



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009
TRANSCRIPT IN CONFIDENCE

1052411

**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)**

Melbourne

9.37 AM, FRIDAY, 25 SEPTEMBER 2015

Continued from 23/09/2015

PN8962

JUSTICE ROSS: Mr Izzo?

PN8963

MR IZZO: Your Honour, I believe that the first matter here is to call Professor Rose to give his evidence.

PN8964

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

<JOHN MATTHEW ROSE, AFFIRMED

[9.38 AM]

EXAMINATION-IN-CHIEF BY MR IZZO

[9.38 AM]

PN8965

MR IZZO: Professor Rose, can I ask do you have two reports there with you that you have prepared? The first is a document headed Value of Time and Value of Work Time during Public Holidays?---That is correct, yes.

PN8966

And if you look at the inside cover of the first page, it's dated 3 July 2015?---That is correct, yes.

PN8967

Then you should have another report which is some 9 pages long and it's called: Comment on Response to the Rose Report Value of Time and Value of Work Time during Public Holidays by Professor Altman?---Yes, I have that, yes.

PN8968

Did you prepare both of those reports?---I did, yes.

PN8969

Do those reports contain your opinions that you genuinely hold?---Yes, they do.

PN8970

Are those opinions based wholly or substantially on the specialised knowledge that you have and that you have identified in the reports?---That is correct, yes.

PN8971

We'd like to tender both of those reports, your Honour.

PN8972

UNIDENTIFIED SPEAKER: No objection, your Honour.

PN8973

JUSTICE ROSS: I'll mark the Value of Time report which is dated the 3rd of July 2015 as exhibit ABI1, and the comment on the response to the Rose report as exhibit ABI2.

*** JOHN MATTHEW ROSE

XN MR IZZO

**EXHIBIT #ABI1 VALUE OF TIME REPORT BY JOHN ROSE
DATED 03/07/2015**

**EXHIBIT #ABI2 COMMENT ON RESPONSE TO ROSE REPORT
BY JOHN ROSE COMPRISING 9 PAGES**

PN8974

JUSTICE ROSS: Cross-examination?

PN8975

MR DIXON: May it please the Full Bench, Dixon and Gotting appearing from Sydney. We wish to cross-examine Professor Rose. If it's appropriate for us to start we contend to do so if that suits the Full Bench.

PN8976

MR MOORE: As major contradictor in the case, I submit that the appropriate course is for the union – the SDA – to commence?

PN8977

JUSTICE ROSS: Yes. Any issue with that, Mr Dixon?

PN8978

MR DIXON: No, your Honour, thank you.

PN8979

JUSTICE ROSS: All right.

CROSS-EXAMINATION BY MR MOORE

[9.40 AM]

PN8980

MR MOORE: Professor Rose, my name is Moore. I am counsel for the Shop, Distributive and Allied Employees Association. I want to ask you some questions about your report.

PN8981

MR DIXON: I apologise for interrupting my learned friend but we are struggling at this end to hear his questioning. I think it might be because he may be some distance away from the microphone.

PN8982

JUSTICE ROSS: Perhaps if you just make some general comments, Mr Moore, and we'll see if that's picked up.

PN8983

MR MOORE: Mr Dixon, it's Stephen Moore here. Can you hear me all right?

PN8984

MR DIXON: That's much better, thanks very much.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN8985

MR MOORE: Professor Rose, can I just get a sense of how this research that is crystallised in your report, Value of Time and Value of Work Time during Public Holidays, I just want to get a sense of how it proceeded. The first stage was survey development comprising the preparation of some questions; that was undertaken by you and your colleagues I take it?---No, prior to that there was a focus group and a pilot study, and that was used to crystallise, but there was some work where we did develop the survey.

PN8986

I see, all right, and the pilot to which you refer was in the form of two focus groups conducted by Professor Holden?---That is correct, yes, in April.

PN8987

Pardon?---In April.

PN8988

Thank you. The purpose of the focus groups, speaking generally, was to make sure that the methodology being proposed for the research was feasible and suitable to the subject matter?---Yes, sir.

PN8989

And to better understand the context of the proposed research?---Yes, sir.

PN8990

So you do the focus groups, the nature of the surveys or the experiments are then formulated and finalised, respondents to the survey need to be recruited – they were recruited by an outside firm, that's right?---That is correct, yes.

PN8991

And as I understand from your report, 472 people completed the survey but after what you refer to as extensive data cleaning only 443 – their responses were retained for the report, is that so?---That is correct, yes.

PN8992

And this extensive data cleaning, you say that it was undertaken to ensure that only representative and plausible responses were included, and I think you refer to the removal of some respondents who were earning more than \$50 an hour?---That is correct. There were two data validation questions in the survey and they were used to test whether the responses of the respondents were accurate and plausible.

PN8993

So the 29 that were removed, were they all people who were earning more than \$50 an hour or might there be other characteristics which resulted in them being cleansed from the data set?---That was the primary question that was used. There was also a validation because they were also asked for their yearly income, and if their yearly income exceeded what they were saying, for example, their hourly income was by a large income, they were also removed.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN8994

I see, so all those that were removed were removed for one or other of those reasons?---That is correct, yes.

PN8995

I see, thank you. You've got extensive experience in the conduct of work choice or choice experiments?---I have extensive experience in choice experiments, yes.

PN8996

Do you accept that it's essential for a credible and reliable choice experiment or survey that in its conduct the respondents not be exposed to any undue influences which might unduly colour their responses?---In a non-academic setting, yes. In academic settings there would be situations where you want to expose them to certain conditions to test what those conditions are.

PN8997

I understand, but putting that to one side if you're not wanting to test the reaction to certain influences, otherwise it's critical that survey respondents not be exposed to any influences which might potentially unduly influence their responses?---I would agree with that statement.

PN8998

Thank you, and when you conduct – I'll withdraw that. My questions to you today, I will refer to choice experiments or a survey, is it reasonable to do that interchangeably? A choice experiment is a type of elaborated survey, from a non-expert perspective, is that a reasonable thing to say?---It's a type of question that can be used in a survey, so if that's how you wish to define it I'll work with that.

PN8999

All right, thank you. When the Institute for Choice is doing work for clients, one way to protect the integrity of the choice experiment or the survey is to make sure that someone independent from the client conducts the survey, is that a fair comment?---Actually it's a university ethics committee requirement that as chief investigator or investigators of a project we are not to have any direct dealing or handling or any way of identifying who the respondents are.

PN9000

I see, so from the university perspective you need to get a third party to conduct the survey or the experiment?---Or we need to acquire very special ethics committee clearance.

PN9001

It's not good practice though for the client itself to conduct the survey or the experiment, do you agree with that?---I don't understand the question, sorry.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9002

In terms of ensuring the integrity and the reliability of responses generated in a choice experiment or a survey, it's not good practice for the client for whom the survey or experiment is being conducted to itself conduct the survey, do you agree

with that?---Not necessarily. If the person is trained in how to actually do the survey I wouldn't have a problem with it.

PN9003

It's less than ideal, would you accept that?---If the person's properly trained to actually do the interviews or the actual survey itself I personally wouldn't have a problem with it. I mean I could see instances where it might be problematic but -
- -

PN9004

You just don't hand it over to the client and say you do the survey?---Not ordinarily, no.

PN9005

No, because that would be at risk of jeopardising the integrity of the results generated from the survey?---Sorry, that was a question?

PN9006

That was a question.---If the person's properly trained to actually do the interviews I wouldn't see that that's necessarily the case.

PN9007

To be properly trained to conduct the interviews, what does that require?---I've trained interviewers extensively in the past to do these types of experiments, so I would normally sit down with them, go through the survey, explain to them how the questions work, and explain to them what can potentially lead to biases, so what to say, what not to say, and that basically the role of that person is to not answer the questions but be there if there are questions of the respondent.

PN9008

So when you were talking about being properly trained all you mean really is being given some guidance by you as to how to go about it?---That's what we've done in the past, so I've done that for multiple projects in the past.

PN9009

The survey was undertaken in May this year and it was conducted in group sessions in various locations around Australia, that's right?---That is correct. The method is known as central location.

PN9010

Am I right in thinking there were about 10 respondents in each group?---That's my understanding, yes.

PN9011

Did each session take about an hour?---That's approximately what it took. That's my understanding, yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9012

And each group session was conducted by a facilitator?---Yes, so the facilitator was there to set up the room, set up the laptops and be there if there were any questions, so yes.

PN9013

So if there were 10 in a group and there are 472 respondents there must have been around 47 sessions that were undertaken around the country?---That would be correct, yes.

PN9014

Yes, and do you know how many different facilitators there were?---I was not present, so no.

PN9015

And the role of the facilitator; so the respondents would turn up at a location and the facilitator, having set up the location with the relevant equipment, would explain the process to the respondents?---That was what their job was, yes.

PN9016

Yes, and they would guide the respondents through the survey questions?---No, the role of the facilitator was to ensure that the equipment was there and only interact with the respondents should the respondents have specific questions. But the actual way that the survey was set up, the respondents were expected to go through the survey with minimal interaction with the actual facilitator.

PN9017

Because in actually going through the survey, the respondents are in front of a computer screen. Is that right?---That is correct.

PN9018

Yes?---And each screen had a set of instructions as to what that - what to do on that screen.

PN9019

I see. So the facilitator would answer questions if they arose from the respondents?---That was what the process was set up to do.

PN9020

Yes, and they would provide assistance if it was required for the respondents to complete the questionnaire?---That was the established procedure, yes.

PN9021

Now these focus - I'm sorry, these sessions were conducted at locations determined by Australian Business Industrial and the New South Wales Chamber?---That's my understanding, yes.

PN9022

Yes, and is it your understanding that most or all of those sessions were in fact conducted at the offices of one or both of those bodies?---That's my understanding, yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9023

And it's the case, isn't it, that the facilitators themselves were representatives of either Australian Business Industrial or the New South Wales Chamber?---I presume that's correct, yes. I don't know.

PN9024

I can show you a document if it helps you be clear on that. Excuse me a moment. If the witness could be shown this document.

PN9025

You understand that you were required to produce various documents as part of this proceeding?---Yes, I believe they've all been provided.

PN9026

Yes. This is one of the documents and it's an email chain. I'm happy for you to familiarise yourself with it if it assists, but I just want to draw your attention to the third-last page. You should have at the top of the page - well, it actually starts at the bottom of the previous page, the heading of an email from Gail Bradford sent Monday 4 May 2015, 10.18 am, to Lyn Parkes subject "Dates". Do you see that?---Yes, I see that.

PN9027

And Gail Bradford is part of your team at the Institute for Choice?---She was the project manager for this project, yes.

PN9028

I see, and she is from the institute?---She is a project manager at the Institute for Choice, yes.

PN9029

Yes, and do you know who Lyn Parkes is?---I do not know Lyn Parkes, no.

PN9030

All right. You'll see that the email says:

PN9031

Hi Lyn. Below are the dates for the second round of focus groups which form part of this project. As discussed, the client will be conducting these focus groups themselves and have organised the venue and iPads for participants to complete the survey.

PN9032

And I stop reading the extract there. So does that confirm your understanding that the Australian Business Industrial and the New South Wales Chamber staff themselves conducted the group sessions?---That would seem to confirm that.

PN9033

Yes?---But as you can see I wasn't cc'd into any of these emails and the recruitment was handled by Gail, so.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9034

And the client was Australian Business Industrial and the New South Wales Chamber?---Sorry, you'll just have to give me one second. The client was Australian Business Industrial and the New South Wales Chamber, yes.

PN9035

Thank you.

PN9036

I tender that document, your Honour.

PN9037

JUSTICE ROSS: Exhibit SDA1.

**EXHIBIT #SDA1 EMAIL CHAIN BETWEEN GAIL BRADFORD
AND LYN PARKES RE FOCUS GROUPS SENT 04/05/2015**

PN9038

MR MOORE: Thank you, your Honour.

PN9039

You didn't attend any of the 47-odd sessions, did you?---I was in the US at the time.

PN9040

And so far as you're aware your staff at the Institute for Choice didn't attend?---I believe none of them attended, no.

PN9041

No. So you're not in a position to say whether or not representatives of the New South Wales Chamber or Australian Business Industrial, whether or not they had any influence on the responses given by the respondents in the conduct of the survey; you don't know, do you?---I wasn't present and none of my staff so I - no.

PN9042

Do you accept that that outcome whereby this Choice experiment or survey was conducted without any supervision by you and by the client itself impairs the reliability of the survey results?---I wasn't present so I don't know what was specifically said, so - or not said.

PN9043

But as a matter of good practice would you accept that that is not an arrangement which should be observed in order to ensure that a survey or experiment is conducted to produce reliable results?---Perhaps.

PN9044

You understood that the Institute for Choice was being retained to produce a report for use in this proceeding and you understood that your clients were seeking in this proceeding to reduce penalty rates which seemed disproportionately high?---That was their objective, yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9045

And you understood that?---I - that was my belief, yes.

PN9046

Now I want to ask you some questions about the sample of respondents that you selected. You say in your report that quotas were set to get respondents from different States. That's right?---That is correct, yes.

PN9047

And that was done to ensure that the results were representative?---That is correct, yes.

PN9048

Perhaps if I ask you to look at table 2 in your report which I'll tell you the page. I think it's 17. Yes, page 17, table 2. Do you see that?---Yes I have it in front of me, thank you.

PN9049

So they were the quotas that were set, that's right?---That is correct, yes.

PN9050

And in the fourth column one can see the quotas set for each State and so what that's identifying, am I right in reading it this way, that in the case of the ACT the quota set was to have 35 respondents from the metro area, 15 from the rural area being a total of 50 respondents?---That is correct, yes.

PN9051

Yes. So that would tell me that the quotas that were set for this experiment provided for equal numbers of respondents from New South Wales, Victoria, Western Australia, South Australia and Queensland; that's so?---That is correct. Yes.

PN9052

You understand that Queensland and South Australia and Western Australia are relatively less populated than New South Wales and Victoria?---That is correct, however my assumptions in going in to this was I was more interested in relative costs of living across the various areas, in particular, metro and rural, so it wasn't necessarily set at a population level. It was more to ensure that we got a good coverage of cost of living.

PN9053

Cost of living? I thought it was intended to be representative of across the different states?---It was what we call a quota sample, but with random sampling within each of the quotas.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9054

Yes. All right. Now, in terms of what was actually achieved, in terms of where the respondents came from you deal with that in table 3 over the page. So if I give you a moment to look at that table. That tells me, if I look at Western Australia, 78 persons were from Western Australia, and the number in brackets 111.43 says

that the quota was over achieved by 11.43 per cent; that's correct?---That is correct. Yes.

PN9055

Yes?---Yes.

PN9056

And with Victoria 58, and that tells us that the quota for Victoria was under achieved by about 18 per cent?---That is correct. Yes.

PN9057

And likewise the quota for Queensland and New South Wales were also exceeded?---That is correct. Yes.

PN9058

Yes. So looking at these numbers, and you are no doubt better at numbers than I am, it seems to me that only about 13 per cent of respondents were from Victoria in this survey; is that right? Does that sound correct to you?---That would be roughly correct. Yes.

PN9059

And about 17 per cent were from Western Australia; does that sound right?---Correct. Yes.

PN9060

You would accept then that having regard to the quotas you set and the extent to which they were under achieved or over achieved that the end result is that it can't be said that these survey results are representative of the different states which make up Australia?---In particular with Northern Territory, yes.

PN9061

Well, putting Northern Territory aside, it's not representative, for example, that 13 per cent of the respondents are from Victoria?---It's – if you are going off a random sample across all of Australia that would be correct, yes.

PN9062

And did the client have any input into determining the quotas that were set?---I determined the original quotas.

PN9063

I'm sorry?---I determined the original quota as set out in table 2.

PN9064

All right. Thank you. Now, the first research question that you undertook to investigate in your report which is conveniently set out on page 3 at paragraph 2.1 was to determine how important different times of the day are for relevant employees under the two identified awards, where importance is defined in terms of either a willingness or ability to substitute activities occurring at different times of the week for work. Now, to do that respondents completed an activity diary for the week prior to the survey; that's right?---That is correct. Yes, sir.

PN9065

And so in completing that diary – I'll withdraw that. So in doing this part of the experiment, an example of what was placed in front of the respondents is on page 6; is it not?---Yes, that is correct.

PN9066

So just to assist the Commission, the respondents turn up and they have completed a diary for their previous week; that's right?---They complete this screen, yes. So this is for the previous week. That is correct.

PN9067

I'm sorry, say that again?---They complete the questions on this screen.

PN9068

Yes?---So, yes, you are correct.

PN9069

They complete the questions on the screen - - -?---Yes.

PN9070

- - -by reference to the diary that they filled in for the previous week?---This diary is them telling us what they did over the previous week, yes.

PN9071

I see. So when they complete the diary is that a hard copy that they complete at home?---No.

PN9072

I see. So what they do is that they were permitted to make notes to prompt their recollection of what they did in the preceding week, and to turn up at the designated time at the session and then if they needed the notes or if not to enter into the screen what they did at different times on different days?---That's my understanding. Yes.

PN9073

I see. And so they'd enter those activities in, and so dealing with the one that's on page 6 the activity type there is having a cup of coffee or a snack; is that right?---That was the default, yes.

PN9074

Okay. And so for each activity that the person recalled from the previous week, which was identified at a particular time that it was undertaken; that's right?---That is correct. Yes.

PN9075

What they then needed to do is fill in what's in the box there, namely enter in who participated in the - - -?---Correct. Yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9076

And then they were faced with the heading underneath that, Activity Importance?---That is correct. They ticked the radial button. Yes.

PN9077

Pardon?---They ticked the radial button. Yes.

PN9078

I see. And Activity Importance was defined to mean whether the person could or potentially would be able to change or forsake that activity; that's right?---Yes, as shown "could never miss" down to "could easily reschedule or change or miss".

PN9079

Yes. So to simplify things somewhat, after the respondents did that, on the basis of that data that was then entered, you produced various tables and one of those tables is table 7, which I will find?---Page 22.

PN9080

Thank you. Page 22, that's right. That's correct?---That is correct. That is based on that particular question.

PN9081

Yes. And a low ranking means there is – well, a rating of 1 means that the respondent could never change the activity, and a rating of number 6 means that they could easily reschedule the activity?---That is correct. Yes.

PN9082

All right. So if we look at table 7, just to understand the table, looking at Monday, and I should pause and just ask you this: table 7 has been generated by reference to all of the respondents who entered the data in in the previous screen that I just asked you about?---That is correct. Yes.

PN9083

Yes. And so the ratings of different times have been determined by reference to that data entered?---That is correct. So these are the average.

PN9084

Yes?---Yes.

PN9085

This is an average. So on Monday what that tells us is that between 6 am and 7 am, which had an average rating of 2.270, that was the lowest score for that day, and therefore you say the most important time; that's right?---It would be the most important in terms of the inability to actually change activities.

PN9086

Yes?---As per that question. Yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9087

And likewise at 9 pm where it's shaded, that's the highest score for the day, average score for the day, and you say that is the least important time in terms of

ability to reschedule activities?---That's what my interpretation of that question would be, yes.

PN9088

Yes. Now your evidence, in your report, you say that:

PN9089

The activity importance scale -

PN9090

this ranking:

PN9091

- provides an indication as to how important various times of the week are to the sample population.

PN9092

That's right?---They were asked for each day of the week. So you can actually break it down by day as well as time.

PN9093

Yes, as you say at page 7, the second paragraph:

PN9094

The activity importance scale can be used to provide an indication as to how important various times of the week are to the sample population.

PN9095

That's right?---That's what I've said, yes.

PN9096

The respondents though in the survey or the experiment were not actually asked a question in those terms though, were they? That is, they were not asked "How important is time X during your day?" That's right?---That's what the stated Choice experiment was specifically designed to do. In this particular question they were asked whatever that question is shown on table - or in the figure that you asked, six.

PN9097

So do I understand then that your answer to my question is that they weren't asked that question?---I'd need to have a look at the question. Sorry, just one second.

PN9098

The screen is on page 6, if that assists?---Thank you. So that's the actual question they were asked, how could they actually change that particular time or not.

PN9099

Well, what they were asked to do was to rank the activity's importance, correct?---That's correct.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9100

Yes, they were not asked to identify the importance of a particular time of day?---That activity - the way that the survey worked was that activity was tied to a particular time of day.

PN9101

I think the question is conducive to a yes or a no answer, Professor Rose?---I'm sorry, I'm not trying to be - - -

PN9102

Were they asked how important a particular time of the day was? Yes or no?---No. However the question itself was linked to specific times of the day.

PN9103

All right. Now what they were asked to rate was the importance in terms of capacity to change an activity. That's right?---Where that activity was actually specified for a particular time of day.

PN9104

That's right?---That's correct, yes.

PN9105

Yes?---I would agree.

PN9106

So this is a fair example is it not - or tell me if you disagree with it; if I was a respondent and in the experiment and I recorded that on a Sunday afternoon between 3 pm and 4 pm, that the activity I engaged in was walking the dog, all I was asked to do in terms of the screen on page 6 was to rank the importance of that activity in terms of whether or not it could easily be rescheduled or never rescheduled. That's right?---That is correct, yes.

PN9107

All right, so if I formed the view "Well, I could walk the dog any time on a Sunday. It's easily rescheduled" it would be rational would it not for me to rate that low or very low?---Yes.

PN9108

Yes. So my point to you, Professor Rose, is this. That the ranking that I then give to walking the dog between 3 pm and 4 pm says nothing directly about the importance of me of that hour of time, does it not? That's correct?---I would put it to you that it indirectly infers the importance of that hour of time.

PN9109

What do you've done is to assume that the importance I attribute to an activity in terms of capacity to reschedule it is a meaningful proxy of the importance of time?---I would agree with that statement, yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9110

Thank you, and if that assumption is unsound then the rankings made by the respondents are not an accurate reflection of the relative importance of time. Would you agree with that?---If an assumption is found to not hold, then yes.

PN9111

Thank you, and for completeness can I suggest to you that the assumption upon which this part of the experiment was conducted was unsound because it conflated the importance of an activity and assumed, as it were, that that was a sound representation of the respondent's view of the importance of a particular period of time?---I would disagree with that assertion.

PN9112

All right. When respondents were undertaking this task in the experiment what they had in front of them was the screen on page 6. That's right?---Yes, when they were completing the activity diary this is the screen they would have seen. Yes.

PN9113

Yes, and so they weren't asked - when they were asked to rate or rank the activity importance they were not asked to rank the relative importance of an activity by reference to the option of doing a work shift. That's correct?---At this stage, no.

PN9114

So you agree with that?---I would agree with that, yes.

PN9115

Thank you. I just want to ask you now about what you refer to as the discrete Choice experiments that you conducted. I gather from the documents that have been produced that it was essential that the survey respondents be persons receiving penalty rates. Is that as you understood it?---That was a criteria on the sampling, yes.

PN9116

And why was that?---Because the exercise was to examine penalty rates and the value of time that people place on penalty rates.

PN9117

And so if that was the purpose of the task it would be nonsensical, I assume, to have respondents who were not receiving penalty rates?---That's correct. That's my view, yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9118

Now the first discrete Choice experiment you undertook involved the respondents engaging with the screens on the computer, illustrations of which you've got in your report, and if I could direct you and the Commission to page 52. I'll take you through these, Professor Rose, but taking it one step at a time. For the first Choice experiment what the respondents needed to engage with were the screen on the computer represented by page 52, which was called scenario 1 of 4 and then they would be shown scenario 2 of 4 which is the following page, then over

the page to scenario 3 and then scenario 4?---Yes, insofar as the numbers shown here are just one example of what a respondent may have seen. So there's - - -

PN9119

I see. They're just illustrative?---This is an illustrative example so - - -

PN9120

I understand that. I understand that, so that in terms of the data or the numbers that appear under the heading "Offers" that would be variable? I'm not suggesting to you that what appears under the heading "Offers" appeared on each and every screen for each and every respondent. This is just illustrative?---That is correct, yes.

PN9121

All right, I understand. So the instructions that the respondents were presented are set out above the heading "Offers", that's right?---That was the instructions the respondents were shown, yes.

