

PN980

I think you put your evidence is - as you put your evidence, you don't roster these two casuals, you work it yourself. But what you would like to do if the variation was made is to roster these two casuals. Have I understood your evidence correctly?---That's correct.

PN981

Now in respect of these two casuals that you don't roster, can we assume that you have worked out what you would be required to pay them in penalty rates under the current award if they worked on a - let's say a Sunday?---That's correct.

PN982

You've done that exercise?---Yes.

PN983

What is that figure?---What happens on public holidays - - -

PN984

I think I asked you on a Sunday, so we'll deal with one day at a time?---What would I be paying them?

PN985

In penalty rates?---Yes. Well on the Sunday it's the 175 loading. On public holidays it's 250 loading. The rates would go from something like \$30 to \$60 and so on that decision, because my records show that on a Sunday my wages to turnover are 40 per cent, my records show on a public holiday on average they're 33 per cent. In ordinary rates, I average 22 per cent or less. So I have to make a decision. I have very small margins. If I don't work those dates, I would be losing money, more money than what I probably already am on a Sunday.

PN986

Perhaps I was not clear enough. I am not asking you what the total penalty rate is - 175 per cent. If these people worked, if these casuals worked on that day, some of their wage, the extra amount would be attributable to penalty rate?---That's correct.

*** COLIN WILLIAM WALLER

XXN MR DOWLING

PN987

You have worked out what that extra amount is?---Well, that depends how many hours they are going to work. I employ - that's why I have a high casual rate. If the rain comes, everybody goes home. So they might only work two or three hours. So I can't give you a specific number. But I would be prepared to pay what is due under the award, what the minimum hours are and what the award rate is and that's what I always do.

PN988

Perhaps I will go to the next stage then. I think it is your evidence then that if this, the AHA proposal was made, you would roster those two people and you wouldn't work it?---That's correct.

PN989

So do you know what the difference between the hourly rate you will be paying that person under the current penalty rate and what you will be paying that person under the AHA proposal is?---Yes.

PN990

What is it?---There is a 25 per cent difference on the Sunday. It comes from - - -

PN991

Do you know what the hourly figure is?---Well, the hourly figure is in the vicinity of 30 to \$40. Say you have got \$10, \$12 an hour.

PN992

I am suggesting to you that if this person is a Grade 2 food and beverage attendant, which is two steps from the bottom, under the current penalty rates on a Sunday they would be paid \$32.32. Does that accord with what you would pay someone on a Sunday under the current award?---I would have to check it. I don't do the payroll, but I sign off on it at the end of the day. So I'm sure that's been calculated.

PN993

But does that sound about right to you on your recollection of things?---It sounds about right.

PN994

I am suggesting to you that under the AHA proposal, the same person would be paid \$27.71. Does that accord with the calculation you have done or have you not quite worked it out in the same - in this way?---What I have done is calculated it on the current award rates and at this stage, without any changes, that has made me come to the decision that I must work those days. I would have to reassess depending on what award rate comes back, but any reduction would be a benefit.

*** COLIN WILLIAM WALLER

XXN MR DOWLING

PN995

I don't doubt any reduction would be a benefit for you, but I understood it to be your evidence that if the AHA proposal was successful, you would roster these two casuals in your place. Are you now less sure about that?---My reason for wanting to get out is that I have a full commitment. I work there 50/60 hours a week. If I wasn't paying in the respect of - on public holidays, the 50 to \$60 an

hour, I would probably open more. I would probably give more service. But I can't because I am already losing money on those trading days.

PN996

Perhaps you can answer my question. I am suggesting to you that the rate for that casual would be \$32.32 and under the AHA proposal it would be \$27.71; a difference of \$4.62. Is it still your evidence that under the AHA proposal you would roster those two casuals in your place?---Yes, I would, certainly.

PN997

If that person, for the difference of the \$4.62, you are saying that still would entitle you, still would enable you, under your concerns about finances that would enable you to roster an additional person?---Well, I think there is further savings as well with that change. There is the fixed superannuation of nine per cent to go on that and then there is the two and a half to three per cent worker's comp that goes onto that. So the savings might be a little bit more if we are going to get down to the dollars and cents. In that case, I would certainly, you know, strongly consider it and I would, because I don't want to work on Sundays. I would rather be doing other things and - - -

PN998

Which is it? Which is it, Mr Waller? Would you strongly consider it or would you do it?---In the current state, I would do it.

PN999

So if that person earns - the difference between that person over an entire day might be somewhere less than \$60. But on your evidence that you want the Commission to accept, that would enable you to roster that person in your place?---If the savings were 50 to \$60 a day in relation to rostering people instead of me working, I am very happy to do that, yes.

PN1000

When you say you are very happy to do it, should we understand that you don't want to work on the weekend?---I don't.

PN1001

Why is that?---I have worked for 40 years weekends. I have had enough.

PN1002

What is it you want to do on the weekend?---I have other commitments. I would probably still be at the hotel, but I wouldn't have to be as active. I wouldn't have to be walking around the tables. I wouldn't be picking up glasses. I wouldn't be pouring beverages, et cetera.