PN9122

Yes, and it says in the second sentence:

PN9123

In each scenario we would like you to assume that your boss has approached with you a number of shifts that you require filling with various hourly pay rates. We would like you to tell us which, if any, of the shifts you would accept filling in for. In doing so we would like you to pretend that your week is exactly the same as you told us for the past week i.e. your schedule is exactly the same. If a shift overlaps with an existing work shift, accepting the new offer would mean that you would no longer have to work the existing shift and you would be paid at the rate shown for the new shift.

PN9124

And it goes on to say that it would be repeated four times and then in the final paragraph it says:

PN9125

We ask that you take this seriously.

PN9126

And I won't read any more of that. So the shifts that then – following those instructions, and looking at scenario 1 on page 52, to take that as an illustration, the respondent is presented then with the shifts on the dates there set out. The times are identified, the shift hours and the pay rates. And what they had to do is just simply click to each of them?---Yes. The only caveat I would add is the activity diary at the bottom of the page would have been filled out.

PN9127

Thank you. So the activity diary would have been filled out to tell the respondent what they did last week?---That is correct. Yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9128

Now, you say in your report that the experiments, and I quote from you:

PN9129

pivoted the attribute levels of the design around the current award rates so that scenarios would cover situations in which the pay offers were both greater and less than the current pay rate.

PN9130

To be clear you don't mean by that that when a respondent is looking at the screen in scenario 1 there at page 52, you don't mean that the column "pay rates" pivoted itself, that it changed. It was fixed in terms of what was shown on the screen?---That is correct. They were – I used what's called an experimental design to systematically vary the attribute levels as per table 1 in the report.

PN9131

Yes. And so the pivoting to which you refer occurs when one looks through, when a respondent sees scenario 1 through to 4, there's a variation in the rates of pay?---That is correct. Yes.

PN9132

Yes. Now, from the responses to these experiments you derive what you identify in your report as the threshold hourly pay rate necessary to induce the respondents to accept an offer of work at different times; that's right?---That is correct. Yes.

PN9133

And if I could perhaps ask you to look at page 40 – I'll withdraw that. Before I go on to that question, looking back at the pages in the scenarios, at page 59 through to 62 one sees the second – the screen shots as it were, illustrative screen shots of the second discrete choice experiment; that's right?---That is correct. Yes.

PN9134

And that was the same as the first experiment save that certain dates, such as on page 59, and the second date, Tuesday January 2015, certain dates were identified as public holidays?---That is correct. Yes.

PN9135

It was otherwise the same task that the respondent needed to undertake as in the first experiment?---That's correct. Yes.

PN9136

Thank you. So I was about to take you to page 43. So based on the experiments you conducted, just to assist us in understanding this table, and if I could just focus on the second table, General Retail Industry Award 2010, by way of illustration, what you calculated, on the basis of the experiments that I've just asked you about, is that for respondents under the Retail Award the threshold hourly pay rate to induce them to work on a weekday is 112.22 per cent of the average reported hourly pay rate. Am I reading that correctly?---Yes, relative to the current award. Yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9137

Well, it's 122 per cent of the average reported hourly pay rate. I'm sorry, it's 112.22 per cent of the average reported hourly pay rate?---Yes, that's correct.

PN9138

Yes. And just staying with that one box in the table in brackets under 112.22 per cent is the confidence interval?---That is correct. Yes.

PN9139

So what that tells us is that one can be 95 per cent certain that the actual threshold hourly pay rate for the population from which the sample is taken falls in that range?---That is correct. That's the correct interpretation, yes.

PN9140

Thank you. And then so for Saturdays, looking at the retail table it's 112.22 per cent?---Correct. Yes.

PN9141

And for Sundays it's 156.93 per cent with the confidence intervals put in brackets under each of those entries?---Yes.

PN9142

Thank you. Now, it seems notable to my eyes that the threshold hourly pay rate that you identify, or the percentage of the actual hourly pay rate that you identify is identical in relation to the retail award for a normal working week, for weekdays and Saturdays. You see that?---Yes.

PN9143

All right. So even down to the second decimal point, so to that level of precision you're saying that they're exactly the same?---I am saying that if you look at table 12 from which these are derived there were no statistical significant differences between those two. Yes. And therefore the two are the same. So in the modelling process I tested for statistically significant differences between those two, and I didn't find that they were statistically different, and hence they collapsed to one value.

PN9144

That surely threw up a red flag to you, did it not?---No. That's what the empirical data suggested, so that's what I reported.

PN9145

Well, just because that's what the data says doesn't mean it's right though. Do you accept that? The data is just as good as the experiment that's been conducted? Do you agree with that?---I agree with that, but that's what the data said, so that's what is reported.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9146

What I'm suggesting to you is that did this not suggest to you that something might be awry in your experiment design, because it was telling you that the percentage of the actual rate paid to induce workers to work on a normal weekday,

and on a normal Saturday, was exactly the same?---I am saying that the two are statistically not different, and that's what the data said. That's all I can say.

PN9147

It didn't lead you to reflect upon the methodology that you adopted in this experiment, or the way in which the data had been derived?---No, that would be unscientific, because I made no assumptions about any of this going into it.

PN9148

I don't understand how it's unscientific to reflect upon data generated and to consider whether or not it might cast light on the appropriateness or accuracy of a methodology. How is that so?---Because you're presuming that I went in with a particular set of hypotheses.

PN9149

No, I'm not. I am not assuming that at all. I'm suggesting to you, Professor, that you were presented with numbers which patently suggest that the results of your experiment were erroneous because it identified absolutely no difference in the threshold rate of pay required to induce a worker to work on a Saturday and a weekday. Surely you would have seen that something was wrong there?---I refute that wholeheartedly and disagree in that you are making a set of assumptions and I didn't. You're the one making assumptions that these two are different and should be different in the population. I have no evidence other than what I've gathered.

PN9150

Well, the evidence is out there in the real world, Professor. Saturday is something called the weekend. That's familiar to you?---Yes, I am familiar that Saturday is part of the weekend. Yes.

PN9151

All right. So you're prepared to take that into your deliberations in the way in which you discharge your professional tasks?---That is correct.

PN9152

All right?---That Saturday is part of the weekends. I will not argue against that.

PN9153

All right. So that's an assumption you'll make?---No, I believe that that's a fact.

PN9154

All right. And – I'll withdraw that. Now, I want to ask you some other questions. You've read a report prepared by Professor Altman entitled Response to the Rose Report Value of Time and Value of Work Time During Public Holidays?---I did. Yes.

PN9155

And you've responded to that in your second report which was tendered to the Commission this morning?---That is correct. Yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9156

I just want to draw your attention to something you say in your second report. In paragraph 2 you say:

PN9157

It is my opinion that the theories identified by Professor Altman are critical in the current context and failure to incorporate mechanisms to account for such behaviour are likely to result in systematic biases in the survey results.

PN9158

And before I ask you about that, can I just also draw your attention to paragraph 45 where you say:

PN9159

Evidence suggests that making stated choice experiments more realistic by accounting for referencing, anchoring and framing can reduce any hypothetical bias that might be present.

PN9160

So in paragraph 2 when you refer to the "theories identified by Professor Altman", you're there referring to, amongst other things, what he has to say about the theories of referencing, anchoring and framing?---That is correct.

PN9161

Yes?---Which come under the umbrella of behavioural economics.

PN9162

Yes. And you recognise the force and importance of those theories and principles in good design of choice experiments?---Yes. In the second paragraph you highlighted, in brackets are papers that talk about these issues. I'm an author on all those papers, so, yes, I'm well aware of them.

PN9163

Yes. Yes. And one of those theories, which you don't refer to specifically, but which I don't understand you to contest the importance and relevance of, is the theory and notion of loss aversion?---That's two-sided. Loss aversion derived from Kahneman and Tversky in the 1970s is basically the suggestion that losses are valued different to gains.

PN9164

Yes?---In risky choices.

PN9165

And the classic example of loss aversion is the scenario to which Professor Altman refers in his papers about the experiment conducted with a mug at a University. You're familiar with that?---No, that – I would – I am familiar with that, but I wouldn't say that that's the classic experiment. The classic experiment was Kahneman and Tversky and it deals with specifically risky choices, i.e., something where there is a financial gain or a financial loss, a probability thereof, so in gambling.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9166

Yes?---But he was referring to a particular type of experiment and I am familiar with that. Yes.

PN9167

And the experiment was to this effect, that he referred to, that is Professor Altman, that is, that if respondents in an experiment are invited to place a value, how much they would pay for a mug, they determine value X. They were then asked how much would they need to be paid to give that mug up, and the results, loss aversion suggests that the value that they would require to give up the mug would be greater than the value to purchase the mug?---That is correct. Yes.

PN9168

Yes?---So it's relative to the reference point.

PN9169

Yes. I see. So you see loss aversion as being a principle which falls within the rubric of referencing?---It is basically stating that people have a particular reference point and people value gains relatively to losses differently, relative to that reference point.

PN9170

I see?---So if a person currently has a mug, and you take it away from them, there'll be a particular value. If they don't have a mug, and you're offering them a mug, they'll have a different value.

PN9171

Yes. And it's important, and this is a general question, it's important in good survey and experiment design to take account of that phenomenon?---It would be good practice. Yes.

PN9172

And in very simplistic terms, loss aversion captures this simplistic proposition: that people value losses more than they value gains?---Yes. And it can be non-linear or linear effects.

PN9173

Okay. Thank you. And you don't dispute Professor Altman's evidence that there is a large and influential literature which suggests that individuals' responses in surveys are heavily influenced by reference points?---That is the evidence. Yes.

PN9174

And that their responses are also heavily influenced about how questions are structured and framed?---That in the literature is known as design artefacts. Yes, there is an extensive literature on that. Yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9175

And you also don't dispute his evidence that responses to survey questions can change depending upon how a question is framed?---That is evidence dating back to the 1970s, yes.

PN9176

And the evidence also shows that responses to survey questions can change depending upon the context of which a question is framed?---That is correct. Yes.

PN9177

Thank you?---A framing effects, yes.

PN9178

So the selection of reference points in a survey question or how a survey question is anchored to posited facts is critical to ensuring that one can have confidence that the survey results represent the true preferences of the population in which the survey is to be conducted?---Insofar as the references and the anchoring that you're referring to are reflected in the population as outside of the survey context, yes, I would agree with that.

PN9179

Yes. If you want to get meaningful insights about a population, so far as one can do it, one wants to reflect the contextual constraints or reference points which are in population and reflect those in the survey; that's correct?---Yes.

PN9180

Now, Professor Altman criticises your report centrally, as I read it, because of the failure for you to account for loss aversion in the way in which the questions were framed. You understand that's the central critique that he advances?---I believe that is a critique he is advancing. Yes.

PN9181

Yes. And you say that loss aversion was accounted for, and the questions properly framed in your survey, because survey respondents were offered alternatives both above and below the current pay rate?---The framing was given as the previous week's activities, so they were given a context in which to make the decision.

PN9182

Yes?---The referencing is accounted for in that they were given offers that were both above, below and of the same value as the current pay rates, yes.

PN9183

So your answer is to say, well, the questions had a context. They had the diary, their activity diary from the past week, and they were given options through the different four scenarios of pay rates above and below the award?---My position is that Professor Altman has failed fundamentally to understand how the survey was constructed. You're providing an example of a mug whereas in the experiment people were shown seven different shifts, which some of which were above, some of which were the same, and some of which were below, and they were asked to make trade-offs between those. If you look at point 30 of my comment back to Professor Altman I provide examples of in the actual screens in my report that show that.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9184

Professor Rose in your survey or experiment the respondents were never presented with an option as to whether or not they would be prepared to work for a rate X per centage less than their current rate or award rate. That was never put to them in those terms, was it?---Not in those terms, no.

PN9185

No. Do you accept that if the question had been framed in that way that it would have likely generated different results?---It would have definitely generated different results, yes.

PN9186

Thank you, and because people value losses more than gains, what that would have generated in all likelihood would have been a higher threshold rate of pay that they would require to be paid to work at certain times?---You're making an assumption that you're going to be using a method known as contingent valuation to do that, and as I clearly state in my report there was a ruling by the Copyright Tribunal that you shouldn't be using those types of methods.

PN9187

Professor Rose, I'm not making any assumptions. I'm just asking you a question?---I - - -

PN9188

And the question is that you've accepted that if the questions had been framed in the way in which I put to you before they would have definitely resulted in different results, and I'm simply asking you the question would you not expect that in all likelihood the results that would have then been generated would have been a higher threshold rate of pay to induce people to work at different times?---I don't know. That would be an empirical outcome. It's a potential empirical outcome, but I would put it to you that you shouldn't be doing a survey in that method in the first place.

PN9189

Coming back to the example about the mug, to look for a suitable analogy, your questions were more directed at identifying the willingness of participants to pay for the mug in the first place rather than the identification of their willingness to forfeit the mug?---I think you're confounding the anchoring with referencing

PN9190

Well, I might be but do you agree with that general - the proposition that I've put to you?---No, I don't believe that is strictly true.

PN9191

What you did in the survey, in effect respondents were responded to click on (indistinct) at different rates of pay at different times. So they were invited to in effect identify the value that they seek to be paid to work at particular times, yes?---That is correct, yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9192

And that is, I suggest to you, analogous to asking in the mug example "How much will you pay for the mug?"---That is incorrect and my reasoning for stating that is that I don't offer them a single mug. I am asking them to trade-off between several mugs. They were shown seven shifts. Each shift was described by various times and different pay rates, both above and below their - and including the current penalty rates, and they were asked to trade-off between them. The analogy with the single mug is erroneous analogy.

PN9193

All right. You agreed with me some time ago this morning that in conducting this research you understood that your client wanted to reduce penalty rates which seemed disproportionately high?---That was their objective and, as I told Dick Grozier at the time, that whatever results we produced that would end up in the results.

PN9194

Did you formulate the survey (indistinct) in mind?---No, I did not.

PN9195

You say in your report - this is in paragraph 40 of your report - that the focus of your research was simply to derive - I may have misdirected you there. Just excuse me. This is actually at paragraph 40 of your reply report. You say there that the scope of your research was simply to derive the WTA, the Willingness to accept, for work relative to the current award rates?---That is correct and - - -

PN9196

All right, and you understood that your research was being conducted in the context of a claim being made by your clients to reduce penalty rates. That's right?---That was their objective, yes.

PN9197

Yes, and do you then not agree that the most relevant and directed question that you should have asked respondents was how they would react to a cut in penalty rates?---The methods that I used are designed to actually get at their reaction to that cut and, to be brutally honest, the assertion that you're making is that I was only interested in looking at a reduction in penalty rates, wherein the survey clearly allowed for the outcome that it might have given results contrary to that and actually suggested higher rates of pay.

PN9198

Now you say in paragraph 5 of your reply report that Professor Altman is correct in saying that choices cannot and should not be made context-free and I think you agreed with me before that to generate useful survey results one wants to, so far as one can, replicate contextual elements of the population in the survey?---That would be the best practice. Yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9199

Yes. Now can I show you this document - before I do that I'll ask you a question. You did obtain some insights into the broader context of the sample, of the

population, through the pilot focus groups conducted by Professor Holden. That's so?---That is correct, yes.

PN9200

Yes. All right I'll just hand you a document. Is this a copy of the pilot report prepared by you and dated 24 April 2015 which you provided - I withdraw that - prepared by you?---That is correct, yes.

PN9201

Yes, and this was provided to your clients, at least Australian Business Industrial?---That is correct, yes.

PN9202

And you'll recall that in this report you in effect provided some feedback, as it were, to your client about how the pilot went conducted by Professor Holden?---That is correct, yes.

PN9203

Yes. So if you could turn to page 10. This is appendix A to your pilot report and this is the report prepared by Professor Holden in relation to the focus groups, the two focus groups he conducted?---That is correct, yes.

PN9204

And he deals with - just to take you through the document - the objectives and method, and on page 11 the results, and there are a number of headings that appear thereunder over the next few pages. If you go to page 14 you'll see there's a heading "1.4 value of time" and Professor Holden there writes:

PN9205

A key objective of this overall research project is to establish how those on penalty rates value their time. The following represent insights gleaned from the focus groups on this issue.

PN9206

There's then a heading:

PN9207

Being off work when others are off work.

PN9208

The respondents indicate that there is a value to being off work when everyone else is not working, regardless of whether Saturday, Sunday or a public holiday, and the converse that there is a cost to "working retail when everyone else is off". A number of respondents echoed the sentiment that "It is hard to have a social life" when working non-regular work hours. In this context penalty rates are seen at least partially as compensation for this cost.

PN9209

You read Professor Holden's report that this extract forms part of?---Yes I did.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9210

You noted this paragraph?---Yes I did.

PN9211

Yes and so far as I can see, Professor Rose, you didn't seek in any way to design your survey or experiment to deal with or explore the issue in the paragraph that I've just read out. Do you agree with that?---It is my belief that when respondents were answering the questions they were asked to think about their previous week and in making the choices that they made they would have taken into account such factors as was described in this particular paragraph.

PN9212

If you could just go over the page to page 15 still in this section. There's a heading:

PN9213

Casual workers do not choose.

PN9214

Following from the notion that penalty rates are valuable is that a number of workers indicated that being asked to work hours for penalty rates was not always a choice. That is, the participants often felt obliged to work the hours offered irrespective of the rate that is being paid. You come in if you're asked to. Participants noted that if they did not accept the offered hours then they could lose the offer of such hours in the future. That is, the employer may hold a considerable amount of power in the allocating of hours. They can reward those they wish with hours paid at penalty rates and they can withhold those hours and allocate otherwise undesired hours to those that cannot or otherwise do not accept the offered hours.

PN9215

I don't read the next paragraph but if you need to, please do. Now this observation of Professor Holden raises what you and Professor Altman refer to in your respective reports as the issue of coercion, doesn't it?---That is correct, yes.

PN9216

Yes, and you say in your reply to Professor Altman that your survey failed to take account of coercion when computing the willingness to accept?---I don't know what assumptions respondents made when they were answering the questions.

PN9217

Well, just answer my question. Your position is - and you've said, haven't you - that your survey failed to take account for coercion. That's so?---They were told - sorry, can I just check the exact wording of the question? They were asked exactly what was shown in that figure. I believe it did not force coercion on the respondent so I would agree with that, yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9218

I'm sorry?---I would agree that they were not told that they were being coerced into making that choice, yes.

PN9219

You've said in paragraph 35 of your reply statement:

PN9220

Professor Altman states that the survey task failed to account for coercion when computing the WTA for pay rates. This is correct.

PN9221

?---I agreed with you. I said yes, that's correct.

PN9222

All right?---So I don't know what we're arguing about, sorry.

PN9223

The type of research you undertook is unable to provide insights into the willingness to accept and its quantification when work is required or coerced. That's correct?---The whole concept of willingness to accept or what you're calling willingness to accept, otherwise known in the economic literature as marginal rates of substitution, assume that people are able to trade-off one attribute with another and have zero change in their utility or preferences. In the scenario that you're suggesting, you are suggesting that people are unable to make choices therefore they're not able to trade-off and therefore the marginal rates of substitution in theory don't exist or are undefined or infinite.

PN9224

So the answer to my question is yes, is it?---The answer to your question is that from an economic sense if people are unable to make trade-offs because they're being coerced, then there are no trade-offs being made and the marginal rate of substitution is effectively infinite.

PN9225

Yes, so your analytical framework as exemplified in your experiments assumes freedom of choice by the survey respondents. That's so?---They were told that, but what assumptions they were making when they answered the questions, I can't say, no.

PN9226

No, but I'm asking about your analytical framework. For it to have validity it assumes that there's perfect choice between the options?---It assumes that people are making trade-offs between the alternatives. What assumptions they make when they make those choices, I can't say.

PN9227

Do you accept that your experiment is unable to provide any insights into a population if that population was characterised by a level of coercion in relation to work?---It's my testimony that I did not assume that respondents were being coerced into making choices. However whether the respondents themselves made that assumption when they did the survey, I can't say.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9228

No, I'm just asking about your methodology, not about the respondents. I'm suggesting to you that your experiment would be of no assistance in yielding meaningful insights into a population if that population was characterised by the existence of a coercive element in relation to work, namely a requirement to work. Do you agree with that?---I - no, I put it to you that I have no way of teasing out whether a person accepted in the experiment a shift because they were assuming they were being coerced into it or not. I can't separate it out. It doesn't necessarily preclude that respondents were acting that way, but I can't say one way or the other whether it was. The method itself makes no such assumptions. It just assumes that they are trading off the attributes. There were respondents who would accept shifts. Why they accepted that shift I can't say other than the modelling exercise.

PN9229

But you were told by Professor Holden that coercion was a real issue in the focus groups that he conducted. That's right?---I was actually present behind the mirror at the time and there were several - or I think there were two respondents who made that claim. Yes.

PN9230

Yes, so can you point the Commission to any aspect of the experiment that you devised which took account of and was framed by a reference to any element of there being a requirement to work or any constrained choice?---I did not make any assumptions about constrained choices, no.

PN9231

That means that there's no aspect of your experiment which contextualises the questions asked by reference to there being any requirement or coercive element to what - - -

PN9232

MR IZZO: Objection, your Honour. I think this is probably the fourth or fifth time the same question has been asked in various different ways. I think Professor Rose has answered multiple times that he hasn't taken into account coercion, and he has provided some comments about assumptions the witnesses may or may not have made. I don't understand how the Tribunal is helped by having the question asked a fifth and sixth time again.

PN9233

JUSTICE ROSS: The last question was put in a different way by reference to the contextualisation but – ask the question, Mr Moore.

PN9234

MR MOORE: Thank you. You understood that – you've agreed with me before that it's important for an experiment or a survey, in order to provide meaningful results, for it to reflect the context, so far as one can, of the broader population to which it's directed, yes?---That is correct, yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9235

There is no aspect of your survey which incorporated the contextual element, in the population of hospitality and retail workers, of there being an element of coercion or a requirement to work, that is so?---Yes.

PN9236

All right?---But if I could add, there's also no contextualisation in my survey that at a particular hour a very good looking male or female entered the store and so a person prefers to work a particular time because they're going to see that person. You can only control it for so much.

PN9237

Professor Rose, that is, can I suggest, a trivial response, and can I suggest to you that what you were told about by Professor Holden, as you watched behind the mirrors, was that there was a real world context of a requirement to work. We're not talking about handsome or attractive employees. You did not incorporate any of that contextual element in your survey, is that so?---I did not control for that, no.

PN9238

You accept then that the results of your research cannot be regarded as reliable, insofar as there is a coercion or a requirement on workers to work at certain times?---I do not accept that, no.

PN9239

In effect, what you did is assume away the idea of work being required or coerced. That's what you did, didn't you?---I assume that the respondents will answer within their context.

PN9240

Another assumption you made is that Sunday is no more or less important than any other day of the week. That's correct?---I made zero assumptions about importance of any days, Sunday included, so yes I would agree with that statement.

PN9241

You accept though, do you, that at a minimum that is at least a contestable proposition, in that at least some people in the wider community, in the workforce, hold the view that Sunday's different. Do you accept that?---I would accept that it's an empirical question, yes.

PN9242

Do you accept that some people might think that Sundays are special?---I would accept that that's an empirical question, yes.

PN9243

Well you say it's an empirical question but, as you've indicated, to generate a reliable and useful survey you need to turn your mind to the context of the population. Is that so?---Yes, I agree, yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9244

So I'm suggesting to you that one part of the broader context to which you could have referred in formulating your survey is the fact that for some people at least Sundays might be special?---If I was to bias the results, yes, that's what I would have done.

PN9245

Well you could've - when you say, if you wanted to bias the results, but you could have asked different questions?---I could have. The framing that I put, I put no more emphasis on Sundays than I did any other day of the week, so respondents could actually freely answer any way they so chose, so the results reflects their brief free thoughts as opposed to me trying to get directly at it.

PN9246

But in your second experiment you did impose some additional context, didn't you?---We had to in order to look at the effect of public holidays - - -

PN9247

I'm just asking, did you?---Yes.

PN9248

Yes, so you posited the second experiment is the same as one, except respondents are told by way of context, by way of framing of their choice, day x is a public holiday. That's right?---That is correct, yes.

PN9249

So could you not have – there wouldn't have been any theoretical impediment to you designing a question which posited date x, assume it's a Sunday of special significance, you could've done that?---The assumption that I made was putting it in the context of their previous week, so if on that particular previous week the Sunday they had a christening for example, then that same assumption would have flowed through to the survey, so it's indirectly built into the survey as it is.

PN9250

There was no impediment to you designing a survey question which identified a day as being of special significance and asking the respondents to then make their choices accordingly?---I could have done that, yes.

PN9251

Yes. Your Honour, can I move to another matter. One of Professor Altman's criticisms of your research is that it's not direct at identifying the loss of welfare or utility ensuing from reductions in penalty rates. You understand that's a criticism he makes of you?---That is correct, yes.

PN9252

Of your research?---Yes, sir.

PN9253

And you're generally familiar I take it – I'm sure more than generally familiar – but you're familiar with the notion of Pareto optimality?---That is correct, yes, sir.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9254

And in short terms, that encompasses the notion that those whose utility or wellbeing is reduced by some action, in this case let us say a reduction in pay, that there should be some compensation for their loss or utility or wellbeing so that the net social utility is not reduced. That's what the concept stands for in simple terms?---Yes, I would agree with that.

PN9255

In your response to Professor Altman's criticism on this point about what he says is your failure to identify welfare effects associated with reduction in penalty rates is, you say, well the respondents were able to account for those impacts by freely accepting or rejecting the shifts that were placed before them?---That is correct, yes.

PN9256

That response though, Professor Rose, assumes though that the respondents had complete freedom of choice in relation to the options before them, that's right?---That is correct, yes.

PN9257

You would agree that if there is no absolute freedom of choice and that if work is wholly or partly coerced, there would be welfare effects associated with a reduction in penalty rates?---Yes.

PN9258

Thank you, and you understood from Professor Holden's focus groups that in the real world, in the population of interest, there isn't unencumbered free choice, you understood that?---Not in all cases but in some, yes.

PN9259

There was no theoretical impediment to you designing an experiment designed to illicit a respondent's willingness to accept work in the face of being forced to work a particular shift, is that so?---It's not clear to me at this moment how you would actually go about that. I am sure that there is probably a method that could do it but the method that I used is called choice modelling and what you're describing is coerced – there is no choice; you do it or that's it, so the theory – you talk about theory, I don't know.

PN9260

All right, thank you. I'm reminded by my junior that I haven't sought to tender the pilot report, if the Commission pleases, of 24 April 2015. I do seek to tender it.

PN9261

JUSTICE ROSS: I'll mark that exhibit SDA2.

**EXHIBIT #SDA2 PILOT REPORT OF JOHN ROSE DATED
24/04/2015**

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9262

MR MOORE: Thank you.

PN9263

In your reply report, you say that - and this is in paragraph 46 - any bias in the experiments you undertook would be such that the values reported are higher than the true willingness to accept. That is, if there's any bias, it's an upward bias. That's the substance of what you're saying?---With one caveat. I used the term "whilst mixed" so - - -

PN9264

Which term, sorry?---My statement in 46 is, "The evidence, whilst mixed, suggests" - so I would say there is evidence that if hypothetical bias is present, it could go either way. However, by and large the evidence is that it's going to be, in this case, strategically biased. It would be expected to be upwards, yes.

PN9265

You, though, haven't controlled for other biases in your experiment. You didn't, in particular, control for the possibility that respondents might be coerced or required to work?---I did no control for that directly, no.

PN9266

Would you accept that if that had been able to be controlled for, that would mean the estimates of the willingness to accept are biased downwards?---No, I don't hold that that would follow.

PN9267

You didn't control for the effects of loss aversion in terms of you didn't ask people about their preferences framed by reference to there being a cut in penalty rates?---I disagree with that. There are examples in the report. I believe if you look at point 30 of my reply to Professor Altman - no, sorry, that's incorrect. It's my contention that the respondents were shown several shifts; seven shifts per gain. In each of those shifts, some of those offers were above the award, some were below the award and some were equal to the award. Respondents were not just asked to accept a shift, but they were going to do this not independent of each other, so that they could gamify and select shifts where they only went above the awards or where they were at the award or above; so there was no mechanism or reason why they would necessarily have to be forced to choose shifts below the award. The whole system was set up in such a way that people are trading off not just times with costs, but shifts with different various amounts.

PN9268

But you've accepted that the results would definitely have been different if respondents were asked their preferences in the face of a cut?---They were.

PN9269

Penalty rates?---If you look at figure 3, for example, of my report on page 9 - - -

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9270

Yes?---The first offer is at a rate of \$16.21, which is below their current and they're asked whether they would accept or reject that, whereas the seventh offer is on a Tuesday at \$30.10 per hour where they were asked to accept and reject.

It's my contention that they were actually asked in the first instance would they accept a penalty rate below their current rate.

PN9271

Well, they weren't asked in those terms?---I'm not sure what terms they were asked in then.

PN9272

You're assuming that the respondents well understood what the applicable penalty rates were and what their hourly rate was at each particular time. That's so?---I'm assuming that they know their currently hourly rate, yes. I would agree with that.

PN9273

Not only their current hourly rate, but what the award rate was?---Yes.

PN9274

JUSTICE ROSS: The award rate for ordinary hours or penalty hours.

PN9275

MR MOORE: The award rate for any hours.

PN9276

JUSTICE ROSS: Perhaps you might clarify that.

PN9277

MR MOORE: All right.

PN9278

You've assumed that the survey respondents knew their actual rate of pay. That's right?---They were asked a question as to their actual rate of pay, which is reported in my report.

PN9279

You also assumed that they knew what the applicable award rate of pay was?---I did not assume that. I presented them with offers that were pivoted around the current award rate.

PN9280

But you've just given evidence that by making the offers you did, it was evident to the respondents that they were at certain occasions being offered an amount less than the award?---I'm assuming that they knew what the current rate was, yes.

PN9281

Yes?---Yes.

PN9282

You're assuming that they knew what the current award rate for ordinary time was?---Yes.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9283

You're also assuming that they knew what the current and applicable penalty rate was?---Correct, as per table 1 of my report.

PN9284

I see. Table 1 sets out the schedule of the applicable award rates?---Table 1 sets out the actual values used in the experiment, so these are the values that they were shown.

PN9285

Yes. You're assuming that the respondents knew those values insofar as - well, the restaurant worker; that he or she knew the applicable award rates under that award?---I'm assuming that they were shown these values over the experiment. If you wish to get into loss aversion, then these would be relative to what they assume as the current rate, yes.

PN9286

Just to be clear, you assumed that the respondents knew the rates for Monday to Friday, Saturday and Sunday, public holiday rates, under their applicable award?---Just to clarify, I did not make that particular assumption, but if you wish to discuss loss aversion, it's accounted for under that assumption, yes. If you're talking about loss aversion, yes, I am making that assumption.

PN9287

I see?---But in the survey itself, the survey design, no such assumption was made. They were just presented with these offers.

PN9288

I understand?---And they could accept or reject.

PN9289

Thank you, Professor Rose?---Thank you very much.

PN9290

JUSTICE ROSS: How long are you likely to be, Mr Dixon?

PN9291

MR DIXON: About 15 minutes or 20 minutes, your Honour.

PN9292

JUSTICE ROSS: All right. We might take a - - -

PN9293

MR DOWLING: Your Honour, can I just let you know that there is a discrete topic that Mr Moore and myself have discussed that I will cover. I anticipate that will be in the sort of 15-minute range, as well.

PN9294

JUSTICE ROSS: It might be that you go first and then Mr Dixon.

*** JOHN MATTHEW ROSE

XXN MR MOORE

PN9295

MR DIXON: Yes.

PN9296

JUSTICE ROSS: We might deal with you now, Mr Dowling, if that's all right, and then we will take a short break after you complete your cross-examination before we go to Mr Dixon.

PN9297

MR DOWLING: Thank you, your Honour.

CROSS-EXAMINATION BY MR DOWLING

[11.19 AM]

PN9298

MR DOWLING: Professor Rose, you have there, do you, your report; the one titled "Value of time and value of work time during public holidays"? You have that with you?---Yes, sir.

PN9299

You have your reply report, as well, the one headed "Comment on response to the Rose report"?---Yes. I do, yes.

PN9300

I think you now have in front of you the document that was marked SDA2, which is the pilot report document. Is that right?---Yes, I do, sir.

PN9301

Thank you. It's clear by your response to Professor Altman that you've read his report. Have you also been shown the report filed by Professor Ballen in this matter?---I have not, no.

PN9302

To be fair to you, I'll hand you a copy of that.---Sorry, can I correct my answer? I've been shown one excerpt from that report, just to be clear.

PN9303

All right, well perhaps I'll show you the report and you can clarify – it might be that the relevant part where - - -?---Thank you.

PN9304

You've been handed a document. On the front page it says report by Professor Jeff Ballen, Department of Economics, University of Melbourne. That's the document you have?---Yes, sir.

PN9305

Can you turn to page 22, please, and you'll see there a heading, a part way down page 22 – report by Professor Rose – do you see that?---Yes, sir.

PN9306

I think your evidence a moment ago was you were shown an extract or part of this report. Is that the part you were shown?---Yes, sir.

*** JOHN MATTHEW ROSE

XXN MR DOWLING

PN9307

Can I then firstly end – should we take it that when you were preparing your response to Professor Altman you had seen this extract at that time?---No, I saw this after I'd prepared my extracts – my original extracts – and I added one point in after seeing this.

PN9308

I see, so by the time your final document that is your reply report, if we can call it that, was filed you had seen and read this extract from Professor Ballen?---That is correct, yes.

PN9309

But you didn't make any reference to or see fit to comment in any way on what Professor Ballen had said in your reply report, is that right?---No, I believed at that time and I still do that the argument is similar to some of the arguments put forward by Professor Altman.

PN9310

I see, and by the argument are we talking about the concept of the marginal WTA versus the average WTA?---Sorry, I just need to get some definitional issues out of the way. The willingness to accept, which is what it's being referred to, is actually in an economic sense the marginal rate of substitution.

PN9311

Yes.---In my report I present the average marginal rate of substitution but it is a marginal rate of substitution. What Professor Ballen and Professor Altman are referring to as marginal is a different concept, so there is different terms in the economical language being used here.

PN9312

All right, well perhaps we'll deal with what it is that Professor Ballen has to say, and I'll let you respond to it if you think it's appropriate. Firstly, can I ask you to look at paragraph 51 under the heading Report by Professor Rose, and you'll see there, dealing with the first sentence, it says, first:

PN9313

The findings reported by Rose are about the average hourly wage that survey respondents indicate they would need to be paid to be willing to work on different days.

PN9314

Do you see that sentence?---I do, yes, sir.

PN9315

And do you accept that Professor Ballen's description is an accurate one, at least up until this point?---No.

*** JOHN MATTHEW ROSE

XXN MR DOWLING

PN9316

All right.---If I can clarify, I agree that most of the discussion in my report is around the average, however, in table 12 and in the modelling section, the

econometric models I estimated assumed that the willingness to accept was normally distributed over the population, and in table 12, for example, you can see that the normal hourly rate has a mean of \$21.50 but there's also a standard deviation of \$3.60.

PN9317

Yes.---So even though I don't discuss or go into that in great detail in the report, there is evidence in my report that there is more than just a mean estimate in the data, or in the model.

PN9318

I see. I'll come to that, but is what you're saying from the data you've produced you could extract the entire distribution?---From the data it is there; it's actually presented in table 12.

PN9319

All right, I'll come to that. Can I just nextly deal with then what it is that Professor Ballen has to say at paragraph 52, and he there deals with the proposition that he describes as:

PN9320

Labour supply in any market will be determined by the marginal wage.

PN9321

Do you see that proposition there at paragraph 52?---I do, yes, sir.

PN9322

He uses an example, and I want to make sure that I understand it and that you understand it, and then you can tell me your views about it, but he uses an example where he has five potential workers.---That is correct, yes.

PN9323

You've read that example?---I have read this example, yes.

PN9324

Each has a minimum wage for which they are willing to work, or they are willing to supply their labour I think is the expression he uses?---That is correct, sir.

PN9325

So if we can imagine the five workers – we've got five workers sitting up here, and in Professor Ballen's example they each have a different wage at which they are willing to work, and in his example it's 1, 2, 3, 4, 5?---That is correct, yes, sir.

PN9326

I don't want you to bother about who up here might be '5' and who might be '1'; I just want you to - - -

PN9327

JUSTICE ROSS: I can let you know that if you like.

*** JOHN MATTHEW ROSE

XXN MR DOWLING

PN9328

MR DOWLING: Professor Ballen's proposition is that if he wants to hire and be able to hire all five of those workers, he is going to have to pay \$5?---If the demand for labour is for all five workers, then that is correct.

PN9329

Let's assume the demand is for all five, he wants to test the labour supply, and he wants to hire all five, and the meaning of that that he derives is to say, well that means the most important detail for me is the marginal rate, which is the \$5, and that's the rate at which I have to be conscious of to enable the complete labour supply?---That is his argument, yes.

PN9330

Do you accept what he says there so far?---Under the assumption that the demand for labour is for five workers, yes, and that is an assumption.

PN9331

Okay. He compares that in his example with the average wage, and of course across our five workers with 5, 4, 3, 2, 1, the average wage is going to be $\$3 - 15$ divided by 5 is \$3, so the average wage at which someone is willing to work is \$3, but he says of course that's not the important figure because if I pay \$3 only three of these five people will be working; those that are willing to work at \$5 and at \$4 will not be working. Again, perfectly sound proposition.---Under the assumption that all - - -

PN9332

Yes.---Yes, I would agree with that, sorry.

PN9333

So he says, if I'm assessing labour supply that the wage that needs to be paid is \$5, the important thing that I want to know is the marginal rate, the marginal rate which is \$5.---Yes, he would want to know the marginal rate of the marginal rate of substitution, yes.

PN9334

To take that example one step further and if in fact Professor Ballen is paying \$7, and all five people up here are working, and he wants to determine the level of reduction that he might be able to make but maintain the same labour force, again, he says, the important figure is the \$5?---I need to be a little bit clear here - potentially yes, because as your learned colleague pointed out there may be loss aversion effects, so assuming away loss aversion effects, i.e. you give somebody a \$7 mug and try and take it away, you would be correct if you were ignoring the potential for loss aversion effects.

PN9335

But whether I'm ignoring loss aversion or not, I still need to know the point at which – the important point for me to know is the \$5 point, because at that point I'm not going to be able to maintain the same labour force. Do you accept that?---You want to know the equilibrium point between supply and demand, yes.

*** JOHN MATTHEW ROSE

XXN MR DOWLING

PN9336

Yes, and that's \$5 in my example, yes?---In this particular example, yes.

PN9337

Yes, all right. Knowing the average wage that these five will be willing to accept at \$3 will not help you with that exercise in determining how far I can reduce the 7, do you accept that proposition?---Yes, in your example.

PN9338

In my example I might not necessarily want to reduce my \$7 down to the marginal rate, but it's still important for me to know what that marginal rate is so I can ensure the same labour supply. Do you agree with that?---That is correct, yes.

PN9339

All right, and I think you say that this is an issue that you didn't feel obliged to respond to Professor Borland because the issue is partly taken up or taken up by Professor Altman and you've made a reply to Professor Altman, is that right?---That is correct, yes.

PN9340

Now if you go to your reply report which is the document that was marked ABI2?---Yes, sir.

PN9341

And I think you referred to paragraph 30 earlier, I think incorrectly, but if you go to paragraph 30 in response to this issue. Is it fair to say this is where you are dealing with this issue we are currently discussing in response to Professor Altman. Is that right?---Yes, that is correct, sir.

PN9342

All right, and you say:

PN9343

Such an argument would suggest that in order to -

PN9344

I'm reading from the third line of paragraph 30:

PN9345

Such an argument would suggest that in order to entice all potential workers into the labour market one should offer the WTA value required to entice the last worker into the labour, not the average WTA value.

PN9346

Do you see that?---That is - that was the argument put forward, yes.

PN9347

All right, and that is from paragraph 52 of Professor Borland, that is what you understand Professor Borland to be saying?---That is correct, yes.

*** JOHN MATTHEW ROSE

XXN MR DOWLING

PN9348

And you put three propositions against that. You say firstly:

PN9349

The sample of respondents who undertook the experiment are in the labour market at the current wage rate which provides external validity to the findings of the Rose report hence the real WTA is either the current wage rate or lower.

PN9350

Now just so at least I can understand it can I put your response in the context of my five, four, three, two, one example? As I understand it what you are saying is - and I think I said in my example I was paying \$7. So what you're saying is that my \$7 is either the real WTA or the WTA is lower than my \$7?--My argument is in reference to what your learned colleague referred to as the real world out there. Given the current demand and supply for the labour market, the fact that my results reproduced the current WTA suggests that for the current demand for labour, that that is the correct value.

PN9351

You refer to the real WTA?--Yes.

PN9352

So if we're keeping it within my or Professor Borland's hypothetical example, all you're saying is that your results enable you to say that the real WTA in my example is \$7 or less?--No, that's not what I was attempting to say. What I was attempting to say is that - and that's what I mean by external validity, is that my results from my survey have replicated the results for the current - taking into account demand and supply in the current market conditions. That's all I'm attempting to say. The word "real" is I'm trying to use what we would call revealed preference data which is data in the real world, real world observations. That's all I was attempting to say. I'm sorry if it's not clear.

PN9353

Okay, and if you're saying this in response to Professor Borland as well as Professor Altman is it fair to say that that's not properly responsive to the notion that what Professor Borland wants to know is the \$5. That's not responsive to that to say "Well, I'm using the real world and what you'll find is my example uses" in your words "the real WTA". It's not responsive to the proposition that you still need the \$5 marginal rate to ensure that you have the same labour supply?--No I - what I was attempting to do there is to say that in the current context the average that I have reproduced reproduces the marginal rate out there in the real world, because it replicates the figure that is actually the current penalty rates. So my response was basically trying to say that the average result that I've obtained here is the marginal rate, at least given the current demand and supply in the market as it currently stands. I then go on to try and talk about this in a more theoretical way in the rest of my response.

*** JOHN MATTHEW ROSE

XXN MR DOWLING

PN9354

So if we bring it back to my example, you're saying because of the way you've carried out your experiment what you will have is somewhere in between seven and \$5 and that will assist Professor Borland because he will still have the full labour supply?---No. The - what I am saying is that my results have replicated the real market results, given the current labour market supply and demand. My argument against that is I've only looked at one aspect of the supply or demand. The willingness to accept is the supply of labour. I can't answer because I'm - I don't have the answer as to what the demand for labour is.

PN9355

Yes?---So you're making the assumption that the demand is for all five workers, and if that is the demand then that's perfectly acceptable. But I can't answer that. I haven't looked at the demand for labour.

PN9356

Okay, you're only looking at the supply side and the WTA, and when Professor Borland is dealing with this issue he's doing the same. He's saying, "If I look at this from the supply side, what's important to me is the marginal rate". So you're both looking at it from the supply side in that way - - -?---But - - -

PN9357

Is that fair?---Yes, but he's making an additional assumption.

PN9358

All right, we'll come to that. So all you're saying in your first response is "Well, because of the people I've asked, they're working in this market, that the figure that I come up with might be something resembling the five to the seven", correct?---Sorry I didn't understand the five - the five to seven from that example?

PN9359

Yes?---If that is the rate, the marginal rate, yes.

PN9360

Now you have a second matter you raise. You say:

PN9361

Secondly, the objective of the Rose report was to determine the value of time for the (indistinct) which is what the reported WTA values represent. The fact that the WTA values reported are distributed normally over the sample population by potentially allowing for one to examine the marginal WTA as opposed to the average WTA does not, nor should not, change the objective of the report.

PN9362

If I can divide that up, firstly you're saying "Well, I was acting consistent with my objective"?---Yes, that's what I'm saying.

*** JOHN MATTHEW ROSE

XXN MR DOWLING

PN9363

Secondly, should we understand from what you say there - and you've raised this earlier- that the individual level data you acquired allows you to report the full

distribution, the full range?---I'm sorry, you're going to have to define individual level data.

PN9364

Perhaps we don't need to use the expression "individual level data". Is it fair to say that the data you acquired as part of this process enables you to report the full data range in respect of this issue, the marginal, the average? You can report the full distribution?---The modelling exercise as reported in table 12 reports a normal distribution, yes. So you can obtain that from those results.

PN9365

Can you go to table 12?---Yes, sir.

PN9366

Perhaps if you go ahead to page 41 because you'll know, having read the extract from Professor Borland, where you say in the second paragraph:

PN9367

On average, employees under the Restaurant Industry Award are willing to accept on average \$21.50 per hour.

PN9368

That he takes issue with the \$21.50 and he says in his example what you're really dealing with there is the \$3. You're really dealing with not the marginal hourly rate that people are prepared to accept, but you're dealing with the \$3. You accept you're dealing with the \$3 there?---Yes.

PN9369

All right, and he says, "The important point that I want to see reported is the five"?---No I - well, that's what he's saying but I would argue is the important point that you would want to see is the equilibrium point between supply and demand. It could be equally not just five. It could be \$1.

PN9370

He says what you will need to see is the rate at which the last worker hired into work will be willing to work for. In my example, that's a five. We're agreed on that proposition?---Under the assumption that there is demand for five workers, yes.

PN9371

Yes. You've already said that both you (indistinct) are not dealing with the demand side. You were looking at the supply side and he is responding to your assessment of the supply side?---But he is making the assumption that there is demand for five workers. If there was demand for one worker, then the marginal rate that you would have to pay would be \$1 because you don't need to attract all five into the market.

*** JOHN MATTHEW ROSE

XXN MR DOWLING

PN9372

It's fair to say neither of you are making this assessment in respect of the demand side and when Professor Borland is making his comment in respect of this very

issue, he's not making assumptions with respect to the demand side either. He's simply commenting on the difference between the average and the marginal?---I put to you that he is making an assumption about - - -

PN9373

MR IZZO: Your Honour, just one concern. There are about three or four different propositions put to Mr Rose in that question. I don't know which proposition he's planning on answering, but I think they need to be broken up, in fairness to the witness.

PN9374

MR DOWLING: Did you understand the question?---I did, sir. I would put it to you that he is making assumptions about the demand for labour. If the demand for labour was for one worker, then why would you pay the \$5? Even though he is couching it in terms of he is ignoring demand, I put it to you that he is making an assumption that there is demand for all five workers. I am arguing assumption-free. He is arguing with an assumption.

PN9375

Well, both yourself and Professor Borland for the purposes of this exercise are focused on the meaningfulness of the supply figure and the supply figure we're talking about is the average versus the marginal?---That is correct, but I am arguing that he is making the assumption that the marginal rate of substitution is what - in this case the last person is what you need for the demand side of the equation. I would put it that if there was only demand for one worker and you paid \$5, then you're overpaying by \$4.

PN9376

But in that example you've back to me, you're making an assumption about demand yourself, aren't you?---I'm making no assumptions. I'm just reporting what the values were from the data. If you look at table 12, you can extrapolate the whole distribution. I provide the standard deviations.

PN9377

Can you go to table 12?---Yes, sir.

PN9378

JUSTICE ROSS: Do you know how much longer you're likely to be, Mr Dowling?

PN9379

MR DOWLING: Somewhere in between five and 10 minutes, I think. I'm in your hands.

PN9380

JUSTICE ROSS: Is now convenient?

PN9381

MR DOWLING: Yes, now is convenient.

*** JOHN MATTHEW ROSE

XXN MR DOWLING

PN9382

JUSTICE ROSS: We'll take a break.

SHORT ADJOURNMENT

[11.43 AM]

RESUMED

[12.00 PM]

PN9383

JUSTICE ROSS: Yes, Mr Dowling.

PN9384

MR DOWLING: Thank you, your Honour.

PN9385

Professor Rose, you still have your report in front of you. Not the reply report, but the original report. I think the last place I took you was to page 41?---Yes, sir.

PN9386

I had identified in the second paragraph on that page what we both agreed as the average of \$21.50 and took that back to Professor Borland's example. You were then describing how table 12 presents the full distribution. Is it right that your evidence is that that table will enable us to determine what Professor Borland would describe as the marginal rate in respect of that average of \$21.50?---The evidence presented in table 12 presents the full distributional information necessary. Elementary statistics would tell you that 66 per cent of observations fall within one standard deviation of the mean. You have a mean of 21.5 and you have a standard deviation of 3.6, so you would know that 66 per cent of respondents, their marginal rate of substitution in the population falls within that range. Two standard deviations from the mean of a normal distribution includes 95 per cent of all observations, so you can calculate that. Both plus and minus, that is. Three standard deviations of the mean is 99 point, I believe, 67 per cent of all observations within plus or minus three standard deviations of the mean. So all the information is there.