PN1003

What are your other commitments?---My other commitments are family and my other commitments is I have very limited time as it is for recreation.

*** COLIN WILLIAM WALLER

XXN MR DOWLING

PN1004

They are things you would want to do on the weekend?---Most certainly.

PN1005

All right, thank you. Now, do you understand that there is a provision in the award that enables you by agreement to vary penalties to suit the genuine individual needs of the employer and the individual employee?---Yes, I am aware.

PN1006

Is that a clause that you have ever sought to use in respect of your current workforce?---No, I haven't.

PN1007

Nothing further.

PN1008

JUSTICE ROSS: Re-examination?

RE-EXAMINATION BY MR STANTON

[2.36 PM]

PN1009

MR STANTON: Yes. My friend was asking you about the possibility of - well, your evidence about engaging two casuals. How many hours would there be for the two casuals in the scenario that you have described in your statement. That is two casuals being rostered to work on the Sunday or the public holiday or both?---Yes.

PN1010

What sort of hours?---It would be possibly a maximum of four and the minimum under the award is two would have to be rostered.

PN1011

But how many hours do you envisage they would actually work?---Three hours each. Three to four hours, depending. Some days we have 280 people for lunch, in which case they would be working four or five hours. Other days we might only have 40, in which case they don't work. It is very dependent on the local market, the tourist market at the time, weather, functions, what is happening in the area, whether there is a wine festival on, et cetera. Many variables, but we can usually predict, but sometimes you can't. All of a sudden you get a busload of people arriving and that's why I am always there on a standby just to take those waves.

PN1012

My friend asked you questions about applications for employment. You indicated in your evidence that people come in and ask for jobs. Just clarify, do they speak to you?---Well, I have two managers. They advise me who is in. They're usually locals. We know them. We know what university they are going to or what their current state is. They are probably patrons of the hotel as well. So I speak quite regularly. I am there 40 to 50 hours a week during that key time, but also managers there when I am not there and they let me know what is happening.

*** COLIN WILLIAM WALLER

RXN MR STANTON

PN1013

Nothing further.

PN1014

JUSTICE ROSS: Anything further for the witness? All right. Thank you for your evidence and your time this morning. You are excused.

<THE WITNESS WITHDREW

[2.38 PM]

PN1015

JUSTICE ROSS: We might interpose Ms Cameron now.

PN1016

MR STANTON: Yes, your Honour.

PN1017

JUSTICE ROSS: I don't think the evidence will take very long. So is that convenient?

PN1018

MR STANTON: Yes.

PN1019

JUSTICE ROSS: Right, let's do that. There is only one statement for Ms Cameron, is that right?

PN1020

MR STANTON: I am grateful to my friend who has reminded me that the video link from Canberra is at 2.45.

PN1021

JUSTICE ROSS: Yes, but that doesn't matter, I mean, if it is five minutes later. It is not going to go away. We have booked the room, so no-one is disappearing. I am starting to reassess, Mr Stanton. Is the witness far away?

PN1022

MR STANTON: I was looking out the door.

PN1023

JUSTICE ROSS: No, okay.

PN1024

MR STANTON: I call Susan Cameron who will take an affirmation.

<SUSAN PATRICIA CAMERON, AFFIRMED

[2.40 PM]

EXAMINATION-IN-CHIEF BY MR STANTON

[2.40 PM]

PN1025

MR STANTON: Ms Cameron - Ms? Mrs?---Ms.

PN1026

You are the Lord Roberts Hotel?---That is correct.

*** SUSAN PATRICIA CAMERON

XN MR STANTON

PN1027

That is East Sydney?---Yes.

PN1028

How long have you had or how long have you owned that property, that hotel?---I have owned the business for 20 years.

PN1029

How long have you worked in the hospitality industry?---Thirty years.

PN1030

For the purposes of these proceedings, have you made statements?---Yes, I have.

PN1031

I will show you these documents. You have been handed some documents. There is a stapled number of pages?---Yes.

PN1032

Just take a moment to look at that?---Yes, I am familiar with it.

PN1033

You recognise that as your statement made in these proceedings?---Yes, that's correct.

PN1034

There is a single page. Do you recognise that a supplementary statement?---Yes, that's correct.

PN1035

Which you have made in these proceedings?---Yes.

PN1036

Do you say that these statements are true and correct to the best of your knowledge and belief?---I do, yes.

PN1037

Could I just have a moment? I would seek that the statements be entered into the proceedings as Ms Cameron's evidence-in-chief.

PN1038

JUSTICE ROSS: Yes, Mr Dowling.

PN1039

MR DOWLING: Thank you, your Honour. The first objection is at paragraph 8 for a reason which will now be obvious. The second are the last two sentences of paragraph 12. The last are the words - the last part of the last sentence of paragraph 13, beginning, "We will lose continuity," to the end of the sentence.

*** SUSAN PATRICIA CAMERON

XN MR STANTON

PN1040

JUSTICE ROSS: The objections to paragraphs 12 and 13 are on the basis that they are speculative; is that right?