PN9387

You're telling us that we can work backwards from the 21.50 using the standard deviations and assess what Professor Borland will call the marginal rate?---Yes. All the information is presented. The model allows for heterogeneity., Even though I discussed the average, the actual information is there that you could work with.

PN9388

We don't find the marginal rate in table 12, but we find the standard deviations to enable us to work backwards?---That is the standard deviation of the distribution of marginal rates of substitution.

*** JOHN MATTHEW ROSE

XXN MR DOWLING

PN9389

Is there a reason you haven't reported the marginal rate? You say you've reported the standard deviation so we could work it out, but is there a reason you haven't reported the marginal rate?---It's not standard to do so. It's statistically

significant. In most econometric studies you concentrate on the mean. The problem with the normal distribution is it's unbounded, so in theory - to work off Professor Borland's example - by unbounded, I mean it goes off into plus and minus infinity, so the last marginal rate of substitution is by mathematical definition plus infinity.

PN9390

Yes, but of course in the same way that you cleaned the data in respect of the 30-odd, you would clean - if someone identifies their marginal rate at a million dollars, that would be cleaned out and so you could present, without requiring us to use the standard deviation, the normal curve of the marginal rate at both ends. Your data would enable you to do that?---Not the data. The model.

PN9391

The model would enable you to do that, yes?---That's correct, yes.

PN9392

But you haven't done that. That's not in table 12, what I've just described. Is that fair?---No, I didn't plot the normal distribution.

PN9393

There's nothing further, your Honour, from me. There is just one issue that I'd like to raise before Mr Dixon gets to his feet. We don't dispute Mr Dixon's ability to cross-examine, but we just ask for this caution. Clearly the witness is what might be described "in his camp" and regularly - if I can refer the bench to two cases. I'm sorry we don't have copies of either of these, but the first is *Mooney v James* in the Victoria Supreme Court [1949] VLR 2. That's referred to in a decision of the Australian Industrial Court, their Honours Smithers, Woodward and (indistinct) [1975] 6 ALR 579.

PN9394

The import of the decisions is this, your Honour, that whilst you may be entitled to cross-examine someone in your own camp, you should be cautioned against using leading questions in circumstances where someone cross-examining someone not in their camp might be able to use leading questions.

PN9395

JUSTICE ROSS: I suppose also in this instance the report of Professor Rose relates to the other two awards, not the Fast Food Award.

PN9396

MR DOWLING: That's so. In respect of Fast Food, as we understand it, there's no change sought in respect of Sunday and all that part that deals with Sunday doesn't seem to relate at all.

PN9397

JUSTICE ROSS: Yes.

*** JOHN MATTHEW ROSE

XXN MR DOWLING

PN9398

MR DOWLING: Public holidays. My apologies. I said Sundays and I meant to say public holidays. We just ask that that caution be issued. Thank you, your Honour.

PN9399

JUSTICE ROSS: Mr Dixon, you've heard all that.

PN9400

MR DIXON: We're aware of our obligations, your Honour. Our simple purpose is to ask Professor Rose for some assistance in clarifying and explaining some of the data that is recorded particularly in the tables. I don't believe that we are going to in any way offend what my learned friend suggests.

PN9401

JUSTICE ROSS: All right. In event that you think it steps over the line, Mr Dowling or Mr Moore, you can take the objection and we'll re-visit the scope of cross-examination at that point. Yes, Mr Dixon.

PN9402

MR DIXON: May it please the Commission. I will use leading questions just to start off with, to cover what is covered in the executive summary. I don't think that will be the subject of any legitimate complaint.

CROSS-EXAMINATION BY MR DIXON

[12.07 PM]

PN9403

MR DIXON: Professor Rose, may I draw your attention to your first report; the one dated 3 July 2015?---Yes.

PN9404

It appears in the executive summary that you set out on page 3 under the heading "ES2.1", the identity of the first research question which you addressed in your survey?---Yes, sir.

PN9405

The findings in respect of that first issue are then set out, can we take it, from the bottom of page 3 of the executive summary through to the top of page 5?---That is correct, yes.

PN9406

In respect of the research question that you there conducted, you used what you've described as the "relevant importance placed on time"?---Yes. It was a rating scale designed to elicit the ability of respondents to change certain activities as designated at particular times of the day.

PN9407

What we heard earlier is that a low score of one would mean never changed and a high score of six could very easily reschedule or change the activity?---That is correct. Yes, sir.

*** JOHN MATTHEW ROSE

XXN MR DIXON

PN9408

So that when we come to look at the tables, can we take it that the lower the score, the more important the times were to the respondents of the survey?---The less able they were to change activities at that time, the inference being that that is more important to them, yes.

PN9409

That's the question that - you've proceeded on the basis that there is a proxy and that it's a meaningful basis for - - -

PN9410

MR DOWLING: Your Honour - - -

PN9411

MR DIXON: The questions you've asked is a meaningful basis for - - -

PN9412

MR DOWLING: Might I be heard?

PN9413

JUSTICE ROSS: Yes. Just wait, Mr Dixon. He seems to be covering - to the point that he's asking questions that the witness has already answered.

PN9414

MR DOWLING: Yes, we have traversed this ground with the witness.

PN9415

JUSTICE ROSS: Yes.

PN9416

MR DOWLING: My learned friend ought not have the opportunity to traverse the same ground again.

PN9417

JUSTICE ROSS: Yes.

PN9418

MR DOWLING: He's doing it in terms, I might add, which notwithstanding my learned friend's protestations, are leading.

PN9419

JUSTICE ROSS: Mr Dixon, the witness has already given evidence in relation to that matter.

PN9420

MR DIXON: Your Honour, he did not – we accept that, but as I understood the evidence there seemed to be a question posed to him about whether the proxy was a meaningful or legitimate proxy, and in my respectful submission we're entitled to ask Professor Rose for his view about whether in the report that was adopted the question asked can legitimately be viewed - - -

*** JOHN MATTHEW ROSE

XXN MR DIXON

PN9421

JUSTICE ROSS: Why can't Mr Izzo deal with those points in re-examination?

PN9422

MR DIXON: Your Honour, I don't know what Mr Izzo is going to say.

PN9423

JUSTICE ROSS: No, but you're not re-examining. What's the question you want to put to the witness? Perhaps we might deal with this, if you wouldn't mind stepping outside for a moment, Professor Rose.

<THE WITNESS WITHDREW

[12.11 PM]

PN9424

JUSTICE ROSS: What question do you want to ask the witness, Mr Dixon?

PN9425

MR DIXON: Your Honour, as we understood the questioning of Professor Rose was that the question that was asked of the particular respondents was whether they would never change, which was the low score, as opposed to could very easily re-schedule a changed activity as the high score.

PN9426

JUSTICE ROSS: Yes.

PN9427

MR DIXON: And it was put to him that wasn't - the actual question that was asked of the recipients was not about the importance placed on time, but he responded to that challenge on the basis that it was a meaningful proxy for importance.

PN9428

JUSTICE ROSS: Yes?

PN9429

MR DIXON: The questions posed.

PN9430

JUSTICE ROSS: And what's your question?

PN9431

MR DIXON: Is to ask him to explain his reasoning for that view.

PN9432

MR MOORE: That's re-examination, your Honour.

PN9433

JUSTICE ROSS: Yes. Mr Izzo's listening to it so I'm sure he's taking notes, and he can ask the question in re-examination.

*** JOHN MATTHEW ROSE

XXN MR DIXON

PN9434

MR DIXON: If your Honour pleases.

PN9435

JUSTICE ROSS: Where's your next line of questioning likely to go?

PN9436

MR DIXON: I want Professor Rose to assist us in interpreting table ES1 on page 4, and ask him for some explanations about the values are attributed to time and days.

PN9437

JUSTICE ROSS: On page - - -?

PN9438

MR DIXON: Roman (iv) – it's the same as table 7, your Honour.

PN9439

JUSTICE ROSS: Yes.

PN9440

MR DIXON: And I wish to ask Professor Rose about whether there is any statistical significance between the values that are attributed – or in the differences attributed to the different times and different days, and it would assist, in my respectful submission, the Commission in understanding the table in the context of the relatively small discrepancies between values on the particular days or the particular times.

PN9441

JUSTICE ROSS: Well, can I put this to you? Don't ask questions that you think will assist us. If we've got questions, we'll be putting them to the witness after cross-examination is finished, so if it's for your client and your interest by all means.

PN9442

MR DIXON: I wish to proceed on that basis, your Honour.

PN9443

JUSTICE ROSS: All right, well there doesn't seem to be anything exceptional about that. We'll see how the question's put. Let's bring the witness back.

PN9444

JUSTICE ROSS: This might illustrate the benefit of you being here, Mr Dixon, and sitting next to Mr Izzo, and all of the employer interests in the room at the one time, so we can separate out further cross-examination from re-examination.

PN9445

MR DIXON: Although, your Honour, it's not my role of course to influence Mr Izzo in the questions he might ask.

PN9446

JUSTICE ROSS: I'm not suggesting you'd influence him but I don't want you re-examining either.

PN9447

MR DIXON: If your Honour pleases.

<JOHN MATTHEW ROSE, RECALLED ON FORMER AFFIRMATION [12.15 PM]

CROSS-EXAMINATION BY MR DIXON [12.15 PM]

PN9448

JUSTICE ROSS: All right?

PN9449

MR DIXON: Thank you. Professor Rose, may I draw your attention to table ES1, which I think is also replicated as table 7 later in your report?---Yes, sir, I'm looking at it now.

PN9450

You've indicated there, as we understand the position, for example that for the period 9 pm - or 10 pm on Monday, Tuesdays, Wednesdays and Thursdays, I think, can we take it that that means that those were least important times on those days for the respondents to the survey?---That is correct, yes, sir.

PN9451

And for Friday the period is the least important – are we correct in understanding that that's for the period 8 pm to 9 pm?---That was what the survey results indicated, yes, sir.

PN9452

Is there a statistically significant difference in your view between the figure of 3.421 for Friday – sorry - at 8 pm and the ratings for the 9 pm for Monday, Tuesday, Wednesday and Thursday?---Without actually doing the analysis I couldn't answer that question just looking at the means.

PN9453

Would it assist you if you went to the top of page 5?---Thank you, that's what I was actually looking for.

PN9454

You're still in the executive summary, where you appear to comment on some differences observed but you say that with those figures they are not statistically significant?---Sorry, that's what I was - - -

PN9455

Is that in any way - - -?---Sorry, continue, sorry.

*** JOHN MATTHEW ROSE

XXN MR DIXON

PN9456

I beg your pardon. I was asking whether the observation you make at the top of page 5 about the differences in the figures, they're quoted not being statistically significant assists you in answering the earlier question about Fridays versus the other days of the week for the period 9 and 10 pm or 8 pm?---Yes, sorry, that was actually what I was looking for, so that was the findings, yes.

PN9457

The question I'm really asking you is to whether at the top of page 5 there is a difference in certain results, which you say are not statistically significant. What we're trying to establish is to whether the differences for the Friday figure, 8 pm, versus the figures for 9 pm, Monday to Thursday, would fit into a similar category of not being statistically significant?

PN9458

MR MOORE: My friend is leading the witness - - -

PN9459

JUSTICE ROSS: Yes.

PN9460

MR MOORE: - - - over terrain which the witness has already given an answer before that he was unable to answer an earlier specific question and now my friend is leading him in relation to more specific matters in this table. I object to that.

PN9461

JUSTICE ROSS: Have you done the calculations?---No, sir, I don't believe I have.

PN9462

That's your answer, Mr Dixon, he hasn't done the calculations.

PN9463

MR DIXON: If your Honour pleases. Professor Rose, if you look at the table ES1 again and you look at the Saturday figures and the Sunday figures, there are – the average figure for Saturday is 2.849 and the average for Sunday is 2.871. Are you able to express a view as to whether there is a statistically significant difference between those two averages?---In order to determine statistical significance you need to understand the spread of the data. I don't have the data in front of me, so the answer is no.

PN9464

Can you tell us by reference to the table whether as between Saturday and Sunday, whether there is a particular time which is materially more important to the recipients of the question on one day as opposed to the other?--- Statistically, no I'm not able to.

*** JOHN MATTHEW ROSE

XXN MR DIXON

PN9465

But if you look at the recordings on the times of the day between the Saturday and Sunday, the actual times, they appear to be relatively similar although there are some differences?

PN9466

MR MOORE: I object to the question.

PN9467

JUSTICE ROSS: Yes, we can - yes.

PN9468

MR MOORE: This is leading again.

PN9469

JUSTICE ROSS: Yes, it is. We can look at - - -

PN9470

MR DIXON: I'm sorry, I didn't hear the - - -

PN9471

JUSTICE ROSS: We can look at the table ourselves and you can make submissions in relation to the table.

PN9472

MR DIXON: Would your Honour just bear with me? It was an introductory question to just clarify whether, if one looked at those individual times, Professor Rose was in a position to express a view as to whether they are markedly different from a statistical point of view.

PN9473

THE WITNESS: The answer to that question I'm happy to answer is no, because it - for statistical significance you can't just look at a mean. You need to understand the spread and so the spread for example on Saturday might be very, very small and Sunday and you could tell that there was a statistical difference, or the spread could be quite large. So whilst I could analyse that from the data, just looking at the table you cannot tell anything about statistical significance.

PN9474

MR DIXON: Thank you, and can we take it, Professor Rose, that in respect of - or perhaps I could just draw your attention to table 9 on page 24?---Yes, sir.

PN9475

And on table 9 you have reported time importance by day by reference to socio-demographic segments and you have broken it down, firstly you've done an entire sample and then by reference to the two awards, and in respect of the 24 years or less group are you able to express a view by reference to the data as to the value they place on their weekday time by reference to Saturday time; whether it's more or less important to them?---On average a weekday time is valued more importantly than Saturday for the under 24s in the - - -

*** JOHN MATTHEW ROSE

XXN MR DIXON

PN9476

And that is the case, is it, for each of the awards as well?---That would appear to be the case as derived from the data, yes.

PN9477

And is it the same in respect of both Saturdays and Sundays?---For 24 years or less?

PN9478

Yes?---No, that would not be the case. For example on average the Sunday for 24 years or less was 2.937 but for Mondays it was 2.944. So in that case on average it's lower. Whether it's statistically different or not I can't comment.

PN9479

But if you leave aside Monday for the moment?---Then on average yes, it would appear that Saturdays - - -

PN9480

JUSTICE ROSS: Mr Dixon I'm not sure we need the witness's assistance to work this (indistinct) numbers applied on their face and you can make what you're putting now in a submission.

PN9481

MR DIXON: Subject - - -

PN9482

JUSTICE ROSS: You're simply asking the witness is (indistinct) one six the Saturday rate for 24 years or less higher or lower than the Monday to Friday numbers. Well, we can tell that on the table.

PN9483

MR DIXON: I understand that, your Honour, but I intended to ask another question and that is - - -

PN9484

JUSTICE ROSS: Let's move to the other question.

PN9485

MR DIXON: That it was based on that identification of those figures.

PN9486

JUSTICE ROSS: All right.

PN9487

MR DIXON: And the next question is whether, Professor Rose, there is statistically any significant difference as a result of those comparisons that are there carried out?

*** JOHN MATTHEW ROSE

XXN MR DIXON

PN9488

MR MOORE: I object to the question again. The witness is being asked I think in answer to a question by your Honour whether he - - -

PN9489

JUSTICE ROSS: The witness in answer to one of your earlier questions said he couldn't tell - make a statement about the statistical significance as you were taking him through this table.

PN9490

Is that correct, Professor Rose?---That was another table, your Honour, but in reference to this table it's the same answer.

PN9491

MR DIXON: And that's what I wish to establish, your Honour, and I thank you. Thank you, your Honour, those are our only questions.

PN9492

JUSTICE ROSS: All right. Just before you do, it's probably convenient if we ask our questions first.

PN9493

MR IZZO: Certainly, your Honour.

EXAMINATION-IN-CHIEF BY JUSTICE ROSS

[12.28 PM]

PN9494

JUSTICE ROSS: And then if something arises it can be the subject of some cross-examination.

PN9495

Professor Rose, can I just clear up my understanding of some of the points, and one of them relates to the diary that the respondents were required to fill in. I think it's the one on page 6, and they're not given a - is my understanding correct, when they turned up they were given this screen and they filled in the days; they weren't given a physical diary and they filled in this screen based on their recollection of what took place in the previous week?---Your Honour, it's my understanding that respondents were asked prior to attending to actually make notes as to their activities during the week and they could bring those notes. Whether they did or not, I don't know.

PN9496

In Professor Holden's report I think he notes that some of them were looking at their phones and that sort of thing. So it wasn't a physical diary but they were told they should make notes on what they did during the week and then they come in and they - it was just for the one week prior to them attending, is that right?---That is correct, yes, your Honour.

*** JOHN MATTHEW ROSE

XN JUSTICE ROSS

PN9497

COMMISSIONER HAMPTON: And they weren't given any template to record the notes? It was just a general instruction to record notes in any way they saw fit?---I'm not sure what instructions they were given, your Honour.

PN9498

COMMISSIONER HAMPTON: Right.

PN9499

JUSTICE ROSS: Can I take you to table 14 on page 43?---Sorry, could you repeat the table - page numbers?

PN9500

Page 43 of your main report?---43.

PN9501

Table 14?---Yes, your Honour.

PN9502

If I look at for the moment under the Restaurant Industry Award and the normal working week column on the left, so it's not one with the public holiday. The reference there to 146.21 per cent, based on what you say in the last paragraph on that page do I interpret this correctly if I was to say that on average the respondents required a premium of 46.21 per cent in order to accept - that's a percentage above their reported average normal hourly week day pay rate - to be induced to accept a shift on the Sunday?---That is correct, your Honour. Yes.

PN9503

And the range then - there are some that required a higher premium, almost double their hourly week and others that would work pretty much for what they got during the week. That's the - - -?---No - - -

PN9504

- - - 96.882?---No, your Honour.

PN9505

No, that's not right?---No, that's incorrect. The 146.21 is what we call a point estimate, so that's actually the parameter that comes out. There is what we call estimation error in that parameter. The numbers in brackets, the confidence intervals, suggest that I am 95 per cent certain that the true value is between those two values.

PN9506

I see?---That's the true average value. The values that are reported in table 12 - so these are based on the average reported in table 12, but there is a distribution around that average as well.

*** JOHN MATTHEW ROSE

XN JUSTICE ROSS

PN9507

I see, so you are 95 per cent certain that it's somewhere between 96.88 to 195.54?---That's correct. This is assumed to be normally distributed, so the best

guess would be it's 146.21, but there's is uncertainty around it and the true value is within that range.

PN9508

The figure that I found curious was when you look at the General Retail Industry Award - this is a different point to the one Mr Moore took you to - the weekday rate for a normal working week, you end up with 112.22 per cent. So they would require a premium of 12.22 per cent above what they currently get for working during the week to work during the week Monday to Friday. Is that because the shifts that are offered then may not suit them and might be different to the normal shifts Monday to Friday?---That's one possibility. So the experimental design presented them with seven shifts which were experimentally systematically varied over days, so it is quite possible that they preferred not work on certain days.

PN9509

And they have their diary underneath the previous week as well that they were referring to?---That is correct, yes.

PN9510

Okay. When you refer in your evidence to the copyright tribunal decision, is that the one you're talking about at page 8 of your report?---Yes, sir.

PN9511

All right. You will recall the questions that Mr Moore put to you about coercion and also about the significance of Sunday for some people. Am I right in that - as I understood your answer, it was that you hadn't designed the experiment to take those matters into account, but you had assumed that each respondent, when they filled them in, would take into account their own context; that is, whether they felt coerced to work or whether they attached a special significance to Sunday. Is that right?---Yes, sir.

PN9512

COMMISSIONER HAMPTON: Professor, there was a discussion about reference points and anchoring, and if I could just take you to your responses to Professor Altman in paragraph 6?---Yes, sir.

PN9513

This is your response to his criticisms about the (indistinct) anchoring, and at the top of that page you say - you make comments about the respondents "would have seen the actual award rates," because the precursor to that, the actual - the rates that were in their options that they could choose were the actual rates, below the actual rates and above the actual rates?---As per table 1 of my main report.

*** JOHN MATTHEW ROSE

XN JUSTICE ROSS

PN9514

Then you go on to say, "In that way the current award rate is not only present, but acts as a reference point to respondents who know their current hourly pay rate." Now, I understand second part of that proposition, that it acts as a reference point to respondents who know what their current hourly pay rate is, but the query I've got is in what way is it present for an individual respondent who would not know

what their current hourly pay rate is?---So in table 1, what I've done is I have varied - sorry, can I just reference table 1?

PN9515

Yes?---Table 1 on page 10, you can see for example, that Monday to Friday under the Restaurant Industry Award, the values that were shown were between \$12.61 and \$23.43. So they were presented with a range, so even if they didn't know that the exact rate was \$18.02 I'm presuming - and it's an assumption - that they're thinking the pay rate is somewhere between there.

PN9516

Well, that's what I'm getting at; what is your basis for assuming that?---That the award rate is the legal rate, so they have to be paid at least legally that rate or higher.

PN9517

So they understood that it was the award rate?---No, I am assuming that respondents are being paid the award rate or higher.

PN9518

But they wouldn't necessarily know what their ordinary hourly rate is, would you agree with that, with or without penalties?---I can't answer for every respondent. In the pilot study, the majority of the respondents in the focus groups were aware of what their award entitlements were.

PN9519

Right. Where do I find that information?---That's not presented in any of this, but that would be in Professor Holden's - he was responsible for the focus groups - if you didn't write that down. But I was present during those focus groups and they were asked did they know their entitlements et cetera. There was a whole bunch of questions that Professor Holden put to them, and my understanding from their responses was that the majority of the respondents present in the room were aware of their award entitlements.

PN9520

JUSTICE ROSS: Professor when you say that, do you mean that they were aware of what they were actually paid?---They were aware of what they should have been paid and what they were actually being paid. The majority, not all. I am not making claims that the entire population were aware, but in the actual pilot study, the respondents that were present - the majority of them - my understanding was that they did know what their entitlements were.

PN9521

Thank you . Anything arising?

FURTHER CROSS-EXAMINATION BY MR DOWLING [12.37 PM]

*** JOHN MATTHEW ROSE

FXXN MR DOWLING

PN9522

MR DOWLING: Just one matter. Professor Rose, arising from the question the President asked you about the diary process, as I understood your evidence,

participants when they first came in, some might have had notes or some other way to recollect their previous week, and they then entered that into the survey and then that previous week became their reference point?---It's my understanding that during the recruitment process respondents were asked to take notes of their activity and that they could bring those with them to the survey.

PN9523

You're not clear on whether they did or didn't, is that right?---I was not present during any of the interviews, so I can't state - so in answer to your question, no, I'm not aware.

PN9524

There's an alternative way could have been done, is that right? There could have been - you're familiar with the term "time-use diary"?---I'm very familiar with time-use diaries.

PN9525

Yes, so these people could have been asked to fill in a time-use diary for the week before they came in and then when they came in, they would have had their completed time-use diary. That would have been, I'm putting to you, a preferable and more reliable method, do you agree with that?---In terms of dropout rates, no. In terms of actually getting responses, yes. So in time-use diaries there is an excessive amount of respondents who are asked to complete them, particularly over a week-long period. They actually drop out from the survey. The typical time-use diary, at least in transportation literature, is no longer than two days.

PN9526

All right, but if we can for the moment - taking into account what you say in terms of drop-out rate, in terms of the reliability of the information that is then contained in the diary, you'd accept the time use will give you a more accurate picture of that week than a recollection of the week?---I don't think there is any literature one way or the other on that, so I couldn't offer an opinion.

PN9527

All right, thank you.

PN9528

JUSTICE ROSS: Re-examination?

PN9529

MR MOORE: No, your Honour.

PN9530

JUSTICE ROSS: Mr Izzo?

RE-EXAMINATION BY MR IZZO

[12.39 PM]

PN9531

MR IZZO: Professor Rose, could I please take you to page 17 and table 2 of your main report?---Yes, I've got that.

*** JOHN MATTHEW ROSE

RXN MR IZZO

PN9532

Down the bottom, in table 2 you've set out quotas that you had desired to achieve the purposes of the survey, is that right?---That is correct, yes.

PN9533

And then over the leaf on table 3 you set out the actual quotas achieved by segment. Is that right?---That is correct, yes.

PN9534

Can I ask you to provide your view about whether the quotas actually achieved affect the validity of the report in any way?---That's an empirical question. I can't - from a theoretical perspective - no. Provided that within each of the samples, within those quotas they're randomly sampled.

PN9535

Thank you. Now, if I can take you next, professor, to page six of your report and you will see there that most of the page is taken up by a screenshot of the diary entry activity calendar. And you were asked some questions about - by Mr Moore, I think, about whether - well, you were asked some questions about the importance that the employee has placed on particular periods of time. Do you recall that?---Yes, sir.

PN9536

Can you explain to the tribunal why you chose to ask - sorry, I withdraw that - when going about this exercise and valuing employee's time, can you explain to the tribunal why you chose to go about obtaining data on this by asking people to fill out an activity diary, in the way in which you have done here?---The reasoning for doing it this way was two-fold. First of all the central component of the survey was the stated choice experiment. This was done so as to provide a framing context in which to complete the state of choice experiment. The second reason that I did it this way was leaning on what's called scheduling - the literature on scheduling and the premise there and the assumption is that activities are what's of importance and you derive the importance via the activities.

PN9537

Okay, thank you for that. Now, if I could take you to page 43 of the main report, please, and table 14? You were asked some questions about this table by both his Honour, President Ross, as well as Mr Moore I believe. You gave evidence, the way I understand it, is if we take the - just by way of example the very first column "Sunday", you'll see a figure of 146 percent. See that?---Yes, sir.

PN9538

And in my understanding of what you said is that that's the average premium that employees required to work on a particular Sunday. The 146 represents the average or the mean, is that right?---That's a point estimate of the mean, yes.

*** JOHN MATTHEW ROSE

RXN MR IZZO

PN9539

And then you've got below 96.88 percent to 195 and you said that's the spread, if you like, either side of that figure so that you can say you're 95 percent confident

that the figure would fall within that spread, is that right?---I'm - yes, so that's 95 percent confidence level.

PN9540

Can I ask when looking at 146 percent figure - the mean there - and then looking at the spread, is there a difference in - well, sorry I withdraw that. I'll start again. When we talk about the probability of a particular point or result being accurate is there a difference in the probability of 146.21 percent? You've changed the - - -

PN9541

JUSTICE ROSS: Well, that must be a great question, Mr Izzo.

PN9542

MR IZZO: They've changed the air routes it seems.

PN9543

JUSTICE ROSS: Someone's bumping against one of the microphones interstate.

PN9544

MR IZZO: Right. We'll try again. It gives me an opportunity to try and better frame this question.

PN9545

JUSTICE ROSS: All right.

PN9546

MR IZZO: Is there a difference in the probability between the 146 percent figure and the two outliers - if you like - the 96 and 195?---The - what the 95 percent confidence in all of it is it's a normal - it's assumed to be normally distributed. So the mean - the mass of that probability density function is 146. What it basically is saying is however that that is just one point on that distribution and 95 percent - so this gets back to standard deviations and that. But 95 percent of the possible outcomes fall within that range, of which that is just the mean of that distribution.

PN9547

And when you say "normally distributed" what do you mean by that?---So a normal distribution is a bell-shaped curve. In the estimation of these models there's what's called a variance - co-variance matrix which basically represents the robustness of the parameter estimates and the confidence intervals represent the robustness of the actual estimates themselves. So that confidence interval represents how robust the estimates are.

PN9548

So when you say a bell-shaped curve does that mean that the 146 is at the top of the bell-shape does it?---That's correct. That's the highest point of mass in that distribution.

*** JOHN MATTHEW ROSE

RXN MR IZZO

PN9549

Thank you. You were also asked in this table by Mr Moore, you will see there's a figure for 112.22 percent for Saturday in the retail - column 1 there for retail - and then 112.22 percent for week day. Do you see that?---Yes, sir.

PN9550

And you were asked some questions about those two figures and I think the answer you gave is that there's no statistical difference between the answers you got on a weekday and the answers you got on a Saturday. But can I ask does that mean that the raw data you received had exactly the same answers for week days and Saturdays?---So, in the modelling process - so basically I fit statistical models to the data. You can't just look at the raw data per se because the assumptions are that people are trading off the times and costs and over the seven shifts. So they're not just trading off within a shift. They're trading off across the shifts. So that is the modelling outcome from that. So that's the best result from that modelling outcome.

PN9551

So the - I might just re-ask the question slightly differently because I'm not sure if there was a direct answer to a particular question. Well, I'll ask this. The answer you gave to Mr Moore was that they are statistically no different. But does that mean that the raw data that you actually received in relation to Saturday pay rates and Sunday pay rates is the same?

PN9552

JUSTICE ROSS: I didn't hear the question.

PN9553

MR IZZO: I think that might be the case, your Honour, but the difficulty is I'm not sure the witness answered the question. Your Honour, I'm willing to acknowledge that the question is perhaps in that frame but I'm not sure that there was actually an answer to the question.

PN9554

JUSTICE ROSS: Well, you can't cross-examine the witness. You're sort of stuck with the answer you've got. Do you want to ask a different question?

PN9555

MR IZZO: I will. I will leave that, your Honour, at least for now. Can I now ask you another question, Professor? In relation - you were asked a number of questions arising out of Professor Altman's report and you were asked questions about phenomena such as referencing and loss aversion. Do you recall that?---Yes, sir.

PN9556

Can you please explain to us how your survey or the survey you conducted, addresses these particular theories?

*** JOHN MATTHEW ROSE

RXN MR IZZO

PN9557

MR MOORE: I object to that question. The witness was asked a lot of specific questions about those matters and this is an invitation to the witness to reprise his evidence overall. It doesn't deal with any specific evidence that the witness gave.

PN9558

MR IZZO: Your Honour, the witness was asked numerous questions and it was put to him that it was important for the survey to both reference and also take into account loss aversion. It was put to him that the survey did not do that.

PN9559

I am asking him to address a query as to whether the survey does or does not in any aspect of it address those particular concepts. Now, he may have been asked about specific aspects of the survey but I think he was cross-examined on these issues and so it's a question which legitimately arises out of the cross-examination.

PN9560

JUSTICE ROSS: Well, you can ask the question but it is broader than the specific questions put but if anything arises from the answer that you want to cross about you can cross.

PN9561

MR IZZO: Would you like me to repeat the question?

PN9562

JUSTICE ROSS: I think that would be a good idea.

PN9563

MR IZZO: You were asked questions about theories such as referencing and loss aversion. Can I ask you whether your survey - the survey you conducted takes these into account in any way or addresses these things in any way?---Yes, it does.

PN9564

And how does it do that?---In terms of framing effects, basically by giving them the activity diary they were asked to consider that as their point of reference in making their choices in the actual experiment itself and that was returned to them in each game. In terms of referencing by putting a range of attributes over such a wide range - both plus and minus - and the actual current rates that they're paid their reference point would be contained within that particular range and they could make trade-offs with that in mind.

PN9565

Thank you. You were also asked about the need to have context. That was a separate point of discussion. So we'd heard about referencing loss aversion, also context. Can I ask you as well, how did your report address the need for questions to be found off it - participants to be able to complete the survey within appropriate context?---That was the point of placing the activity diaries in the actual survey so that they were given a very specific context in which the choices were being made.

*** JOHN MATTHEW ROSE

RXN MR IZZO

PN9566

Now you were also asked about, or you gave evidence that the employees were not asked to accept a shift that is less than their award rate and it was not expressly identified that the shift was less than their award rate. Do you recall being asked questions about that?---Yes, sir.

PN9567

Can I ask why you didn't use that method?---I didn't want to actually tell respondents what their current award rate was so as to not bias their responses. I'd much rather them just assume their current pay.

PN9568

You were asked about the mug example used by Professor Borland if you recall. And in being asked a question about that example you responded to Mr Moore that in using the mug example he was confusing anchoring with referencing he meant by that?---Well, I'd have to have the transcript back to know exactly what the question was.

PN9569

You don't recall that?---So anchoring is where you place a particular type - or a particular reference point. I think - so you can anchor your choices around your current point of view but I don't know the specific context in which I replied to that.

PN9570

That's fine. Thank you. You were asked some questions about Professor Borland's report. Do you have a copy of the excerpt of Professor Borland's report that was shown to you by United Voice?---Yes, sir I do.

PN9571

And so if I can take you to page 23, and there's a paragraph 52 talks about five potential workers earning \$1.00, \$2.00, \$3.00, \$4.00 and \$5.00 per hour. Do you see that?---Yes, sir.

PN9572

And you gave some answers based on assumption that there were five - sorry the demand for these workers was a demand for five employees. That is, if you adopt an assumption that an employer needs five employees then you gave evidence about what rate the pay would need to be paid. Adopt that assumption. But you adopted assumption that they want 10 employees, does the answer differ?---If you pay \$10.00 and the marginal rate is \$5.00 then the answer wouldn't change. But what you would do in reality is change the reference point. So the reference point is around what the current person being asked. So when your learned colleague was asking about reducing it from \$7.00 to \$5.00 that was my point. If you give the reference point at \$7.00 and then reduce it that's where the loss aversion comes in. So their reference point would not be the \$5.00. It would be the \$7.00.

*** JOHN MATTHEW ROSE

RXN MR IZZO

PN9573

Now you may not recall this as well but when you were having an exchange with Mr Moore - sorry, I believe it was Mr Dowling about this particular paragraph - you made some comments that this paragraph deals with supply site and I believe Mr Dowling also said, "Well, both of you deal with supply site." And then you said Mr Borland also has an additional assumption that he refers to in paragraph 52. Do you recall what you're referring to there?---Yes, I did.

PN9574

Can you explain to us what that additional assumption is?

PN9575

MR MOORE: Well, he's given evidence about what the additional assumption is. It demands for five workers.

PN9576

MR IZZO: As I recalled I wasn't sure whether he'd - whether the witness had actually given evidence to that effect, your Honour. So that's what I was trying to clarify?---Without actually knowing what the demand for supply - so, for example, if the demand is for only one worker then you only need to pay \$1.00. So just to simply assume that you need all five workers and therefore it should go to the last value is you are assuming that you need all five workers.

PN9577

Right. Thank you. You made some comments that you need to see the equilibrium point between supply and demand. Do you recall that?---In order to work out the actual wage rate in an economic system - yes, you need both demand and supply.

PN9578

Why? Why do you say that?---Because the equilibrium point, i.e. where demand and supply cross is the value at which the quantity supplied will be in equilibrium with the actual price or wage at which it's paid.

PN9579

Now, you were asked some questions about potentially using a time-use diary to conduct the activity process that's referred to in the diaries here. Can I ask why you didn't use a time-use diary?---Because it's my personal experience that the drop-out rate of using time-use diaries is quite excessive for anything over two days.

PN9580

Just bear with me for one moment, your Honour. No further questions, your Honour.

PN9581

JUSTICE ROSS: Is there anything further for this witness? No? Thank you, for your evidence, Professor. You're excused?---Thank you, your Honour.

<THE WITNESS WITHDREW

[12.59 PM]

*** JOHN MATTHEW ROSE

RXN MR IZZO

PN9582

JUSTICE ROSS: Now, at 1.00 o'clock as previously advised we're dealing with the objection taken to Professor Quiggin's evidence. And then we're dealing with the mention in relation to the further scheduling of expert evidence. And then I think we've got at 2.30 - you're looking puzzled Mr Moore. You don't think that's what we're dealing with. Well, we'll come back to anyone who doesn't think that's what we're dealing with in a moment. Then at 2.30 I think we have a short further cross-examination of Mr Parker, is that right?

PN9583

MR DOWLING: Yes, your Honour.

PN9584

JUSTICE ROSS: Okay. Well, let's deal firstly with the objection taken by Ai Group to Professor Quiggin's evidence. And we need to deal with that now because he's being called next week.

PN9585

Mr Dixon, is the objection pressed?

PN9586

MR GOTTING: The objection is pressed. It's Gotting in Sydney for the Ai Group.

PN9587

JUSTICE ROSS: Yes, Mr Gotting.

PN9588

MR GOTTING: There was a conference before the Vice President yesterday.

PN9589

JUSTICE ROSS: Yes.

PN9590

MR GOTTING: There were some discussions between junior counsel for the Australian Industry Group and the SDA yesterday afternoon. Regrettably those discussions were unable to resolve the differences between us. There has been a two page document prepared by United Voice that sets out the basis of the objections and the responses of the United Voice, and I'm not sure whether the members of the Full Bench have access to that document?

PN9591

JUSTICE ROSS: No, I haven't seen it.

PN9592

MR DOWLING: Your Honour, I'm sorry to interrupt my learned friend. Can I just say for our part that we'd understood 1 o'clock today was a report-back on this issue rather than the determination of this issue.

PN9593

JUSTICE ROSS: When are we going to determine the issue if he's going to be called next week?

PN9594

MR DOWLING: We have some proposals for that, your Honour.

PN9595

JUSTICE ROSS: All right.

PN9596

MR DOWLING: Two alternatives. Firstly - - -

PN9597

JUSTICE ROSS: I mean, it's a fairly short point, but.

PN9598

MR DOWLING: Well, one alternative that we were going to propose, your Honour, was that it be dealt with on the morning of his evidence. There are I think six sentences and one short paragraph.

PN9599

JUSTICE ROSS: Yes, that's true.

PN9600

MR DOWLING: So it could easily be done with that way. If that causes my friend any problems - and we don't anticipate that it could, but if it did we'd also propose it could be done in writing, your Honour.

PN9601

JUSTICE ROSS: Yes.

PN9602

Is there any objection to dealing with it on the commencement of his evidence, given unlike the Pezzullo objection which was to all of the evidence, this is really only to certain sentences in his evidence.

PN9603

MR GOTTING: There's no objection to dealing with it at the outset of Professor Quiggin being called.

PN9604

JUSTICE ROSS: Okay, we'll deal with it that way. In the meantime we might get a hold of that document that you - - -

PN9605

MR DOWLING: Yes.

PN9606

JUSTICE ROSS: And look, we would probably also be assisted with a short written outline in support of the objection. Would you be able to do that?

PN9607

MR GOTTING: Yes.

PN9608

JUSTICE ROSS: We'll come to the scheduling of the expert evidence in a moment, but perhaps if you could do that by 4 o'clock - - -

PN9609

MR GOTTING: Perhaps I can speak - I'm sorry to talk over you, your Honour.

PN9610

JUSTICE ROSS: Yes. No, no, it's all right.

PN9611

MR GOTTING: And I apologise. Perhaps I can have a discussion with Ms Burke about coming to some arrangement whereby I provide the document and she has an opportunity to respond, and that will all occur before 1 October.

PN9612

JUSTICE ROSS: That's fine, yes. That's fine. I'm happy to leave it on that basis. All right?

PN9613

MR DOWLING: Yes, your Honour.

PN9614

JUSTICE ROSS: So does that deal with that issue for the moment?

PN9615

MR DOWLING: Yes, your Honour.

PN9616

JUSTICE ROSS: Then can I go to the scheduling issues. Now Mr Izzo I think we received something from you which indicates that if you look at the remaining - well, let me deal firstly with the other issue which is the Pezzullo evidence and when that's going to be dealt with. There's an application to vacate the dates. I think the Vice President raised with the Pharmacy Guild that because there are some gaps in the retail evidence on the current timetable, that that evidence could be dealt with then. So is the Guild represented?

PN9617

MR M SECK: Yes, your Honour. It's Seck, initial M, in Sydney.

PN9618

JUSTICE ROSS: Yes.

PN9619

MR SECK: Your Honour, we did seek to ascertain from Ms Pezzullo her availability during the lay witness tranche of the hearing dates during the last two weeks of October.

PN9620

JUSTICE ROSS: Yes.

PN9621

MR SECK: The dates Ms Pezzullo provided were the 20th, 23rd and the 28th and 29th October. If your Honour recalls I think there was some suggestion that Ms Pezzullo's cross-examination would take at least a day.

PN9622

JUSTICE ROSS: A day and a half.

PN9623

MR SECK: Or up to a day and a half.

PN9624

JUSTICE ROSS: Yes.

PN9625

MR SECK: It is our preference that Ms Pezzullo is obviously cross-examined on consecutive days and in those circumstances, given that there is some uncertainty as to the duration of the cross-examination, it might be best to list the cross-examination of Ms Pezzullo for 28th and 29th October, which are the only consecutive days she has available in her diary at the moment during that period.

PN9626

JUSTICE ROSS: During that whole period those are the only two days?

PN9627

MR SECK: Of in terms of consecutive days, your Honour.

PN9628

JUSTICE ROSS: Yes.

PN9629

MR SECK: The 20th and the 23rd are also available.

PN9630

JUSTICE ROSS: On the 28th and 29th I think Professor Altman was going to be available on those days. Now is he available on any other day?

PN9631

MS BURNLEY: No, your Honour, there is two days at the moment.

PN9632

JUSTICE ROSS: Okay, and what is the estimate of cross-examination for him?

PN9633

MR IZZO: Your Honour, presently the estimate of cross-examination for Professor Altman - just bear with me one moment, it is in small writing here. Is 45 minutes, but I must say that I've been notified that the NRA, the retailers not represented but a separate branch, have a desire to cross-examine and - there is a representative here - and I understand they've got an additional half hour perhaps.

PN9634

JUSTICE ROSS: Well, that's all right.

PN9635

SPEAKER: Yes, that is correct.

PN9636

JUSTICE ROSS: If we were to start with Professor Altman's evidence at 9.30 on the 28th and then deal with Ms Pezzullo's evidence following that, that would seem to meet both?

PN9637

Ms Burnley?

PN9638

MS BURNLEY: Yes to a degree, your Honour. As you can appreciate we're trying to balance all the other experts we've still got and the other expert - - -

PN9639

JUSTICE ROSS: We're not dealing with any other experts, yes.

PN9640

MS BURNLEY: Can I just indicate one who has a problem because we've been trying to schedule them for now the November date. One of our witnesses is unavailable at that time and that is - - -

PN9641

JUSTICE ROSS: That's all right, Ms Burnley. I can come back to that later because - - -

PN9642

MS BURNLEY: Yes, he is available on - - -

PN9643

JUSTICE ROSS: No, no, listen. Because on any estimate of the cross-examination all of the witnesses are not going to be dealt with in the time available in November. So further dates are going to have to be scheduled anyway, because if you add up the employer estimates you come up with in excess of 18 hours over those three days that we have remaining, and that's an under-estimate on what you've told us, Mr Izzo, because you're awaiting advice in relation to some of them, and that's only the cross-examination. There will be re-examination. So on any view it's not going to be dealt with on the three days that remain so further days are going to have to be fixed.

PN9644

MS BURNLEY: Your Honour, on our calculation it was 15 hours because that also included examination of Quiggin and - - -

PN9645

JUSTICE ROSS: But in any event - - -

PN9646

MS BURNLEY: - - - Borland.

PN9647

JUSTICE ROSS: Yes, look, it would be very risky to work on the assumption, when you've got four of the witnesses, five of the witnesses that are to be called, the outstanding - yes, that it's likely to affect the cross-examination time required because you're still waiting for advice from one of the counsel. Is that right?

PN9648

MR IZZO: That's correct. They are here represented today but I understand that there's still not a hundred per cent certainty about the time required.

PN9649

JUSTICE ROSS: All right. Which witness?

PN9650

MS BURNLEY: It's Professor Markey, your Honour.

PN9651

JUSTICE ROSS: Yes.

PN9652

MS BURNLEY: And I think he was down only for 45 minutes.

PN9653

JUSTICE ROSS: Yes. No, an hour and 30.

PN9654

MS BURNLEY: An hour and 30?

PN9655

JUSTICE ROSS: Yes.

PN9656

MS BURNLEY: Yes, so that was the one we were trying to put into that October
- - -

PN9657

JUSTICE ROSS: What, are you saying he's only available on the two days that I've been discussing, the 28th and 29th?

PN9658

MS BURNLEY: Yes - he's available more of those days in that week. So there's also been just some discussion regarding the fast foods. There might be some time - I think Friday's free at the moment in that week?

PN9659

JUSTICE ROSS: That's right.

PN9660

MS BURNLEY: Yes, so there could - - -

PN9661

JUSTICE ROSS: Also Tuesday afternoon.

PN9662

MS BURNLEY: Tuesday afternoon. There's been a slight rescheduling which we'll notify the Commission of regarding witnesses, so with regard to the lays. Because we're looking at starting later on Monday and going all day on Tuesday.

PN9663

JUSTICE ROSS: But in any event if Pezzullo is scheduled for the 28th and 29th does that resolve the issue?

PN9664

MR GOTTING: It does, your Honour, from - - -

PN9665

MR IZZO: Your Honour, I'm just confirming the 28th and 29th October?

PN9666

JUSTICE ROSS: Yes.

PN9667

MR GOTTING: It does, your Honour.

PN9668

JUSTICE ROSS: Well, I don't think it would resolve the issue if it was - anyway, yes, okay. All right, then where were we up to in relation to the later dates? Do we - well, I think where we're up to is we don't know because, look, the retailers are going to have to work out sooner or later how long you're going to require them for cross-examination. You've had the reports for a while. How much longer do you need?

PN9669

MR WHEELAHAN: Tuesday, the end of Tuesday.

PN9670

JUSTICE ROSS: All right, well perhaps if you can liaise with Mr Izzo and he can provide an update as to how long it's likely to take. See if you can sort out Professor Markey, but there's plenty of time in that week. His evidence is - at the moment is an hour and a half. So worst case scenario it can be fitted in at the beginning or end of the day. If he's truly not available for the rest of the time we're looking at then that's how we'll have to deal with that. Or if we can't be accommodated, find an hour and a half at some other time in the - well, at some other time. But on the current estimates it doesn't seem that you're going to fit in on those three days. I suppose if you take Markey out of that, that's an hour and a half less anyway.

PN9671

MR IZZO: That looks like a very real risk, your Honour.

PN9672

JUSTICE ROSS: Okay, well, can I suggest that you have a discussion with United Voice and the SDA's counsel and just see what suits the convenience of the witnesses for scheduling over the three days we've advised you, and you'll

recall that in a statement issued on 16 September - so we're talking about here the 4th, 5th and 6th November. That being insufficient, we had indicated that the 9th, 10th and 11th December would be available. But of course we will have to revisit the filing of submissions and you'd have the 14th to 18th December would also be available to complete the expert evidence.

PN9673

Because you'll need to have a discussion about how all this affects - a point I think the Restaurant and Catering Association raised earlier - that even moving as we have to the 4th, 5th and 6th November means you have to adjust the current timing for the filing of written submissions, the more so if we're completing it in December. So on that basis I'd encourage you to the extent 4, 5 and 6 November is not sufficient, you look at the week commencing the 14th to 18th December, mainly because counsel have already blocked that away because on the earlier directions that was the week of the oral hearings on submissions.

PN9674

So that's probably the most convenient starting point, because if we go to the 9th, 10th and 11th December, the week before, we don't achieve anything because you're still going to have to have the time to put in your submissions and we're likely to inconvenience one or more of the counsel because they'll have other matters in that week. Whereas they won't have in that week of the 14th - well, less likely to have because they've been previously advised that's when it would be on. Now when can we come back to deal with these matters, and look, the other question is we have the other witnesses scheduled for the Wednesday, Thursday, Friday.

PN9675

With Pezzullo now going to the later period, what are we doing about those? I might give you that - no, let me leave you with that thought and can I suggest this, that if we adjourn till 2.15 we can resume that discussion. So the most immediate issue is when are we dealing with the Lewis, Quiggin and Borland evidence? Remember we had pushed it to the Thursday, Friday and I think Pezzullo was going first. So you might want to make some inquiries - and I'm thinking here of the people resident in Melbourne who may not be as enthusiastic about sitting on the Friday, and we won't unless it's necessary, unless the witnesses are not available on those other days.