PN1041

MR DOWLING: Yes.

PN1042

JUSTICE ROSS: All right.

PN1043

MR DOWLING: Thank you, your Honour.

PN1044

JUSTICE ROSS: Mr Stanton, anything you want to say about that?

PN1045

MR STANTON: Yes. Just in relation to 12 and - well, certainly 12. This appears to deal with an episode that is not necessarily directly relevant to the main issues, but nothing turns on it. It doesn't harm to remain. It won't divert, in my submission, the Commission from its purpose. In relation to the - - -

PN1046

JUSTICE ROSS: What is the relevance of it?

PN1047

MR STANTON: As I understand it, Ms Cameron is giving an account of an episode where part of the hotel was closed during the day. Can I just have a moment to talk with my instructing solicitor?

PN1048

JUSTICE ROSS: Sure.

PN1049

MR STANTON: Your Honour, it may be and if I might be granted some leave just to draw some evidence to clarify this paragraph. I confess that it is - - -

PN1050

JUSTICE ROSS: Yes, I must admit I was a little puzzled by the first part of the first sentence.

PN1051

MR STANTON: Yes.

PN1052

JUSTICE ROSS: "As it turns out, I was busier than I anticipated." I don't know whether that is, sort of, said in a jocular way because then someone was busier in that someone came in and robbed it.

PN1053

MR STANTON: Yes.

*** SUSAN PATRICIA CAMERON

XN MR STANTON

PN1054

JUSTICE ROSS: So someone turned up but wasn't expected or whether it is a comment about the traffic in the other parts of the hotel.

PN1055

MR STANTON: Yes, because the first sentence indicates a decision.

PN1056

JUSTICE ROSS: Yes.

PN1057

MR STANTON: But as to whether it was at - and I don't want to say too much. I don't want to influence.

PN1058

JUSTICE ROSS: No, no. Sure, sure. Yes, all right. Well, ask the question.

PN1059

MR STANTON: Perhaps if we hold fire on that, perhaps both of us, if leave was given, it might be clarified and my friend can make whatever objection he lies.

PN1060

JUSTICE ROSS: Yes, well, you have leave. Let's ask the questions and let's see where it goes.

PN1061

MR STANTON: Perhaps if I take that opportunity now.

PN1062

JUSTICE ROSS: Sure.

PN1063

MR STANTON: Do you have your statement in front of you?---Yes, I do.

PN1064

That is the stapled one. At 12, paragraph 12, it says: "A number of years ago, I decided to cut staff levels and close the restaurant on Australia Day as I did not expect it to be busy. As it turns out, I was busier." Well, I don't read the rest of it. But was the restaurant actually closed?---The restaurant was closed. So that was the first floor of the hotel. The balcony was open, but the actual restaurant area was closed. So it was quite difficult to control both areas of the hotel. Ordinarily, if the restaurant had have been open, there would have been a staff member that would have been able to circulate in that area. But as it was, there was only myself and two other people and we were busy downstairs.

PN1065

So you were in the bars?---Yes.

PN1066

Just the one or two bars?---Just the one bar.

*** SUSAN PATRICIA CAMERON

XN MR STANTON

PN1067

Just the one bar, I see. I would press to retain it.

PN1068

JUSTICE ROSS: All right. Is there anything else you want to say about the objections?

PN1069

MR STANTON: Yes. In relation to, I think, it is 13, the last sentence. This really is a view expressed by an experienced hotelier. She is expressing the view about her own hotel, your Honour, and she would be in the position to do that. In terms of - I think the other was paragraph 8. Again, the witness is here and can be examined on this. Insofar as it suggests some enthusiasm for working public holidays, again, I don't think this is a controversial point. The issue is raised in evidence by witnesses of the Union. Quite a few express a view. I don't say it is exactly the same, but it is comparable. I don't know that there is too much that is controversial, so I - - -

PN1070

JUSTICE ROSS: The difference is they are expressing a view about their own preference.

PN1071

MR STANTON: With respect, no. Ms Greentree, who is the witness I believe from Terrigal, expresses a view at paragraphs 17 and 18 to the effect that the people that she rosters are keen for shifts, words to that effect, on public holidays and Sundays.

PN1072

JUSTICE ROSS: We will see whether objection is taken to that and how that goes.

PN1073

MR STANTON: Yes. May it please.

PN1074

JUSTICE ROSS: All right. We will uphold the objection in relation to paragraph 8. We dismiss the objections in relation to paragraphs 12 and 13. We note that the issue raised at 12 and 13 may be of - 12, particularly - may be of marginal relevance to the proceedings, but we are inclined to leave the statement as is.

PN1075

MR STANTON: May it please.

PN1076

JUSTICE ROSS: Cross-examination.

PN1077

MR DOWLING: Thank you, your Honour. Your Honour, I am not sure either of
- - -

*** SUSAN PATRICIA CAMERON

XN MR STANTON

PN1078

JUSTICE ROSS: Sorry, yes, no. Mark it Exhibit AHA7 and the supplementary, Exhibit AHA8.

EXHIBIT #AHA7 WITNESS STATEMENT OF SUSAN CAMERON

EXHIBIT #AHA8 SUPPLEMENTARY STATEMENT OF SUSAN CAMERON

PN1079

JUSTICE ROSS: I am relying on you, Ms Stanton, if I get the numbers confused.

PN1080

MR STANTON: So far so good, your Honour.

PN1081

JUSTICE ROSS: Yes. It's early.

CROSS-EXAMINATION BY MR DOWLING

[2.49 PM]

PN1082

MR DOWLING: Ms Cameron, you have given some evidence at paragraph 18 in terms of service of meals. Can I just understand the hours that the bistro or food-serving part of the hotel is open as opposed to the balance of the hotel. Is it right that the bistro is open on a Monday to Thursday from 12 until 3 pm?---Yes.

PN1083

Then again from 5.30 to 9.30?---Yes.

PN1084

It is open on Friday, Saturday and Sunday from midday until late?---Yes.

PN1085

But the same hours on those three days: Friday, Saturday and Sunday?---Yes. Sunday might be a little bit shorter if it's very cold or raining and we might choose to close a little bit earlier.

PN1086

Yours is the hotel we can see out the window here if we look closely?---Yes.

PN1087

At paragraph 18, you say you have calculated the amount of money from serving breakfast-style menus on a Sunday?---Yes.

PN1088

So in respect of the bistro, that is a time that the bistro is not normally open in the morning?---That's correct.

*** SUSAN PATRICIA CAMERON

XXN MR DOWLING

PN1089

So you have looked at what might happen if you do open on a Sunday morning?---Yes.

PN1090

You were asked to produce a document in response to a request as to whether there was any document arising from that paragraph?---Yes. I did some quick calculations.

PN1091

So you did some quick calculations. When did you do those quick calculations?---I did them a number of months ago.

PN1092

Did you do them after your statement?---I can't remember. To be honest, I can't remember.

PN1093

If I can show you a document, the document that you provided to us. I am just making sure we have enough for everybody. I think your evidence is these are the quick notes that you referred to a moment ago?---That's right, yes.

PN1094

Your evidence is you are not sure whether you did this before or after your statement?---I am not sure, no.

PN1095

So when you signed your statement on 26 June, you might or might not have been referring to this document?---I had done some calculations.

PN1096

Were they this or were they something else?---They were this, yes, yes.

PN1097

So is it now your evidence that you did this before you signed your statement?---When - when - which statement are we talking about?

PN1098

The first of your statements is signed - - -?---Yes, well, I had already done the calculations then. That's correct.

PN1099

Are you sure about that now?---Yes, yes.

PN1100

Can I ask you to look at that document?---Yes.

PN1101

You have got four categories of people. You say Sunday rate is four hours up the top and you have got four categories of people down the left column: manager, chef, kitchenhand, two bar/wait?---M'mm.

*** SUSAN PATRICIA CAMERON

XXN MR DOWLING

PN1102

So should we understand from that that they are the people that you would engage for the four hours, Sunday morning, to do those?---That's my estimate of - on a - how I would start the operation.

PN1103

You have got some figures next to them. 36.42 in relation to the manager. 34.31, the chef. You see those figures?---M'mm.

PN1104

They are what you say are the rates that will be payable for those people should you choose to work them?---Yes.

PN1105

Can I take it from that then, on my examination of the award, you have classified the manager as a level 5 and that is the 36.52. Does that accord with your understanding?---I haven't got the wage - the sheets in front of me. I'm not sure if it's called a level 5. I think it was a supervisor.

PN1106

You understand the way the award works, that it has a series of grades?---Yes.

PN1107

Then for the purpose of the salary, it ranks all of those grades within a number of levels?---Yes.

PN1108

An introductory level, a level 1, 2, 3, 4, 5?---Yes, yes.

PN1109

All I am suggesting to you for the moment is that the manager you have got as a level 5. You are not sure about that; is that right?---That would be the highest level.

PN1110

The chef you have got as a level 4, 34.41?---Yes.

PN1111

Kitchenhand is a level 2 and the bar and waiting staff as a level 3. Does that accord with your understanding of things?---Yes.

PN1112

You have then set out some projected sales?---Yes.

PN1113

As I understand it, the next group of numbers where you say "Say, 15, say 20, say, 25," they are what you expect might be spent per head from the 50 covers is the 50 people?---Yes.

*** SUSAN PATRICIA CAMERON

XXN MR DOWLING

PN1114

So taking the middle row of that next group of numbers, for example, you say 50 people might come and spend \$20 a head and that would be a thousand dollars?---That's correct.

PN1115

Then below that you make the same calculations with respect to 30 covers or 30 people. So again taking the middle row, there is an estimate there of \$20 a head for 30 people. There would be \$600 - would be your revenue?--Yes.

PN1116

Then you have got another column in respect of both sets of numbers that I have taken you to. Should we read that as "COGS," the cost of goods and services?---Yes.

PN1117

So in respect of going back to the 50 covers at \$20 a head, that will get you a thousand dollars. Cost of doing goods and services is 330. So that will leave you with \$670, yes?---Yes.