PN9676

Can I leave that to counsel to discuss during the break to see how you might want to shift that, and look, probably we would have a report-back, just a short mention probably just before me 15 minutes prior to the start of those proceedings next week, and then we'll find out where we're up to with the scheduling of the expert evidence for later in the year. Is that all right? Any questions to any of that?

PN9677

MS BURNLEY: Your Honour, your direction was with regard to the employers providing the estimations of time to the SDA's counsel. I'd actually prefer that matter to be dealt with directly to myself. That's the way it's working at the moment.

PN9678

MR IZZO: We can provide it to everyone. That's fine.

PN9679

JUSTICE ROSS: Yes, yes, that's fine. In any event once you send it to us it's going to go up on the internet site so you'll all be able to access it. Any other questions? Is everyone clear about what we're doing? Well, that's a comfort. We'll adjourn until 2.15.

LUNCHEON ADJOURNMENT

[1.15 PM]

RESUMED

[2.19 PM]

PN9680

JUSTICE ROSS: So how did you get on with next week?

PN9681

MR MOORE: I can proffer up something, your Honour. Our view is that the labour economists, Profs Quiggin, Ball and Lewis could all be heard on Thursday, perhaps with extended sitting hours and if necessary the Friday could be held in reserve, but we could approach on the basis that the parties are striving to observe the public holiday in an old-fashioned sort of way, but I think the estimates are for - I think our estimate is half a day cross-examination with Professor Lewis and I think the collective estimates for the cross-examination of the other two is about three hours.

PN9682

I've given some thought to the idea of the professors giving evidence concurrently. While we have been attracted to that in the past, we think it is rather difficult and problematic at this late stage, because ordinarily for that process to be effective, a number of preparatory steps would need to be undertaken and they haven't, and it's a bit hard to do it now, to be honest.

PN9683

So we think that nevertheless the Bench would be assisted in any event by them being heard consecutively through the day. I think, for our part anyway, we're reasonably confident that we could get through them on the Thursday. As to the Wednesday, we'd put this forward; with the matters outstanding in relation to Ms Pezzullo, for our part it would be good for those matters to be brought to a head sooner than later.

PN9684

There have been useful discussions which have occurred around the conference and further discussions are scheduled early next week which hopefully will resolve the issues. They may not resolve the issues and one option to make use of the time or some time on Wednesday is to list the question of objections to Pezzullo at that time.

PN9685

So that, at least, provides some line in the sand as it were, for the parties to try and resolve the matter and, if not, to get a decision from the Bench at that time.

Clarity around those objections is important for a range of reasons, including that it may affect the estimates of cross-examination, which currently are a day and a half. If the objections are substantially upheld, either by agreement or by ruling, the extent the extent of cross-examination may be less. That's what we put before the Bench as a way forward for next week.

PN9686

JUSTICE ROSS: Thanks, Mr Moore. Anyone else want to say anything?

PN9687

MR IZZO: Your Honour, if I could just the Quiggin and Ball evidence, we also believe that it is probably most efficient for the evidence to be taken in a non-concurrent fashion, consecutively one after the other. I am loathe to raise this, but I think I have to. At the moment there are orders for production outstanding in relation to Quiggin an Ball, and there are objections that are due to be filed in relation to those orders for production by this evening, and we are unfortunately faced with the circumstance where we have a limited number of days between now and next Thursday for those - - -

PN9688

JUSTICE ROSS: Are there any more orders for production in relation to any of the other union experts?

PN9689

MR IZZO: Apologies - are there other orders for production?

PN9690

JUSTICE ROSS: Are there any other orders for production of documents foreshadowed in relation to any of the other union experts?

PN9691

MR IZZO: They've all been filed, is my understanding. They've all been filed. They were filed in one collective suite and objections, presumably, are being filed in relation to all of them this evening. I can offer some solutions.

PN9692

JUSTICE ROSS: Sure.

PN9693

MR IZZO: Obviously, we don't know the nature of the objections yet. The objections will likely either fall into two categories. One is there are claims for privilege, or the other is there are actually objections to the categories of document - the actual categories sought.

PN9694

In relation to the claims for privilege, we ended up in a scenario last time where we ultimately, due to the competing position of the parties, there was inspection required of the documents. That will probably take some time if we get to that point.

PN9695

JUSTICE ROSS: What's the volume of the documents?

PN9696

MR IZZO: I don't know the answer to that question.

PN9697

JUSTICE ROSS: Do we know what the volume is in nature of the objections are?

PN9698

MR DOWLING: Sorry, we aren't able to say accurately. We are still formulating the objections and combining the documents in response to the orders. We don't anticipate that it is anywhere near the volume that was produced in respect of Ms Pezzullo, for example, which I understand ran for 10 or 11 lever arch folders; nothing like that.

PN9699

JUSTICE ROSS: Well, that's encouraging.

PN9700

MR DOWLING: Unfortunately it's - - -

PN9701

JUSTICE ROSS: All right.

PN9702

MR IZZO: One solution is for the cross-examination - and I must say I haven't canvassed this with the other employer parties and they might wish to be heard on this - one solution is for the cross-examination to proceed and the witnesses to be recalled if there are any documents that the employers then wish to cross-examine on. By way of example, today with Professor Rose, I think there were only three or four documents that were ultimately used and the employers might make an assessment at the time that there's not a huge forensic advantage, but obviously we can't answer that question at the moment.

PN9703

The other is to try and formulate a timetable either now or on Monday whereby these matters can be resolved before Thursday. Perhaps that is a better use of Wednesday's time than using it for Pezzullo, or an additional use of Wednesday's time.

PN9704

JUSTICE ROSS: Yes, for different reasons I am not attracted for using Wednesday's time, but I will come back to that.

PN9705

MR IZZO: Certainly.

PN9706

JUSTICE ROSS: And in any event, if it is a legal privilege point, we can't deal with it on the basis of the objection the last time. So we would have to find someone else. I'd try and find the same member. The chances of - having gone through the experience once, I am not sure the member will be volunteering twice,

and it's probably - the notice is quite short, so I am not sure about his availability. So it may be that the other course is one we have to take.

PN9707

MR DOWLING: We say, for our part, we wouldn't object to that course; the course where they are recalled, only if necessary.

PN9708

JUSTICE ROSS: And it would only - any further cross-examination would be strictly confined to the notice to produce documents, so the witnesses wouldn't be exposed to two rounds of cross-examination.

PN9709

MR MOORE: We, likewise, would see that as a sensible way forward.

PN9710

JUSTICE ROSS: Okay. Well, you've got the unions with you, Mr Izzo, let's see if we've got your side with you. Does anyone object to that course?

PN9711

UNIDENTIFIED SPEAKER: No, your Honour.

PN9712

JUSTICE ROSS: Give us a moment. Normal members of the bench are available on the Wednesday. I am reluctant to do it, because of the nature of the Pezzullo objections and I don't know the extent to which they've narrowed, but it was essentially to get rid of the whole report. That's something we'd want all of the members of the bench to be involved in. We're conscious of the point that Mr Moore makes that it should be dealt with early, and we will put it in the schedule so it's dealt with on the first day of the commencement of the retail evidence.

PN9713

What I will do is have a mention on the Wednesday. It can deal with both the expert evidence update, what we know where your discussions on that, so the scheduling of any further expert evidence, and also what your proposals might be for dealing with the issues in respect of the remaining notices to produce, so what program we'll have to deal with that, and the parties can give me an update on the Pezzullo discussions and, if necessary, we can deal with any procedural directions for the filing of submissions and the line in relation to that.

PN9714

Now, what time on Wednesday would be most convenient to all of you, given that's the scope of what we would be doing?

PN9715

MR IZZO: There doesn't appear to be any particular preference on the employer's side your Honour, unless there is any Sydney.

PN9716

JUSTICE ROSS: Is there any objection to 9 o'clock and we can get it over with and then you can get on with your day? More importantly, I can get on with my

day. Is that all right for everyone in Sydney? We will make sure there is a video link.

PN9717

So just to be clear, the matters we will deal with there; if I can get an update on where the Pezzullo objection is up to, where the discussions have gotten to. So there's that and there is the expert evidence; that is, getting some clarity around cross-examination times and the issues we discussed just before the break; that is, when might we schedule those other experts.

PN9718

We can probably usefully discuss - I think the comment on the retail draft were 4 pm today, is that right? So we can probably - look, I will have them done one of the issues we can discuss at least and, in relation to the outstanding notices to produce, give some thought to how we might program that, so that we can deal with it as efficiently as possible and when we might deal with those issues.

PN9719

All right. Just get the link established to the courthouse is a bit of exercise, I think, so we will just stand down for a couple of minutes while that happens. Was there anything else?

PN9720

MR IZZO: Your Honour, due to other commitments, might I be adjourned from the rest of this afternoon?

PN9721

JUSTICE ROSS: You can, yes. Excused, adjourned - whatever you like, Mr Izzo. That's fine.

PN9722

MR IZZO: Might I be excused. I apologise.

PN9723

JUSTICE ROSS: No, certainly. We'll stand down.

SHORT ADJOURNMENT

[2.31 PM]

RESUMED

[2.38 PM]

PN9724

JUSTICE ROSS: Just before we go to Mr Parker, can I get an estimate of Dr Sands and the likely time for cross-examination?

PN9725

MR MOORE: Approximately an hour and a half.

PN9726

JUSTICE ROSS: All right. Thank you, let's go to Mr Parker.

PN9727

MR DOWLING: Thank you, your Honour. I think Mr Parker needs to be resworn, your Honour.

PN9728

JUSTICE ROSS: Yes.

PN9729

MR DOWLING: Your Honour, I call Mr Parker.

<JAMES DAVID PARKER, RESWORN [2.39 PM]

CROSS-EXAMINATION BY MR DOWLING [2.40 PM]

PN9730

JUSTICE ROSS: Mr Dowling.

PN9731

MR DOWLING: Thank you, your Honour. Can I just confirm before I start with Mr Parker whether each member of the bench has copies of the material that were produced by Mr Parker? We do have spare copies if anyone doesn't.

PN9732

Mr Parker, can you see and hear me clearly?---I can hear you clearly. Yes, I think I can see you now, too. The top-left screen.

PN9733

Thank you. Mr Parker, you were last in the Commission on 14 September. You might recall, I asked you some questions about whether you knew the purpose to which - the survey that you were preparing, whether you knew the purpose to which it was to be put. Do you recall those questions?---I haven't seen the transcript but yes, I remember you asking questions along those lines, I think.

PN9734

Right. To be fair to you I will read the question and the answer. I said to you:

PN9735

You are commissioned to write the report by the Restaurant, Catering and Industry Association. Did you receive from them a written request asking for or setting out the details of what it is they wanted?

PN9736

You said:

PN9737

I don't recall.

PN9738

You've since sent us some material. I then asked:

*** JAMES DAVID PARKER

XXN MR DOWLING

PN9739

You don't recall whether you've got anything in writing asking you to do the survey?---Sorry,

PN9740

you said,

PN9741

you need to remember that this is back in April, early April. I believe I would have received an email from John Hart who we had done a survey for some years ago asking me if we'd be interested in doing a survey on his behalf. I said obviously yes.

PN9742

I then asked you,

PN9743

Did he tell you that it was going to be used for the purposes of this case, or the case dealing with penalty rates?

PN9744

You said,

PN9745

No, I suppose I made that assumption. I'm sorry, we'll go back a step. I didn't know anything about a case at that stage.

PN9746

Do you recall all of that?---Yes, I do.

PN9747

Do you have the documents that you provided to the Commission with you?---Yes, I do.

PN9748

Amongst those documents there are three versions of the survey. Do you have those?---Yes, I do.

PN9749

Without asking you to go to them, is it correct to say that the first version of the survey that you provided to Mr Hart was dated 20 April 2015?---Yes, it was.

PN9750

So the discussion we were having, you referenced as being in early April. So we're talking about before you produced the questions, did you know what the questions would be used for? And your answer was, "I didn't know anything about a case at that stage." Do you also have the emails that you produced?---Yes.

*** JAMES DAVID PARKER

XXN MR DOWLING

PN9751

Can you go to the email from Mr Hart to you of 10 April of this year at 9.54 am?---Yes, I have that.

PN9752

You'll see there, Mr Hart says:

PN9753

This all looks very logical. We have some time up our sleeves this time. Need to include in a submission on 27 May.

PN9754

Do you see that?---Yes.

PN9755

Can I ask you whether despite what you said on 14 September, does that indicate to you that on 10 April you knew in fact that the survey was to be included in a submission for the purposes of the Commission?---I can't recall, because I don't know if there was a phone conversation that alerted me to the submission prior to that email.

PN9756

Well perhaps if you turn ahead, if you then go - perhaps it might assist your memory if you then go to the email from Mr Hart to you of 17 April at 4.02 pm. Do you have that email?---Right. Yes, I do.

PN9757

Now 17 April is still before you have finalised the first set of questions, and in this email Mr Hart says:

PN9758

Thank you. We need to not do members only as the Commission is very critical of internal surveys.

PN9759

Do you see that?---Yes.

PN9760

Is it fair to say that at that point it was very clear to you that your survey was to be used for the purposes of the Commission?---Yes, I suppose that's a fair assumption to make.

PN9761

And that's at odds - - -?---Can I just point out, I've never - sorry.

PN9762

That's at odds with your answer on 14 September; do you agree?---Can you just repeat that answer from 14 September, please?

*** JAMES DAVID PARKER

XXN MR DOWLING

PN9763

Sorry your Honour, I'm reading from PN 4554 where Mr Parker says, "I didn't know anything about a case at that stage." I'm saying your knowledge - - -?---I believe - - -

PN9764

My question to you is, your knowledge exhibited by the email of 17 April is not consistent with your answer that you didn't know anything about a case at this stage. Do you agree?---I believe my answer was - no, I don't. I think my answer was based on when I was first contacted by Mr Hart. Obviously over the course of the following ten days I would have learnt more about the purpose of the survey.

PN9765

I see. So you accept that by the time, or certainly before you drafted the earliest version you've sent us on 20 April, you at least knew at that point that the survey was to be used for the purposes of the Commission?---Certainly by the time the first draft - that was done, yes, I did.

PN9766

Just to be clear, the email of 17 April that I took you to that refers to, "We need to not do members only as the Commission is very critical of internal surveys"?---Yes.

PN9767

That's a response to your email if you go back to the immediately earlier email from you to Mr Hart of 17 April 2015 at 2.03 pm. Do you have that email?---Yes, I do.

PN9768

You'll see there in the 5th paragraph you there ask Mr Hart, "Would it be better to do a member only survey"?---Yes.

PN9769

Do you see that question?---Yes.

PN9770

That's what Mr Hart's responding to when he says, "We need to not do members only as the Commission is very critical of internal surveys." Is that as you understand it?---Yes.

PN9771

I also, you might recall, asked you some questions about - you'll remember there was, I think on your figures, some 26,000 cafés and restaurants who employed persons in Australia as the total pool of potential survey recipients. Do you recall that evidence?---Yes, I do remember that but I also remember commenting I didn't know that number until after the survey had commenced.

*** JAMES DAVID PARKER

XXN MR DOWLING

PN9772

That's right. You were given a list by the RCIA of some 18,000 on your evidence; is that right?---That's correct.

PN9773

And I asked you:

PN9774

Were you told by the RCA when they gave you the list why it was that their list was 18,000 and the ABS identified that there were, in fact, 26,000 cafés and restaurants?

PN9775

And as you indicated a moment ago, you said:

PN9776

No, I didn't know the 26,000 until after we'd finished the survey

PN9777

?---Correct.

PN9778

That's PN 4614, your Honour. Now, can I take you back to the emails you have there and can you go to the email of 16 April at 4.57 pm from Mr Hart to you. Do you have that email?---Yes. Yes, I do.

PN9779

And do you see there Mr Hart says, amongst other things:

PN9780

We have a database of 17,000 restaurants with phone numbers that we can provide. (That comes from Dimmi.)

PN9781

Do you see that?---Yes.

PN9782

Are you able to explain to the Commission what Dimmi is?---No, I'm not.

PN9783

You don't know what Dimmi is?---I believe it's some sort of restaurant reservation service, but beyond that I really don't know much at all about it.

PN9784

Did you ask Mr Hart at the time, "What is Dimmi and who's included in your list from Dimmi"?---No, I didn't. I felt that a list of 17,000 was a very substantial list, without knowing its accuracy but you know, business to business lists are often notoriously unreliable with businesses opening and closing and so forth, so I felt that a list of 17,000 was robust. I didn't feel the need to ask what it was.

*** JAMES DAVID PARKER

XXN MR DOWLING

PN9785

Mr Parker, it's not just the size of the list; it's also where the list comes from that surely affects the reliability of the survey. Is that a fair proposition?---On one extent, yes, and on one extent, no. The key thing for me as a researcher is to have

a large and reliable pool of restaurants to choose from. In the sense that it may introduce bias, then yes; I suppose it may be relevant, but again with a list of that size we're only going to take a sample frame of possibly six or seven thousand numbers, I wouldn't see that being particularly important in the scheme of things.

PN9786

But I think it's your evidence that at the time you received this list you didn't know what the total number of employing cafes and restaurants was. Is that right?---That's correct. That's correct.

PN9787

So if, for example, the total number of cafes and restaurants who employed persons was 200,000, wasn't that important to know so that you could know the proportion or the size of the sample you were getting?---Yes, it would be, but I don't think I would ever have envisaged that the number of restaurants and cafes would have been anything of that magnitude and - - -

PN9788

But did you ask, Mr Parker? Did you ask?---Sorry, go on.

PN9789

Did you ask what the total size was?---That I can't recall. That may have occurred during the phone conversations. I'm sorry, I can't tell you.

PN9790

And - - -?---I just remember - I just remember feeling at the time that 17,000 was a robust and substantial number of restaurants from the total population, but I can't tell you exactly what that total population was. I couldn't then.

PN9791

And you chose not to ask what the source of the 17,000 was. Is that your evidence?---Yes, that's correct. I don't know what it is now so I suspect I didn't know what it was then.

PN9792

All right. Once you later established that in fact it was 26,000, you didn't seek to ask why is there a difference between the 26,000 in the total pool and the 17,000 that I've been given. Again that's not a question you sought to ask?---We do a lot of business to business surveying and I have never seen - - -

PN9793

Mr Parker, I wonder if you could just answer my question. Did you ask that question?---I'm trying - I'm trying to answer your question. What I'm saying is (indistinct) business surveys. This list was a much larger size and a much better quality than most business to business lists we worked with, so I felt comfortable that it was adequate.

*** JAMES DAVID PARKER

XXN MR DOWLING

PN9794

So because it was bigger than some lists you get, that was comfort enough for you. Is that your evidence?

PN9795

MR CLARKE: Objection, your Honour. It would appear that my friend is traversing grounds beyond the scope that Mr Parker was recalled for, but he is now in effect going into cross-examination over and beyond. I note from the transcript and my research of it that it was never - it was never put - - -

PN9796

JUSTICE ROSS: It is all right. He has withdrawn the question.

PN9797

MR DOWLING: Mr Parker, I asked you some questions about the very first question in the survey. Do you recall that the very first question in the survey reads, amongst other things,

PN9798

Hi, my name is - and I'm calling from Jetty Research on behalf of the Restaurant and Catering Industry Association. The association is conducting a national survey regarding an important issue to all operators.

PN9799

Do you recall being asked that?---Yes.

PN9800

Your Honour, I'm at PN4664 now.

PN9801

(To witness) And I asked you whether framing the question that way by referring to the association and the issue of importance to them had the potential to create sample bias, and you said

PN9802

It has the potential to, I suppose.

PN9803

Can I ask you to turn back to the emails and particularly to the email from Mr Hart to you of 16 April 2015 of 4.57 pm?---Yes.

PN9804

You will see there in the fifth paragraph Mr Hart says to you,

PN9805

It is very important that we set up the intro the question to mention the association (to encourage responses).

*** JAMES DAVID PARKER

XXN MR DOWLING

PN9806

Should we understand from that, that the reason you included reference to the association in question 1 was because of Mr Hart's urging?---Only partially. I suspect we would have done it anyway. It adds credibility to the survey, I believe, and it also would have encouraged response which we were very keen. With a survey like this, as well as saying research, the quantity of response (indistinct)

response. We were very keen to maximise quantity of response and we felt that adding in the mention of Restaurant Catering Industry Association would add a little bit of credibility that might encourage some people to take part who might not have otherwise.

PN9807

All right. Can I ask you about one last topic. You will recall I asked you some questions about question 12 in your survey. Question 12 is the question that reads,

PN9808

If penalty rates were reduced would you be more likely to open on Sundays and public holidays?

PN9809

?---Right.

PN9810

I asked you a number of questions about that particular question, but particularly about the grouping or the combining of Sundays and public holidays in the question. Do you recall that?---Yes.

PN9811

I think I suggested to you that if someone might have an affirmative answer to a Sunday but a negative answer to a public holiday, they would still be included in the 'yes' count and that that would provide a misleading figure.

PN9812

MR CLARKE: Your Honour, objection.

PN9813

JUSTICE ROSS: He hasn't asked a question yet.

PN9814

MR CLARKE: Your Honour, I'll let the question be asked. We will go to the transcript on the 23rd then.

PN9815

MR DOWLING: Do you recall all of that, Mr Parker?---Yes.

PN9816

All right. Can I ask you, do you have your original statement with you as well?---Yes, I do.

PN9817

That attached to the back of it the survey.

PN9818

MR CLARKE: Your Honour, objection.

*** JAMES DAVID PARKER

XXN MR DOWLING

PN9819

JUSTICE ROSS: Yes.

PN9820

MR CLARKE: On 23 September my friend outlined reasons for needing to recall the witness, and in those submissions he made on that day he outlined two broad areas, both of which have already been canvassed in the questions that have been asked.

PN9821

JUSTICE ROSS: All right. Mr Dowling, are you going to come to the material that's been produced quickly?

PN9822

MR DOWLING: Yes.

PN9823

JUSTICE ROSS: Good.

PN9824

MR DOWLING: I needed to lay this foundation unfortunately.

PN9825

JUSTICE ROSS: No, I understand.

PN9826

MR DOWLING: (To witness) Can I take you to question 11 in the survey. You will see it says there,

PN9827

Why do you choose not to trade on Sundays and/or public holidays?

PN9828

?---Yes.

PN9829

And again it combines the Sundays and public holidays. It comes those two concepts. Do you see that?---Yes, yes.

PN9830

All right. Can I take you to the draft versions of the survey questions you've provided to us - sorry, the draft versions of the survey you provided to us, and particularly to the version dated 20 April 2015?---Right.

PN9831

Do you have that?---Yes.

PN9832

Can you turn to question 6 please?---Yes.

*** JAMES DAVID PARKER

XXN MR DOWLING

PN9833

You will see there question 6 deals with the same topic that question 11 does but it separates out Sundays. It says,

PN9834

Why do you choose not to trade on Sundays?

PN9835

And then gives the opportunity for certain responses. And then question 7 provides,

PN9836

Why do you choose not to trade on public holidays?

PN9837

Do you see that?---Yes.

PN9838

So should we understand that at least in this first version you've provided, the earliest version that you've provided to us, you made a decision to separate out Sundays and public holidays?---Yes.

PN9839

All right. If you go ahead to version 3 that you've provided to us, and you turn to question 7?---Yes.

PN9840

See that there you have combined the two concepts. This later version has

PN9841

Why do you choose not to trade on Sundays and/or public holidays?

PN9842

with the two concepts together. Do you see that?---Correct.

PN9843

All right. Can you then go to the email of 21 April at 11.25 am. This is where you are sending version 3 to Mr Hart?---Right.

PN9844

The subject matter is version 3, and there you say, "Thanks for your time earlier, see whether you think this latest version is closer to what you wanted." Do you see that?---Yes.

PN9845

Should we understand from that that it was Mr Hart that told you to combine the Sundays and public holidays into one question?---Sorry, that I can't recall.

*** JAMES DAVID PARKER

XXN MR DOWLING

PN9846

Are you able to say at all - - -?---Can I just say though that I would have felt comfortable combining those. We were very keen to keep the time (indistinct) so I can imagine I would've been comfortable to combine them, but whether that idea came from me or from Mr Hart, I simply can't recall.