PN1118

That is what you mean by that?---Yes.

PN1119

If you go over the page, you have got three examples, 50 covers, 30 covers, 60 covers. Do you see that?---Yes.

PN1120

So for argument's sake, should we take the middle of those. And your wages bill is 733, cost of sales, 200. You have rounded up the figure from the previous page of 198 to 200, yes?---Yes.

PN1121

That is what you are doing there. Power and light bill is a hundred. Total 1,033, sales \$600. So you have recorded a net loss of 433 on that example; yes?---Yes.

PN1122

Is it your evidence that this is the sort of thing or this is the thing that you will do if the AHA variation is made?---Yes.

PN1123

Have you gone to the trouble then of doing the same calculation on the basis that the variation is made? What your labour cost would be in those circumstances?---Yes.

PN1124

What does that figure come out to?---It comes out that the labour saving would be around 100 to \$120 based on those very rough estimates.

*** SUSAN PATRICIA CAMERON

XXN MR DOWLING

PN1125

Did you write that down anywhere?---Yes, I did. I had my own copy that I kept at work.

PN1126

So what you are saying is, well, even assuming that is right, say it is \$100, so instead of your labour cost being 733, it would be 633?---Yes.

PN1127

So instead of losing \$433 on your example, you would lose \$333 on your example?---Yes.

PN1128

Even though you would lose \$333 on that day, this is still something you would do?---But that's not - my assumption is that we would probably do 50 covers. So I looked at either side of the 50 covers just to see what would be possible and what would be the most I would lose at 30 covers and what would be possibly leaning towards a profit at 60 covers. So I actually thought the 50 covers was more of the average that I was going to make and at that, if my costs came down another 100, \$120, then my loss would be minimised.

PN1129

So you think 50 covers is the more likely scenario?---I do.

PN1130

Can I tell you then that for the level 5, the level 5 manager under the AHA proposal would be \$32.09 an hour, which would be a total of \$128. The chef would be \$30.20, a total of \$120. Is this the process that you went through?---Yes.

PN1131

You looked at the AHA rates?---Yes.

PN1132

A kitchenhand level 2 would be \$27.71 and that would be \$110 in total and the level 3 bar attendant would be \$33.43 and, sorry, that rate would be \$28.65 under the AHA proposal. And that would mean - so that accords with your recollection of the process you went through?---Yes.

PN1133

JUSTICE ROSS: Sorry, what were the difference with the bar wages? You calculated the difference for the others.

PN1134

MR DOWLING: Sorry. \$200.55. I'm suggesting to you \$200 versus the 228, your Honour.

PN1135

JUSTICE ROSS: Yes, thanks.

*** SUSAN PATRICIA CAMERON

XXN MR DOWLING

PN1136

MR DOWLING: I am suggesting to you, on those sums, the total difference in labour costs is \$77.55. Does that accord?

PN1137

DEPUTY PRESIDENT ASBURY: I calculated it was about \$100 to \$120 but then again I would have added on things, savings such as Workers Compensation and insurances.

PN1138

MR DOWLING: Things that you have not done in this diagram?---Yes.

PN1139

VICE PRESIDENT CATANZARITI: With fairness, the super and Workers Comp is on this diagram.

PN1140

JUSTICE ROSS: It says \$95 on the front page.

PN1141

MR DOWLING: Yes. Well, if I am right and the labour cost is a difference of \$77, what did you calculate the difference in the superannuation and WorkCover costs was?---It is just a percentage of the whole amount. It is just 15 per cent.

PN1142

I am suggesting to you, even taking those into account, you would still be well below \$100 in difference?---Okay. My recollection is it was around \$100 to \$120. I thought it was about \$5 per person per hour.

PN1143

So do you maintain your evidence that despite - this is something you say you would do with the AHA proposal, it would still result in a loss but you maintain that this is the sort of thing you would add?---Yes.

PN1144

Even though it would continue to be a loss?---I would - I would add it on the basis that my loss would be minimised for a certain period of time and I would hope to improve and get busier. But to first start off and kick off something, it would be more difficult at high rates.

PN1145

So you are doing this on an estimate of 50 covers?---Yes. At the very beginning, yes.

PN1146

Is it fair to say that might be a bit optimistic at the beginning given it is something you have never done?---I've had - - -

PN1147

To think that 50 covers would - hang on?---I have had - - -

*** SUSAN PATRICIA CAMERON

XXN MR DOWLING

PN1148

Perhaps if you just let me finish my question?---Sorry.

PN1149

Having not done it in recent times at least, to go from zero and not opening at all and published opening hours not indicating you are open at that time, to getting 50 covers immediately I am suggesting to you is a bit optimistic. Do you agree or disagree?---It may be optimistic in the first couple of weeks. I do think - however, I have had requests from some of my patrons that they would like it if I was to be able to open and offer them a brunch.

PN1150

You have not mentioned that in your statement anywhere?---No.

PN1151

So you anticipate at least in the first few weeks your loss would be bigger than the amount that we have come to in this process?---In that - in this particular instance, that is only covering the four hours for the morning brunch situation.

PN1152

That is the only change we are talking about here, isn't it, in terms of the new implementation because the other hours - - -?---New implementation.

PN1153

- - - the other hours you are open anyway?---We are open anyway but then there would be a saving upon those hours as well.

PN1154

But that is not going to change anything you do, you are already open for those hours. It is not going to change your staffing arrangement because you are already operating?---No. That's correct, yes.

PN1155

Can I just clarify in terms of if there were to be any additional hours as a result of this process, I understand from your evidence that the people that it would go to would be your existing casual workforce?---Possibly. I don't know for sure.

PN1156

I am suggesting to you if you were to add on three hours, the easiest people to allocate that to might be your existing casual workers?---Yes, my - yes.

PN1157

You agree?---Yes.

PN1158

Nothing further.

RE-EXAMINATION BY MR STANTON

[3.04 PM]

*** SUSAN PATRICIA CAMERON

RXN MR STANTON

PN1159

My friend was asking you just then about the calculation on the Sunday brunch. If that were trialled, was there any particular period that you might persevere with the trial?---What do you mean?

PN1160

Would it be a couple of weeks or months?

PN1161

MR DOWLING: I wonder if - - -

PN1162

JUSTICE ROSS: You can cross-examine in relation to this question.

PN1163

THE WITNESS: I'd certainly want to give it a good two or three months.

PN1164

MR STANTON: Yes. Nothing further.

PN1165

MR DOWLING: Nothing.

PN1166

JUSTICE ROSS: No? Right. Anything further for this witness? No. Thank you very much for your evidence and your time. You are excused.

<THE WITNESS WITHDREW

[3.05 PM]

PN1167

JUSTICE ROSS: Mr Dowling, what do you want to do about - do you want to tender it to make it easier to follow the transcript? I know it is not - or do you want - the AHA might tender it. Are you content to do that?

PN1168

MR DOWLING: I am not sure what my friend's view is. I am just looking to him to see what - - -

PN1169

MR STANTON: Why don't I tender it and then we will just keep it in the bunch of AHA documents. It can be AHA9.

PN1170

JUSTICE ROSS: Are you content with that?

PN1171

MR STANTON: Yes, your Honour.

PN1172

JUSTICE ROSS: All right. We will mark it AHA9.

*** SUSAN PATRICIA CAMERON

RXN MR STANTON

EXHIBIT #AHA9 SUNDAY RATES DOCUMENT

PN1173

JUSTICE ROSS: We might stand down for a couple of minutes while you just get aligned, all right.

SHORT ADJOURNMENT [3.07 PM]

RESUMED [3.28 PM]

<HELEN SERGI, SWORN [3.28 PM]

EXAMINATION-IN-CHIEF BY MR STANTON [3.28 PM]

PN1174

Ms Sergi, you are the owner of the Steampacket Hotel in Nelligen, is that correct?---Yes. Yes, one of four.

PN1175

I am sorry. One of four owners?---Yes.

PN1176

How long have you been the owner or a part owner of that hotel?---Five and a half years.

PN1177

How long have you worked in the hospitality industry?---Seven and a half to eight years.

PN1178

For the purpose of these proceedings, you have made statements?---That's correct.

PN1179

You have those statements before you now?---Yes.

PN1180

The first of those statements should be three pages?---It's two pages. I don't have the signature page.

PN1181

All right. Can I just confirm, the second of those two pages, is the last paragraph number 14?---That's right.

PN1182

There is an additional supplementary statement dated 26 August 2015?---Yes.

PN1183

You say that those statements, each of those statements, is true and correct to the best of your knowledge and belief?---Yes, I do.

*** HELEN SERGI

XN MR STANTON

PN1184

If those statements could be received into the proceedings as Ms Sergi's evidence-in-chief.

PN1185

MS BURKE: Yes. Just four objections. The first one is to paragraph 9, the words commencing, "There is a community expectation," to the end of that paragraph. The next is to paragraph 10, the whole paragraph. Sorry, I should say the basis for those objections is it is colloquially described as "customer hearsay". Paragraph 11, the end of the first sentence, "as people will not pay it." And paragraph 12, the second sentence, starting, "The other people I roster to work on," et cetera, on the basis of what I would describe as "employee hearsay".

PN1186

JUSTICE ROSS: Is that really the - it is the last part of that sentence. If you put a full stop, "generally have another job." That would be based on her own knowledge but it is the balance of it is the motivation, is that right?

PN1187

MS BURKE: Yes.

PN1188

JUSTICE ROSS: All right. Anything you want to say about that, Mr Stanton?

PN1189

MR STANTON: Your Honour, yes. I press nine. The witness would have local knowledge, a member of the community. I do not think there is anything particularly controversial about what is stated there. The witness would have knowledge of customer expectations to support the balance of that paragraph 9.

PN1190

As to ten, well, the witness, in my submission, would have knowledge of the local area. According to the statement, she is a part owner of the only hotel in Nelligen. One would expect she would have that knowledge to support what is said there.