PN9847

You made the decision in version 2 to have them as separate questions, but you can't recall who made the decision to combine them into the one question, is that your evidence?---Correct.

PN9848

Are you not able to say at the moment why it was a decision was made to combine them into one question?---No, I obviously can't remember why that decision was made, but I do know that we were trying to keep the survey link down, and I'm guessing that may have been the reason.

PN9849

Thank you. Nothing further, your Honour.

PN9850

JUSTICE ROSS: Any re-examination?

RE-EXAMINATION BY MR CLARKE

[3.01 PM]

PN9851

MR CLARKE: Yes, your Honour. Mr Parker, you've indicated you were keen to keep the timing of the survey down. Why was that so important to you?---I think, one thing we discussed initially was that this survey had to be done as a famous survey in order to make it representative. As you've seen, the Australian Catering Industry Association was keen to make the sample size as large as possible in order to get the maximum possible response, and so from that perspective we did decide to make the survey as short as possible, and that's why we cut it down to 3 minutes. That was a compromise we made in order to maximise response and, you know, to ensure that we got the views of those 1000 restaurant and café owners.

PN9852

No further questions, your Honour.

PN9853

JUSTICE ROSS: Nothing further for the witness? Thank you for your evidence, Mr Parker, you're excused.---Thank you.

<THE WITNESS WITHDREW

[3.02 PM]

PN9854

JUSTICE ROSS: Dr Sands?

*** JAMES DAVID PARKER

RXN MR CLARKE

PN9855

MR DOWLING: Your Honour, I might just ask if Ms Burke and myself can be excused because Mr Sands doesn't affect us. We'll try and leave quietly.

PN9856

MR WHEELAHAN: I call Dr Sands.

PN9857

UNIDENTIFIED SPEAKER: Your Honour, I might be excused as well, and Mr Parker might.

PN9858

JUSTICE ROSS: Yes, well Mr Parker can certainly be excused. He's free to go.--
-Thank you, your Honour.

PN9859

MR WHEELAHAN: Your Honour, just before the witness affirms or takes an oath, I've had some discussions with Mr Moore about the three statements that we propose to tender. I don't propose to read into evidence his second and third statements which are responsive to Ms Yu, Mr Kershner and Ms Bartley. My learned friend says that he's not going to read into evidence that part of Ms Bartley's report that is critical of Mr Sands. Similarly, in light of the Full Bench's ruling as to his opinions in part 1 of his report, my learned friend says he's not going to cross-examine him about those opinions, so on that basis I'll simply - - -

PN9860

JUSTICE ROSS: No, I didn't think he would.

PN9861

MR WHEELAHAN: No, so I'll only seek to tender his first statement with the attached report.

PN9862

JUSTICE ROSS: Okay.

PN9863

MR WHEELAHAN: Thank you.

PN9864

JUSTICE ROSS: Do you have anything you want to say about that, Mr Moore?

PN9865

MR MOORE: No, my friend has put that accurately.

PN9866

JUSTICE ROSS: Okay.

<SEAN JAMES SANDS, AFFIRMED

[3.04 PM]

EXAMINATION-IN-CHIEF BY MR WHEELAHAN

[3.04 PM]

*** SEAN JAMES SANDS

XN MR WHEELAHAN

PN9867

MR WHEELAHAN: Dr Sands, please state your full name?---Sean James Sands.

PN9868

And your work address?---26 Sir John Monash Drive, Caulfield East.

PN9869

And your occupation?---Research Director.

PN9870

And you prepared a statement for these proceedings dated the 29th of June 2015. Do you have a copy of that with you?---I may do, I'll just check. I've got several statements but I might not have that copy actually. No, I've got some more recent ones. Could I - - -

PN9871

Sorry, I can't hear you?---I've got some more recent ones. Could I get a copy of that one?

PN9872

Do you have a copy of your statement of 8 paragraphs? Is that the statement that you do not have?---Correct.

PN9873

That is your statement?---That is, correct.

PN9874

And it has two annexures, SS1 being your curriculum vitae?---Correct.

PN9875

And SS2 is the retail award research report filed by you?---Yes. I have that, yes.

PN9876

Correct?---Correct.

PN9877

And save for the opinions expressed in part 1 of that report, which you have summarised at paragraph 1 of the executive summary, the opinions in the report are your opinions based on your specialised knowledge?---Correct.

PN9878

I tender the statement with the attachments, your Honour.

PN9879

JUSTICE ROSS: No objection?

PN9880

MR MOORE: No.

*** SEAN JAMES SANDS

XN MR WHEELAHAN

PN9881

JUSTICE ROSS: We'll mark that exhibit Retail 2.

EXHIBIT #RETAIL 2 WITNESS STATEMENT OF SEAN JAMES SANDS COMPRISING 8 PARAGRAPHS AND DATED 29/06/2015 TOGETHER WITH TWO ANNEXURES MARKED SS1 CURRICULUM VITAE AND SS2 RETAIL AWARD RESEARCH REPORT

PN9882

MR WHEELAHAN: Thank you, your Honour.

CROSS-EXAMINATION BY MR MOORE

[3.06 PM]

PN9883

MR MOORE: Dr Sands, my name is Moore and I appear for the Shop, Distributive and Allied Employees Association. I'm just going to ask you some questions firstly about part 2 of your research report.---Sure.

PN9884

That part, which is called the shop floor employee, to speak generally to begin with, was based upon two things. It's formed on the basis of a focus group conducted with 48 shop floor retail employees, that's right?---Correct.

PN9885

And the other source of what's reported in it is an online survey of 1009 Australian retail shop floor employees conducted in April this year, that's right?---That's correct.

PN9886

And what you've done, as I think you say early in your report, is that in part 2 you've synthesised the results of the focus groups and the survey findings, and reported them in part 2?---Correct.

PN9887

A focus group is a tool of qualitative as distinct from quantitative research?---That's correct, yes.

PN9888

You might recall that in 2012 in the interim review proceedings you gave some evidence in relation to that subject matter?---Mm-hm.

PN9889

At that time you gave evidence that qualitative research is about understanding or gaining a deeper understanding of a particular issue. That's so?---Correct.

PN9890

But that qualitative research is not about being statistically generalisable or being representative, is that so?---Correct.

*** SEAN JAMES SANDS

XXN MR MOORE

PN9891

So where in part 2 you refer to the results from the focus groups, you accept that the results or the matters there set out are not statistically generalisable?---Not in the quantitative sense, no.

PN9892

Thank you, and the same follows of course with part 3 of the report, which is also wholly qualitative?---It is, purely based on interviews.

PN9893

Yes. Can you tell the Commission how the 48 employees who participated in the focus groups, how they were recruited?---Sure, yes. We used an external provider that provides – we basically provide them with information about the kind of people that we're looking for. In this case it was people that work in retail and work on the shop floor, so similar to the survey, and they then go out and try and find those people to recruit them to participate in a focus group.

PN9894

So the entity that provided that service to you was separate from the centre of which you were part?---Correct, they're a company we use regularly.

PN9895

I see, thank you. You were issued with an order by this Commission to produce documents relevant to the production of your expert report?---Correct.

PN9896

Yes, and in those documents that were produced there was produced a document which I will hand to you. The document I have handed to you was one of the documents which was produced in response to the order for production. So under the heading "Monash Business School" you'll see it states, "Retail employee focus group discussion". As I understand it, am I right in thinking that these are the top line summary notes of the focus group of retail employees?---We had - for the focus groups there were three people present from our team. There was two researchers and one note taker, so these are the notes of the note taker during those sessions.

PN9897

Thank you. Insofar as in part 2 of your report for this Commission, you refer to what was said in the focus groups. This is the source to which you had regard in making those references in your report?---The vast majority, yes. There were also recordings of the interviews verbatim but the verbatim notes were not transcribed. The verbatim notes, these are just top line summary notes from those verbatim conversations.

PN9898

Right. So just to be clear, there's a recording of the focus groups, is there?---Yes.

*** SEAN JAMES SANDS

XXN MR MOORE

PN9899

Is there a full transcription of the verbatim recording?---No, but every participant's guaranteed of confidentiality so we don't transcribe the focus groups. Rather we take top line notes.

PN9900

I see. So in terms of the paper record of the focus group, it's this?---Yes, correct.

PN9901

I tender that, if the Commission pleases.

**EXHIBIT #SDA3 DOCUMENT - RETAIL EMPLOYEE FOCUS
GROUP DISCUSSION**

PN9902

Just to ask you another question about the survey - sorry to change subjects for a moment - the survey participants included persons who said that they were employed under the retail award as well as those who said that they were employed under an EBA?---Yes. That was not a qualified but we asked them if they were employed under either of those two to self-select.

PN9903

Yes, self-select. It's dependent upon them - - -?---Being aware and - - -

PN9904

Being aware?---Yes.

PN9905

And I think your report reveals that the survey participants are comprised of 44 per cent who said they were employed under the award, 31 per cent under an EBA, and 25 per cent who were unsure?---That sounds correct.

PN9906

All right. Thank you. If I could ask you to go to page 57 of your report. Just to make sure that we have the same piece of paper in front of us, does that have a paragraph in the middle 2.3.1?---It does.

PN9907

Thank you. You say there in the first couple of lines that 72 per cent of retail employees work weekends?---Correct.

PN9908

And that's a conclusion which comes from the survey?---From the sample, yes.

PN9909

Yes, from the survey?---Yes.

PN9910

You are familiar with a database called the Household Income and Labour Dynamics in Australia Survey, the HILDA database?---I'm familiar with it but not intimately.

PN9911

No, I'm not asking whether you have a working - - -?---No, but I've heard of it.

*** SEAN JAMES SANDS

XXN MR MOORE

PN9912

You've heard of it?---Correct, yes.

PN9913

And you understand it to be a well-established and recognised database?---Correct, yes.

PN9914

You accept that it's known to be a reliable and established data source?---Sure.

PN9915

Insofar as it sheds light on the composition and working patterns of retail workers, would you accept that it would generate more representative and reliable results than the survey that you undertake?---I believe it would be a larger sample size.

PN9916

So is that yes?---So that would be - I would say yes. Larger sample size, more statistically reliable.

PN9917

Thank you. Professor David Peets and Dr Ian Watson have filed an expert report with the Commission in this proceeding entitled "Characteristics of the workforce in the national retail industry with regard to age, weekend work and student status". Dr Watson has examined the HILDA data from 2013 and concluded that 62 per cent of the total retail workforce usually worked on weekends, defined to mean usually working on either one or both of the weekend days. Would you accept in light of what you said before about the nature of the HILDA database that your estimate of 72 per cent would appear to overestimate the proportion who work on weekends?---Yes, I would - to be able to confidently answer that I need to know the two sample sizes and the populations to be able to statistically test the difference, but it would seem to me that it would be a significant difference.

PN9918

There are a couple of differences?---Sure.

PN9919

In your report you want to draw generalisations about the population of retail shop floor employees across the country?---Correct.

PN9920

And evidence will be given to this Commission by Professor Peets and Dr Watson about the same matters based on the HILDA data and in relation to a number of indicia, including the proportion of retail workers who work on the weekend?---Sure.

*** SEAN JAMES SANDS

XXN MR MOORE

PN9921

I can cut to the chase by asking you this question. Are you prepared to accept that if the HILDA data conclusions on the same indicia such as proportion of retail workers who work on the weekends is going to be a more reliable and representative answer to the same question in your survey?---Based on the sample

sizes I'd say yes. It seems that our survey is slightly over representing that question.

PN9922

Yes, all right. You also say in the same paragraph, over the page on page 38, in the second line, that 50 per cent of shop floor retail workers work on Sundays. Do you see that?---I do.

PN9923

The HILDA data shows, according to Dr Watson, that that's actually 35 per cent. Are you prepared to accept that your estimate overstates that?---I need to know - the only thing I'd question on that, which I'm not sure of the answer, is if the two questions are based on the total sample or just on people that work weekends. I'm not 100 per cent sure if they'd both look at exactly the same - - -

PN9924

I can tell you that Dr Watson's evidence is in relation to the total retail workforce?---Total retail workforce, okay. Then yes, I would say ours is a slight overestimate.

PN9925

If I could ask you - if we could turn the page to page 59?---Mm-hm.

PN9926

Often in this report one can see text which is coloured in blue. Is yours - - - ?---Correct, it is.

PN9927

And they are extracts that come from the notes of the focus groups which is SDA3?---They should be, yes.

PN9928

There are other times though in the report where you summarise matters not necessarily marked in blue which are taken from your reading of the notes of the focus groups?---That's correct, and the actual conversations, the focus groups themselves.

PN9929

If you could look at page 60, you deal first - in the second paragraph you say that almost half of Sunday employees work every Sunday?---Correct.

PN9930

Then under the figure 41 you have a paragraph which refers to -

PN9931

The vast majority of shop floor employees discuss that the nature and availability of Sunday hours have changed.

*** SEAN JAMES SANDS

XXN MR MOORE

PN9932

What is then set out there under are summaries, I take it, drawn from the focus group sessions?---That's correct.

PN9933

And also what you say are the verbatim quotes from the notes of those sessions?---That's correct.

PN9934

So if I could ask you to look at SDA 3, which are the notes from the focus group. What you deal with on page 60 of your report about the nature and availability of Sunday hours appears to be dealt with on page 8 of the focus group notes, if you just turn to that. Have you got page 8 there?---I do.

PN9935

Do you see about halfway down the page there's some words in bold, "How has the availability of working Sunday hours changed over the time that you have been working in retail"?---I do.

PN9936

That continues over the page until you get to another heading, "Why do you think that has changed." Do you see that?---I do.

PN9937

If you go back to the report on page 61 you'll see that about halfway down the page there's a paragraph which starts, "Employees subsequently discussed and attributed the abovementioned changes to the following industry conditions," and that appears to then be a reference to the section on page 9 of the focus group notes, "Why do you think this has changed"?---That would be correct.

PN9938

Yes, all right. Thanks. If you go back to page 60 of your report where there's commentary about discussion by shop floor employees about the nature and availability of Sunday hours and how that's changed, and the most substantial changes are said to include the dot points thereunder. And there's a dot point, after the first dot point there is in blue, "It's cheaper for them to get a younger person instead of a mature one, so that's why I don't work on Sundays." So that appears to be a verbatim quote from the focus group notes, is that right?---From the focus group, yes.

PN9939

Yes?---It may or may not appear in the notes. I'm not sure.

PN9940

Well that's the difficulty, Dr Sands, because if you look at page 8 under the heading, "How has the availability of working Sunday hours changed over the time you have been working in retail," I can't see a sentence in those terms there?---One of the things - this document itself is basically co-created as we go along, so it's a - - -

*** SEAN JAMES SANDS

XXN MR MOORE

PN9941

Which document, sorry?---The actual report - well, what becomes the report document. So I said there were three people involved in the creating of - or the focus groups and the creation of the report. There's a person who takes the notes and there's the main interviewers. The main interviewers work on a Google Doc, which is a collaborative document across the project team, and that document is brought to life following each conversation or following each focus group. These notes are then referred to and used to supplement the actual focus groups themselves. Now, I did actually go through and make sure that all of the quotes in here appeared in this document, so if I had a soft copy I could find these exact quotes because I double checked them. But you're right, I cannot see that on that exact page. But my guess is that that paragraph would occur somewhere in here, I just don't know what page it appears on.

PN9942

Somewhere in these notes of the focus groups?---I would guess so, yes.

PN9943

Right. Well, would it not appear under the heading, "How has the availability of working Sunday hours changed over the time you have been working in retail"?---Not necessarily. One of the important things to know about a focus group is that it's a conversation that evolves. The discussion guide itself is not a strict form of interviewing someone. What happens is the conversation evolves over time, and you might at the beginning of the conversation or focus group discuss a topic that's also discussed later, so those conversation points come together to answer the questions as opposed to being a strict step-by-step process of having a conversation.

PN9944

So - - -?---Qualitative research is very - is very (indistinct), I guess you'd call it. It's not prescribed.

PN9945

Are you saying that you exercise some sort of editorial discretion in working out what parts of notes are slotted in in what parts of the report?---I would say that comments or conversations don't necessarily come under the question topic of the discussion guide. They may evolve later. One of the things that we often ask at the end is, "Is there anything else you would like to add?" And that's often when other information might come to light. So I can't say exactly when in the conversation these points came up, but I agree that it's not on this page.

PN9946

All right. Is that also the explanation for why if you look at page 60 of the report at the last dot point there's a reference to "reduced Sunday labour budgets." Do you see that reference?---I do.

*** SEAN JAMES SANDS

XXN MR MOORE

PN9947

So in this part of the notes of the focus group under the heading, "How has the availability of working Sunday hours changed over the time you have been working in retail," I don't see any reference in that section to reduced Sunday

labour budgets. Is that right?---Exactly. I would say that throughout the entire document, you're not going to find every single question under this document.

PN9948

I see. So when one reads your report, one can't assume that the verbatim quotes or the summaries of what was said in relation to a particular question or the things that were said at a point in the focus group discussion about a specific identified question?---That's the nature of qualitative research.

PN9949

So is that yes?---Correct.

PN9950

So that involves you, in writing this report, exercising judgement as to what statements to select from across the discussion, the notes of the focus group, and where to slot them in into your report. Is that a fair statement?---Yes, it's fair to say that that would be the case, yes. I mean, it's not a prescribed conversation, it's an iterative conversation.

PN9951

Because you are effectively building a case, as it were, for the contentions that you're wanting to advance in your research?---Not so much building a case, but identifying common themes of discussion.

PN9952

So page 61 of your report, and I won't go through all of the different statements that don't appear under the particular headings in the notes having heard your evidence, but I just want to also clarify in terms of how you've set this report out. Page 61, the bottom half of the page under the heading or under the words, "Employees subsequently discussed and attributed the abovementioned changes to the following industry conditions." That's also a summary that you've prepared of comments made by people in the focus group at some point or other in the conduct of the focus groups?---Correct.

PN9953

I see. Thank you. Page 62, we then see at the top of the page it says, the first whole paragraph:

PN9954

As shown in figure 42, 47 per cent of Sunday employees surveyed report no real change in the availability of Sunday hours over the last five years.

PN9955

Do you see that?---I do.

PN9956

So we're now swapping back to the survey element of your research?---Yes.

*** SEAN JAMES SANDS

XXN MR MOORE

PN9957

Yes, so am I correct in reading the data that's summarised in the graphs there that what this shows is that for Sunday employees generally that's the column on the left, 80 per cent have observed either no real change in the availability of Sunday hours over the last five years, or in fact they have observed an increase?---Could I just get you to repeat that? I'm just trying to follow the graph.

PN9958

Certainly. So if you look at the graph on the left?---Left-hand, yes.

PN9959

As I interpret that, one way of reading that is that it's saying that 80 per cent of the respondents to the survey have observed either no real change in the availability of Sunday hours over the last five years, or in fact have observed an increase in Sunday hours. Is that - - -?---That's correct, five to seven being, yes, more available now and about the same. So 33 and 47, 80 per cent.

PN9960

Yes, thank you. Then if you could turn to page 65, the pages in between continue to move between references to the survey and references to the focus group?---The survey and - correct.

PN9961

Yes. I just want to ask you about something on page 65. You see at the end of the paragraph - there's one large paragraph on that page?---Mm-hm.

PN9962

The paragraph commences, "When surveyed, as shown in figure 45, the main difficulty amongst shopfloor employees with regard to working on Sundays is impact on the ability to spend time with family/friends, 54 per cent." And it then goes on to say, "The second-highest difficulties the limited number of staff on Sundays," followed by "impacts ability to attend community, sporting and cultural events." You can refer to some statistical differences. At the end of that paragraph you say that, "The results indicate that shopfloor employees aged 24 years and under are significantly less concerned with their ability to spend time with family and friends being impacted by working Sundays." Now, if you keep your hand on that page, but also look at page 119 of your report?---Yes.

PN9963

Is that headed "Appendix F, shop floor employee survey"?---It is.

PN9964

Yes, so this sets out the questions asked in the survey?---Correct.

PN9965

And the question that we are here dealing with on page 65, that I was just asking you about, was a question which I will just find?---I think it's on page 122.

PN9966

Thank you, at about - - -?---Just two-thirds done.

*** SEAN JAMES SANDS

XXN MR MOORE

PN9967

Point 6 on the page, "What do you see as the main difficulties in working on a Sunday," it's that question?---I believe so.

PN9968

So turning back to page 65, the results which you have put in the graph, and to which you refer in the body of the paragraph, they are that 42 per cent of those aged under 24 identified impact on ability to spend time with family and friends, as compared to 54 per cent for employees generally. Am I getting that right?---Correct.

PN9969

Thank you. So it's not correct to say then that those aged under 24 are less concerned with their ability to spend time with family and friends from working on Sundays; it is just that fewer of them identified that as one of the main difficulties, as compared to the general class of employees. Is that a fair comment?---Yes.

PN9970

Now, if you could turn the page to page 66?---Mm-hm.

PN9971

The first main - well, I'm sorry, you say at the top of the page, "The follow-up questions were asked regarding their ability to make up time at other times during week." Do you see that at the top of the page?---Yes.

PN9972

You then move on to saying - and I think you come later in your report to a couple of paragraphs - in fact, to the paragraph at the bottom of the page, but before you get to that point you have a paragraph where you identify that another difficulty of working Sundays is missing opportunities to socialise on weekends and that shopfloor employees, you say, "are mixed in their perceptions of the impact of this and about the opportunities to make this up." Do you see that?---I do.

PN9973

And that statement, that sentence, asserting that shopfloor employees are mixed in their perceptions of the impact of this and about their opportunities to make that up; that sentence is drawn solely from your focus group work?---Correct.

PN9974

Thank you. If you look at page 13 of the notes of the focus group, do you have that, page 13?---I do.

*** SEAN JAMES SANDS

XXN MR MOORE

PN9975

There's a heading, or words involved, "One of the difficulties we have heard with regard to working on a Sunday relates to the loss of weekend social life, ie spending time with family/friends. In your experience, is there an opportunity to make up time with family/friends and to socialise?" So this is the section, this is the corresponding part of the focus group notes?---This would be the question, yes, specifically to that.

PN9976

Yes. Now, on page 66 of your report where you talk about the mixed perceptions, about the impact on socialising and opportunities to make up, you set out to verbatim quotes and those quotations appear on page 14 of your notes?---Yes.

PN9977

The second quote starts at the bottom of page 13; that is, "I see a lot of my friends during weeknights and my friend understands, so they usually do dinners et cetera." Yes?---Correct.

PN9978

That's a participant who seems to be identified by the letters and number WA2?---Western Australia, WA - the state.

PN9979

But WA2 says in the two sentences before that, "There is no opportunity to make up the time at work on Sunday." Do you see that in the start of WA2?---Correct. I should clarify that WA2 is not an individual, it's the group. So it's Western Australia and they are either the younger or older; so I can't guarantee that if it says WA2 elsewhere that it is the same person, if that makes sense.

PN9980

I see, so WA2 signifies what, a person or - - -?---It signifies a group in Western Australia, to which would be older. So we looked at older versus younger.

PN9981

I see. So it's not an individual person?---Correct.

PN9982

So WA2 though has attributed to it the words, "There is no opportunity to make up the time I work on a Sunday"?---Correct.

PN9983

That statement was not included in your report at page 66. Is there a reason for that?---No specific reason, no.

PN9984

If you look back at the notes of this topic in the focus group at page 13, take a moment to read through it, but perhaps I will ask you this question before you read through it. Except for the comments next to the letters "VO", which is the second paragraph, and one two down, which is "Queensland 2", and the one under that, "New South Wales younger"?---Yes.

*** SEAN JAMES SANDS

XXN MR MOORE

PN9985

Other than those comments and the ones that you have extracted in your report, the consistent message as I read the commentary that's there set out by all of the other participants is that they miss out on social activities with family and friends by working on Sundays and that it is very hard to make up that extra time?---Do you agree with that?---It's very difficult to read this document as separate to this document. So the report is a summary of all interviewers conducting the research

across all projects - across all the groups. This is the verbatim notes of one note taker during the group. So it's very difficult for me to comment on the similarity that this document should hold to this one.