PN1191

As to customers complaining, well, it is probably something that many business people have been confronted with.

PN1192

Similarly in relation to 11, as I understand it, the words "as people will not pay it." Well, it just goes to the basis on which the surcharge is not charged on alcohol. I think it explains the paragraph.

PN1193

Now, in relation to 12, which I understand that second sentence and in particular the words "and are keen to earn some extra money on their days off." I would just suggest Ms Sergi can be examined on that to make clear what is intended, or rather the basis for making that statement. I press all of those matters.

*** HELEN SERGI

XN MR STANTON

PN1194

JUSTICE ROSS: We uphold the objection in relation to paragraph 12 and in particular we would excise the words, "and are keen to earn some extra money on their days off." We dismiss the balance of the objections.

PN1195

MS BURKE: Thank you.

PN1196

MR STANTON: Could those statements be marked, your Honour?

PN1197

JUSTICE ROSS: Yes. Mark the witness statement as Exhibit AHA10 and the supplementary statement as AHA11.

EXHIBIT #AHA10 TWO PAGE WITNESS STATEMENT OF HELEN SERGI.

EXHIBIT #AHA11 SUPPLEMENTARY WITNESS STATEMENT OF HELEN SERGI, DATED 26/08/2015.

PN1198

JUSTICE ROSS: Cross-examination?

PN1199

MS BURKE: Yes.

CROSS-EXAMINATION BY MS BURKE

[3.35 PM]

PN1200

MS BURKE: Thank you, Ms Sergi. Can you hear me properly?---Yes, I can.

PN1201

Thank you. Can I take you first to paragraph 7 of your statement, the first statement?---Yes.

PN1202

You say there that on public holidays you trade at a loss due to the cost of penalty rates, that is your evidence, isn't it?---Possibly not at a loss but it is definitely - we're not making profits on those days based on the public holiday rates.

PN1203

The words in your statement at paragraph 7 are that you trade at a loss because of penalty rates. Is that not your evidence anymore?---Well, no. I would re-think that one. I can't recall saying that I trade at a loss but obviously I have done so. I am very firmly believe that what extra wages we pay eat into any profits that we may have made on those days without a doubt.

*** HELEN SERGI

XXN MS BURKE

PN1204

Wages cost always eat into your profits on any day of trading, don't they?---They do, yes.

PN1205

So this statement here now in your statement at paragraph 7 is no longer accurate, you are saying?---Yes. Well, it isn't accurate as far as trading at a loss. Possibly on Sundays we trade at a loss but not - I wouldn't say every time there is a public holiday that we trade at a loss.

PN1206

Because public holidays - sorry, I didn't mean to cut you off?---That's okay.

PN1207

Because public holidays are very busy for you, aren't they?---Yes.

PN1208

In fact, they are your busiest days of the year?---They are, often.

PN1209

At paragraph 13 of your statement you say there that if penalty rates were reduced as sought by the Australian Hotels Association you would roster more of your staff to work on those days?---Yes, I would.

PN1210

Those staff that you would roster to work on those days, they are your existing casual staff, aren't they?---Yes, they are.

PN1211

You say you would provide those staff with between three and eight hours each day of work?---Yes, correct.

PN1212

So taking Sunday first as an example, should the Commission take it from that statement that you have calculated the amount that you would pay your casuals on Sundays if the AHA's proposal is accepted?---I haven't done the calculation. However, I do know that jobs that I do as far as working in the kitchen and cleaning before we open Sunday mornings, those jobs would go to somebody else on those days.

PN1213

So where you say you think it would be between three and eight hours extra work on a Sunday, that is a guess, isn't it?---Yes.

PN1214

You haven't calculated the actual amount of money that it would cost you to pay those employees if the AHA's proposal is accepted?---No, I haven't.

*** HELEN SERGI

XXN MS BURKE

PN1215

You also say in that paragraph, at paragraph 13, that if you were rostering these extra staff on, you and your husband would be able to have some time off. That's right, isn't it?---Yes. Yes, it's true.

PN1216

You and your husband work together at the hotel, is that right?---Correct, yes.

PN1217

So if you were going to have a day off, you could spend time together?---We would spend time with family that don't live in Nelligen.

PN1218

You would see friends?---Yes.

PN1219

Maybe have a bit of a rest?---That's correct.

PN1220

It is important to do those things but those are things that you would like to do on a Sunday. That is right, isn't it?---We would like to do them on Sunday because that is when our family and friends are more available to catch up with, yes.

PN1221

Thank you. I don't have any more questions.

RE-EXAMINATION BY MR STANTON

[3.40 PM]

PN1222

Just this. My friend asked you some questions about making work available to people. You mentioned that you were currently doing some cleaning and kitchen duties?---Yes. I'm a chef as well and I do a lot of the cleaning.

PN1223

Do you do that work on a Sunday and a public holiday?---Yes.

PN1224

MS BURKE: Sorry. I am just going to object to this line of questioning. Firstly, it is leading evidence.

PN1225

JUSTICE ROSS: It is leading and it may not arise. To the extent it does not arise, you will be given leave to cross-examine on it.

PN1226

MS BURKE: Thank you.

PN1227

JUSTICE ROSS: Just bear in mind the scope of re-examination.

*** HELEN SERGI

RXN MR STANTON

PN1228

MR STANTON: Yes, yes.

PN1229

JUSTICE ROSS: If you want to ask a question that does not arise, you should seek leave.

PN1230

MR STANTON: Yes. I confess, I was not clear whether the witness had - whether it was in relation to Sunday or public holidays that that answer was given. There was cleaning and kitchen work. If it assists, that is the area that I wanted to clarify.

PN1231

JUSTICE ROSS: Ask that question.

PN1232

MR STANTON: May it please. How many hours, or how much time would you spend in that cleaning and kitchen duties?---I would - I would spend at least the eight hours on my own on the Sunday and quite often my husband works in the kitchen with me on those days, probably for at least the lunch service, which is a four hour shift.

PN1233

Nothing further.

PN1234

JUSTICE ROSS: Do you want to cross on that?

PN1235

MS BURKE: No, no further questions, thank you.

PN1236

JUSTICE ROSS: Thank you for your evidence, Ms Sergi, and for your time in attending the Commission today. You are excused?---Thank you.

<THE WITNESS WITHDREW

[3.42 PM]

PN1237

JUSTICE ROSS: Is that where we are up to today?

PN1238

MR STANTON: I will just check, your Honour.

PN1239

JUSTICE ROSS: Can I encourage you to see if Ms Booth can be moved to two?

PN1240

MR STANTON: I am instructed that we have done that. It has been done by my instructing solicitor.

*** HELEN SERGI

RXN MR STANTON

PN1241

JUSTICE ROSS: I notice that it has got "to be confirmed", Mr Trengrove and Ms Blair, at least on the schedule I have got. They are here, aren't they?

PN1242

MR STANTON: Yes, I am instructed that they are both here and we will endeavour to have Ms Blair before lunch.

PN1243

JUSTICE ROSS: Yes. Let's see how we go. Okay.

PN1244

MR STANTON: Yes. May it please.

PN1245

JUSTICE ROSS: Anything else?

PN1246

MR STANTON: Nothing further.

PN1247

JUSTICE ROSS: No. We will adjourn until 9.30 tomorrow.

ADJOURNED UNTIL WEDNESDAY, 09 SEPTEMBER 2015 [3.43 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

KASIE ANN FERGUSON, AFFIRMED.....	PN653
EXAMINATION-IN-CHIEF BY MR STANTON	PN653
EXHIBIT #AHA1 WITNESS STATEMENT OF KASIE FERGUSON.....	PN700
EXHIBIT #AHA2 SUPPLEMENTARY STATEMENT OF KASIE FERGUSON	PN700
CROSS-EXAMINATION BY MR DOWLING.....	PN705
THE WITNESS WITHDREW	PN748
PHILIP TUDOR, SWORN	PN748
EXAMINATION-IN-CHIEF BY MR STANTON	PN748
EXHIBIT #AHA3 WITNESS STATEMENT OF PHILIP TUDOR	PN779
EXHIBIT #AHA4 SUPPLEMENTARY STATEMENT OF PHILIP TUDOR.....	PN779
CROSS-EXAMINATION BY MR DOWLING.....	PN779
THE WITNESS WITHDREW	PN835
COLIN WILLIAM WALLER, SWORN	PN860
EXAMINATION-IN-CHIEF BY MR STANTON	PN860
EXHIBIT #AHA5 WITNESS STATEMENT OF COLIN WALLER.....	PN896
EXHIBIT #AHA6 SUPPLEMENTARY STATEMENT OF COLIN WALLER.....	PN896
CROSS-EXAMINATION BY MR DOWLING.....	PN919
RE-EXAMINATION BY MR STANTON	PN1008
THE WITNESS WITHDREW	PN1014
SUSAN PATRICIA CAMERON, AFFIRMED.....	PN1024
EXAMINATION-IN-CHIEF BY MR STANTON	PN1024
EXHIBIT #AHA7 WITNESS STATEMENT OF SUSAN CAMERON	PN1078
EXHIBIT #AHA8 SUPPLEMENTARY STATEMENT OF SUSAN CAMERON	PN1078

CROSS-EXAMINATION BY MR DOWLING	PN1081
RE-EXAMINATION BY MR STANTON	PN1158
THE WITNESS WITHDREW	PN1166
EXHIBIT #AHA9 SUNDAY RATES DOCUMENT.....	PN1172
HELEN SERGI, SWORN.....	PN1173
EXAMINATION-IN-CHIEF BY MR STANTON	PN1173
EXHIBIT #AHA10 TWO PAGE WITNESS STATEMENT OF HELEN SERGI.....	PN1197
EXHIBIT #AHA11 SUPPLEMENTARY WITNESS STATEMENT OF HELEN SERGI, DATED 26/08/2015.....	PN1197
CROSS-EXAMINATION BY MS BURKE	PN1199
RE-EXAMINATION BY MR STANTON	PN1221
THE WITNESS WITHDREW	PN1236