PN9986

But you said at the outset that this was the one paper record that exists of the focus groups?---Correct, correct. The groups themselves were created in a Google document that was collaborated with the research team after each focus group. So this was a co-created document that evolved over time.

PN9987

So is the Google document still in existence?---This is the end result.

PN9988

Right. So when you prepared the report, you did it by reference, I take it, to this document, the notes of the focus group?---That was one source. We- - -

AUDIO MALFUNCTION

[3.40 PM]

PN9989

Was this written by you or was this a group effort?---It was a group effort at the early stages and then I take over – I was involved in the focus groups myself as well, so I was one of the senior researchers.

PN9990

Excuse, me. I see?---I conducted about half of the groups myself.

PN9991

All right. Can I take you back to page 66 of your report?---Yes.

PN9992

You say that under the extracts you say:

PN9993

When surveyed and as shown in figure 46, the majority of Sunday employees are hardly ever, 58 per cent or never 28 per cent able to make up that time to attend community sporting or cultural events during the week.

PN9994

?---That's correct.

PN9995

So – well, I was going to ask you to do the maths, but I think one can do the maths without me asking the question. You then – you make reference to, over the page on page 67, at about three-quarters of the way down, there's a sentence:

PN9996

Sunday employees also note that time on Saturday nights is also impacted by working Sundays.

*** SEAN JAMES SANDS

XXN MR MOORE

PN9997

You see that?---I do.

PN9998

And then at the bottom of the page, after the quotations, it states:

PN9999

Nonetheless, Sunday employees agree that they 'Signed up to that' by opting in to work Sundays and penalty rates partly make up for it.

PN10000

Now, that sentence is not based on any response from the survey, is it?---Not from the survey, no.

PN10001

Thank you. And that sentence is based upon the statement of one participant in a focus group, is it not?---No, that would be based on a theme to come out of the focus group. But if you're referring to this document, it may appear in here one time, I'm not a hundred per cent sure. But it was commonly discussed across the focus groups.

PN10002

All right. Page 68, you deal with the results of the survey in the first part of the page, which deals with the proportions of Sunday employees who most of the time or hardly ever are able to make up time spent with family and friends during the week.

PN10003

Do you see that?---I do.

PN10004

And so in the first two lines of that page, I read that as saying that 80 per cent of Sunday employees, based upon your survey results, are either – I withdraw that. Yes. Looking at the graphs on page 68, figure 47, if one wants to identify the proportion of shop, retail shop floor employees who never or hardly ever are able to make up time from Sunday work, one adds together – I think- - -?---52 and 15.

PN10005

Yes. Would that be right, 67 per cent?---Of all Sunday employees that can hardly ever or never make up time, yes

PN10006

I'm reading that correctly?---Yes.

PN10007

Thank you. Now, if I could ask you, page 69 of the report, the survey question included one about the belief of Sunday employees about the impact of Sunday work and whether or not there was an adverse impact on the health or development of their children. That's right?---I think it's on their health, not their children.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10008

Well, it's the bottom – I'm sorry, Dr Sands, you're right. At the top of page 69, there's a reference to their health and then it gets to their children's health and development?---Okay. You're correct, yes.

PN10009

Yes? And you note that 52 per cent of the Sunday employees who were in the survey, don't have any children. And so if one looks over the page, if we – looking at the graphs in figure 50- - -?---Mm-hm.

PN10010

- - -and just focusing on the general class of Sunday employees, if one excludes the 52 per cent who don't have children, so jus focusing on those who do have children, 14 out of 48, in terms of percentage points, or 29 per cent, believe that Sunday work does have an adverse impact on the health and development of their children. Is that's right?---That would be correct.

PN10011

Thank you, now just bear with me a moment. And if we turn to page 73 of your report the section which is 2.3.4, Sunday Staffing and Service Delivery, all of that page is drawn solely from the focus group work. That's correct?---That's correct.

PN10012

And if one goes over the page, to page 74 at paragraph 2.3.5, there's a heading "Willingness to Work Sunday". And in this section, as you say, in the first sentence under that heading, questions were asked of employees who do not work Sundays?---Correct.

PN10013

And the question – if you can go to page 124 of your report just to see the specific question that was asked?---Mm'hm.

PN10014

The respondents were asked, "You mention that you do not work Sundays. Please select the specific reasons why from the options below". And there's then some eight dot points?---Mm'hm.

PN10015

And the first dot point, "Contractual arrangements", is defined to mean, Monday to Friday contract?---Mm.

PN10016

So in other words, that means the person is employed just to work Monday to Friday?---Correct.

PN10017

All right. And in answer to this question, that was the – the largest proportion answered that that was the reason - - -?---Correct.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10018

That they did not work Sundays?---That's right.

PN10019

And the factors that could be selected or the reasons that could be selected, there was no option to include for a reason why the person didn't work Sundays, there was no reference to spending time with family, was there?---Can you repeat that? I think the fourth point refers to family.

PN10020

I see, in the brackets, "Spending time with family/ friends"?---Yes, there's a - - -

PN10021

Yes, I see. So that fourth point, you would suggest, would you, would capture both social life with friends but also family life?---One dimension of social life, yes.

PN10022

Yes?---There's other dimensions. Yes.

PN10023

I understand?---Yes.

PN10024

I understand. Now going back to page 74 of the report on this question, at about in the paragraph above figure 52 on the third line you say, "These findings suggest that shop floor employees would work Sundays if they could". Do you see that?---Can you just take me to – where was that, sorry, at page - - -

PN10025

Page 74?---Seventy-four, yes.

PN10026

About - - -?---Yes, I've got it.

PN10027

Do you see that?---Yes. These ones. I do.

PN10028

Now in saying that, you're assuming, aren't you, that those who indicated that they did not work on Sundays because of contractual arrangements or because the store in which they worked was closed, you're assuming that they would otherwise want to work?---They may well do.

PN10029

But you're making that assumption, are you not?---Correct.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10030

Thank you. And can I suggest to you that that assumption is unsound because a Monday to Friday employee faced with this question could rationally and

reasonably, when asked to identify the reasons why they don't work on Sundays, simply tick, "Contractual arrangements", I work Monday to Friday?---Correct.

PN10031

Thank you. And you'd also accept, would you, the suggestion that shop floor employees would work Sundays if they could – can I suggest that that is inconsistent with what appears at the top of page 75 where you say, "The vast majority of non-Sunday employees state that there is nothing that would motivate them to work on the shop floor on a Sunday"?---Correct. This was an open response where we asked - - -

PN10032

Yes?---Yes.

PN10033

So the strong message is that if you're working Monday to Friday, there's nothing that's going to motivate you to work on the Sunday?---That's a fair assumption.

PN10034

This part of your report is dealing with those shop floor employees who don't work on Sundays. Just going back to that sub-sample who did work on Sundays, there was no question asked in your survey as to whether or not those who did work on Sundays did so because there was a requirement to work on Sundays. Is that right?---No. To the best of my knowledge, no.

PN10035

Right. Do you agree that would have been a pertinent and useful question to ask, to understand why people work on Sundays, to get a fulsome understanding of the answer to that question?---You mean, in terms of people being forced to work on Sundays?---Well, if the part of the purpose of the research is to understand employee views and attitudes towards Sunday work, a relevant factor to ask is, "Well, are you – do you work on Sundays because you have to, because you're rostered or because your employer requires you to?" That would be a relevant thing to inquire about, would it not?---Look, sure, yes.

PN10036

Yes?---There's a whole lot of things that could be included. It's – yes.

PN10037

Yes. Now page 77 - - -?---Mm'hm.

PN10038

Earlier in your report in that introductory sections, you mentioned that in the survey respondents were also invited to undertake a simple choice task?---Mm'hm.

PN10039

Yes, and that choice task is set out at page 124 of your report. Sorry - - -?---Yes.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10040

Do you see that?---Yes.

PN10041

That's where respondents were asked this question?---Okay. Yes, yes.

PN10042

"We would like you to imagine that your employer revised the Sunday rate and now pays you X per cent more above your standard rate"?---Mm'hm.

PN10043

And then there's the scenario program to present different levels?---Correct.

PN10044

And then they had to express their preference for working on the Sunday at each of those levels. Is that right?---Not at each of those levels. People were randomly allocated to one of those levels, so across the, roughly 1,000 people for those ten groups or eleven groups, there would have been around 90 odd people in each group. It's a method of trying to understand the impact of the scenario - - -

PN10045

I see?---Or the rate of pay on the outcome. So each person only sees one scenario, as opposed to multiple. It's a - - -

PN10046

So there might be one group of 19 that - - -?---No, about 90, sorry.

PN10047

Ninety, I'm sorry?---Close to a hundred, yes.

PN10048

One group, what appears in front of them when they do the survey is, let us say, 10 per cent?---Correct, yes.

PN10049

I see. This was a question asked of all survey participants, was it not?---Correct.

PN10050

It wasn't a question asked just of those who work on a Sunday?---No, that's right.

PN10051

You understood in doing this research, that it was to be used by FCB Lawyers in this proceeding to seek a reduction in the Sunday penalty rate?---Correct.

PN10052

Do you agree that a more relevant simple choice task to set for the survey respondents to ascertain their willingness to work Sundays would have been firstly to direct the question to those currently working on Sundays?---The group could be split by that but there's no difference in terms of looking at the - so this is just the total sample but we do have that ability to split that data because we ask people if they do or don't work on Sundays.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10053

All right, and do you accept that given that the research task was to be used in a proceeding to seek a reduction in the penalty rate that the better question to ask was to rate their willingness to work, in the face of an X per cent cut in the penalty rate?---You could pose it either way.

PN10054

Well, can I suggest to you that the way I put it to you would have been more apposite to the nature of the task for which your research was being used?---Well, we could still work out a cut by looking at the 90 per cent as a reduction, so we can work out - and zero per cent is a reduction of zero penalty pay. So it goes both ways.

PN10055

You understand about framing questions in surveys?---Correct, there is no framing issues here.

PN10056

It's very important how one goes about framing a survey question, isn't it?---It is.

PN10057

And it's important that a survey question be framed and contextualised in a way referable to the broader population with which the sample is directed?---Correct. In this instance it's around pay increases from the base rate.

PN10058

Well, we weren't talking - the case that this research is being used for is not about pay increases, it's about pay cuts?---The point of the question is not to frame them to support the case. The question is to understand how differences in pay rates impact willingness to work, they're two separate issues. We're not framing the questions to get an outcome - - -

PN10059

No, I'm not suggesting that, Dr Sands, but I'm suggesting that a more useful and insightful question relevant to the task at hand, which was to produce research directed at the case for the reduction in penalty rates, would have been to ask respondents about their willingness to work in the face of a cut in penalty rates, do you accept that?---Not wholly. I believe that asking them that would pose a framing that's counterintuitive. What we're looking at here is from a base, from a zero per cent base, which is 100 per cent of what you currently get, looking at different levels, up to a double time, essentially. I think either way we would end up with the same question with the same answer.

PN10060

Well, do you know of a theory known as loss aversion?---Sure.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10061

Yes. And that - I'm going to simplify this, probably - hopefully not in an inaccurate way. But essentially loss aversion suggests that people value losses greater than gains?---Sure.

PN10062

Yes, that's a fair summary?---That's a vary, sure.

PN10063

Yes. And it's a recognised and acceptable theory in the world of surveying and research that you work in?---In the world of economics it is, yes.

PN10064

Yes. And in the world of engaging in research directed at understanding the preferences of employees, you would accept it would have relevance and applicability?---I'm sure it would. We're not econometricians so we're not setting out to - - -

PN10065

No. Do you accept that the way you framed this question, a simple choice question, didn't take account of the possibility of loss aversion?---It's - it's - you could debate that. It's - I believe the question is sound, but you could definitely frame an argument to that point.

PN10066

You accept there is some merit in the criticism I advanced?---I don't think it's a criticism, I think it's a different vary that could be put forward.

PN10067

Now, I want to move on to the last part of your research, which is the retailer perspective, part 3. This part of your research was based solely on interviews with retail managers?---A variety of people, yes, HR managers primarily.

PN10068

Yes. Different positions?---Correct.

PN10069

I think you set out the positions they held, but they were different managers in retail businesses?---That's correct.

PN10070

And as I read your report there were 14 interview sessions with 16 managers?---That's correct, 14 - - -

PN10071

Fourteen?---Retailers, yes.

PN10072

So that means that in one interview there were three managers present or at least - -?---I believe in two interviews there were two managers present if I'm right.

PN10073

It was a group session, was it?---It was a - yes, it was a three-way conversation. So I think you can tell here, yes, the 500, the large retailer, there were two people. And the one with 32, on page 85, there were two people.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10074

You say, at page 84 of your report, that the interviews provide a comprehensive overview of the impact of shop floor labour, including Sunday penalty rates on retail business costs and performance. You accept, though, that you don't make any claim that the results of this part of your research are representative of retailers generally?---This is qualitative research, yes, it's not statistically significant.

PN10075

So you agree with what I just said?---Correct.

PN10076

Thank you. Now, as part of the research with the retailer section, it was necessary to obtain introductions to retailers, wasn't it?---Correct.

PN10077

And it's your understanding that the introductions for retailer participants were facilitated and obtained by FCB Lawyers and retailer organisations, such as the Australian Retailer Association?---The approach we undertook was to identify a list of retailers in small, medium, and large categories and then to put that list back to FCB and ARA to see if they could obtain contacts. If they could we would go through that route, if they couldn't we sought alternative sources.

PN10078

All right. So the answer to my question is yes, and what you have just said is how that facilitation occurred, is that right?---Correct.

PN10079

I will just show you an email?---Okay. Yes.

PN10080

Have you got in front of you an email from Mr Nick Tindley to you and Carla Ferraro?---I do.

PN10081

Of 9 April 2015?---I do.

PN10082

Yes. So in this email Mr Tindley attaches feedback and thoughts on the retail employee's survey and focus group information, and then he goes on to state:

PN10083

I have also set out below the introductory piece that could go to retail businesses. Happy for any feedback or amendments to this.

PN10084

And it reads:

*** SEAN JAMES SANDS

XXN MR MOORE

PN10085

The Australia Centre of Retail Studies, ACRS, has been engaged by FCB Group on behalf of the Australian Retailers Association, the National Retail Association, the Australian National Retailers Association, the Master Grocers Association, to conduct research into a number of aspects of retail employer and employee experiences with Sunday trade. The research will be used by FCB Group in seeking a reduction in the Sunday penalty rate under the General Retail Industry Award as part of the Award Review 2014.

PN10086

And Mr Tindley goes on to say:

PN10087

If you think it requires greater encouragement then let me know, but I think this should trigger a preparedness to participate, and we can then assist if you meet resistance.

PN10088

?---Mm'hm.

PN10089

So you got that email?---I do.

PN10090

I tender that if the Commission pleases.

PN10091

JUSTICE ROSS: 4.

EXHIBIT #4 EMAIL FROM NICK TINDLEY TO SEAN SANDS AND CARLA FERRARO DATED 09/04/2015

PN10092

MR MOORE: Thank you, your Honour. The document that has been tendered is the email, but it includes the attachments, I wanted to provide the whole document as it was provided to us. We only seek to rely upon the cover page of it, the email, not the attachments.

PN10093

JUSTICE ROSS: Are you happy just to tender the first page?

PN10094

MR MOORE: Yes. Now, that template that Mr Tindley sent you, you revised and reviewed that, that's right?---Correct.

PN10095

And I will just show you this document now, 16 April?---Thanks.

PN10096

So this an email from you to Mr Tindley, ccd to Carla Ferraro?---Mm'hm.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10097

It reads:

PN10098

Hi Nick, please find attached stage 3 material, retailer interviews for review, as well as an email invitation template.

PN10099

If you go to the third page?---Mm-hm.

PN10100

That's the template that you prepared presumably on the basis of what had previously been sent to you by Mr Tindley?---Correct.

PN10101

All right, and that was an email that you sent to Mr Tindley?---That's correct.

PN10102

I tender that, your Honour.

EXHIBIT #SDA5 TEMPLATE EMAIL SENT TO MR TINDLEY ON 16/04

PN10103

It was necessary, Dr Sands, for you to obtain retailer interviewees through the agency of FCB and the retail employer organisations, that's right?---We did.

PN10104

Yes, and what you did - and I think you suggested this before - is that you provided some suggested retailers to contact for FCB or the ARA to contact?---Not to contact. It was to see if they had existing contacts. If they didn't we would then approach to make contact.

PN10105

You provided this list of suggested retailers. You provided that list to FCB and asked them to indicate to you whether they could or could not facilitate contact. That's right?---Yes, correct.

PN10106

Can I show you this document of 30 April. At the bottom of the page, three-quarters of the way down the bottom of the page there's an email from you to Mr Tindley where you state,

PN10107

Thanks, Nick. We are still awaiting ARA connections and have some interviews scheduled from ACRS contacts.

PN10108

?---Correct.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10109

And then at the top of the page Mr Tindley emails you on 30 April and he states,

PN10110

I have started mobilising all of the associations to have these introductions facilitated. We have sent a few emails this morning and will continue through the day. Violet, keep an eye out for emails from Rosemary Jacob from ARA, Ekaterini Karabatos from FCB, and Bianca Sito from NRA.

PN10111

That is an email at the bottom that you sent and an email from Mr Tindley that you received?---Correct.

PN10112

Thank you. I tender those, if the Commission pleases.

EXHIBIT #SDA6 EMAILS BETWEEN MR TINDLEY AND DR SEAN SANDS ON 30/04

PN10113

Looking at SDA6 and Mr Tindley's email, did you understand in reading that email that Mr Tindley was referring to the mobilisation of associations being the employer organisations, the ARA and the NRA?---Yes.

PN10114

Was it your understanding that the invitations that were sent out to employers were in the terms of the template which you sent to Mr Tindley on 16 April, which is exhibit SDA5?---That would be my understanding. I believe the associations passed on direct contact details to Violet who then made direct contact with the individuals.

PN10115

But it was your understanding, was it, that the terms of the emails sent out to the retailers was in the terms of the template which is attached to exhibit SDA5?---Yes. That template is actually for ACRS partners, the first line, as a valued partner of ACRS, so that would have been altered for other organisations.

PN10116

I see?---But generally, yes.

PN10117

Otherwise that would have been the form of the email that was sent out?---I would assume so, yes.

PN10118

Violet Lazarevich worked or works - - -?---Works.

PN10119

She is part of the central part of this research project?---She is.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10120

Did she confirm with you that a good response was obtained from the introductions?---A good response in terms of a good response rate or - - -

PN10121

Good response from the retailers wanting to be part of the - - -?---It was - from memory it was reasonably slow. We had to use a combination of sources. The retail association - the associations were able to provide us some of our contacts but we had to use a mix of our own and cold calls as well.

PN10122

Can I just show you this document then. You'll see that at the bottom of the page there's an email from Rosemary Jacob to Violet Lazarevich?---Mm-hm.

PN10123

"Subject, retail interviews, list of contacts for your reference." And it states,

PN10124

Hi Violet/Nick. I've sent out the email introductions to all on the list as attached, except for

PN10125

and there's names redacted?---Mm-hm.

PN10126

And then at the top of the page, Dr Violet Lazarevich responds to Rosemary Jacob saying,

PN10127

Thank you very much. We are already having a good response from your introductions. I really appreciate all your help.

PN10128

That is as you understood the situation?---Correct. I believe Rosemary was from the ARA so we had - it seems we had a good response rate from her contacts.

PN10129

Yes, all right. I tender that, your Honour.

EXHIBIT #SDA7 EMAILS BETWEEN ROSEMARY JACOB AND VIOLET LAZAREVICH

PN10130

So going back to the template which is exhibit SDA5, have you got that there? Sorry, it's within the - - -?---Yes, I have it.

PN10131

It's within the document. On the front is an email from you to Mr Tindley, 16 April?---Correct, yes, I have that.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10132

And the template is three pages in?---I have that, yes.

PN10133

If you look over that email, and I draw your attention to the last sentence in the first paragraph?---Mm-hm.

PN10134

Which states,

PN10135

The research will be used by FCB Group in seeking a reduction in the Sunday penalty rate under the General Retail Industry Award 2010 as part of the award review 2014.

PN10136

I take it you included that sentence because you wanted to motivate retailers to participate in the interviews?---Correct.

PN10137

Thank you. It was though something of a clarion call, wouldn't you say, for retailers who had strong views about Sunday penalty rates to come forward. Would you accept that?---All retailers we spoke to had strong views, yes.

PN10138

Just answer my question, Dr Sands. Would you not accept that it was a clarion call to any retailer who was pretty motivated to reduce Sunday penalties?---I think - how I would answer that call is in the question - sorry - is in our identification of retailers in the outset, there was no knowledge at that point that those retailers were or not in favour of reduction. We randomly selected small, medium, large retailers and then sought to find those retailers. This then came along so it wasn't a case of this being the first point, it was the random assessment or selection of retailers. Then yes, this email went out and hopefully that was an attraction to have them participate.

PN10139

You are an experienced market researcher?---Sure.

PN10140

You understand the importance when assembling a sample for survey or related research of insuring that the sample is representative of the broader population?---Correct.

PN10141

Do you accept that by telling retailers that the research will be used to seek a reduction in the Sunday penalty rate that may well have distorted the retailers who participated in the retailer interviews?---I wouldn't say it would distort them.

PN10142

Well, I will put the question again to you more clearly, I apologise?---That's okay.

*** SEAN JAMES SANDS

XXN MR MOORE

PN10143

Do you accept that by including that sentence in the template, you jeopardised the representativeness of the sample by making it more likely that retailers who have strong feelings in favour of a reduction of Sunday penalty rates would then participate in the interview?---That's a hard question to answer but potentially yes.

PN10144

Thank you, Dr Sands.

PN10145

JUSTICE ROSS: Any other cross-examination of Dr Sands? No.

PN10146

Can I ask you one question?---Yes.

PN10147

Going back to the shop floor focus groups, you mention that the interactions were recorded - it was audio recording?---Yes.

PN10148

What use was made of that?---That's a - basically a back-up. If anyone in the discussion is to find a verbatim quote - as you see here, we have verbatim quotes typed out - then we would go back, but because we do it basically straight after the groups, we tend to not use the audio recordings. And to be honest, not all focus groups - we use the party focus group rooms; we hire venues. Not all venues have capability to record, particularly in, I think, Hobart and Western Australia the focus group rooms were pretty average, but mostly in Victoria and New South Wales we use it as a back-up.

PN10149

Did you use it as a back-up on this occasion?---We didn't need to, because we transcribed post - we'd decompose post each focus group and built the document in an additive process. It tends to be better to have the three researchers in the room writing it straightaway. We tend to find that the most reliable. We use it as a form of triangulation, basically, for data.

PN10150

Thank you. Re-examination?

RE-EXAMINATION BY MR WHEELAHAN

[4.22 PM]

PN10151

MR WHEELAHAN: Dr Sands, at page 84 of your report, Mr Moore asked you questions about the sourcing of the retail managers and you mentioned there a total of 16 that were interviewed?---Correct.

PN10152

In your answer you said, "Well, some of those we source from our own contact, and some we cold-called"?---Correct.

*** SEAN JAMES SANDS

RXN MR WHEELAHAN

PN10153

Are you able to state how many of the 16 interviewed was a result of your own contacts and cold-calling?---Well, there were 14 unique interviews. It would have been roughly half that were provided through association, about four that we used throughout contacts and the rest were cold-calls, but roughly from memory.

PN10154

And the other two?---Are cold calls that we had to identify - look for HR managers, which we tend to use things like Linked In to identify who the HR manager is of a particular - - -

PN10155

About 10 from your own sources, is that right or not from association sources?---No, no, it was about - no, so about three or four from - well, about half associations and half from non, roughly.

PN10156

Thank you. No further questions.

PN10157

JUSTICE ROSS: Nothing further for the witness?

PN10158

Thank you for your evidence, Dr Sands. You are excused?---Thank you.

<THE WITNESS WITHDREW

[4.23 PM]

PN10159

JUSTICE ROSS: Nothing further for today? All right. Well, I will see some of you next Wednesday. We will adjourn.

ADJOURNED UNTIL WEDNESDAY, 30 SEPTEMBER 2015

[4.23 PM]

*** SEAN JAMES SANDS

RXN MR WHEELAHAN

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