



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

1052567

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

AM2014/305

s.156 - 4 yearly review of modern awards

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

Sydney

9.46 AM, MONDAY, 12 OCTOBER 2015

Continued from 9.00 AM, 12/10/2015

RESUMED

[9.46 AM]

PN12029

JUSTICE ROSS: Are there any preliminary matters to be mentioned? Did you sort out the issue involving the Pharmacy Guild or the notice to produce?

PN12030

MS WELLARD: Yes, your Honour. With respect to Dr Oliver my colleague Ms Deal(?) and I have had some discussions with the United Voice in the break. I understand that United Voice has provided an assurance that they will treat the order for production as though it was an order on Dr Oliver directly. What we don't actually know though is the return dated, and unfortunately I think that United Voice has left so I haven't been able to clarify any sort of agreed return date. Objections are to be filed on the 16th and I think our response to those objections is on the 23rd for the hearing on the 29th. So I would hope that anything that they are able to produce is produced at about the same time as their objections.

PN12031

JUSTICE ROSS: All right. Perhaps if you can have a discussion with them about the return date and then if you wouldn't mind just filing a short note with my associate as to what the agreed outcome is just so that we know where it's up to.

PN12032

MS WELLARD: If it pleases, your Honour.

PN12033

JUSTICE ROSS: Was there anything else in relation to the notices to produce?

PN12034

MR DIXON: I apologise, your Honour, was your Honour's question directed at the notice to produce generally?

PN12035

JUSTICE ROSS: Yes. I say with some trepidation. Yes.

PN12036

MR DIXON: As I indicated earlier in the mention there is now a potential overlap with the notices that have been filed by Ai Group which haven't been issued. In relation to the SDA, the SDA has suggested a proposal that they put on some additional material or the tribunal might direct them to do so which would then go to another member for assessing whether there has been waiver of privilege or not.

PN12037

JUSTICE ROSS: So there's a legal professional privilege objection, is that right?

PN12038

MR SECK: There is, Your Honour.

PN12039

MR DIXON: There is. Now the ACTU has filed objection to producing material. It's not clear on what basis, but we surmise that it might be on the same basis.

PN12040

JUSTICE ROSS: I think what we would probably do with all of those is when the matters are brought on at 12.15, or we will see how the evidence goes this morning, but at some point during the day then those matters can be clarified and the way we dealt with a similar objection in the earlier tranche was to refer the matter to another member for the resolution of the legal professional privilege point, because inevitably you have to look at the material and we don't particularly want to look at the material.

PN12041

MR DIXON: We respectfully adopt that proposal, your Honour, but I am not sure that we are going to be able to productively come to any conclusions at 12.15 or thereabouts, other than that further directions are going to have to be given to the SDA to produce some material before it goes to another member, and the ACTU as well.

PN12042

JUSTICE ROSS: Yes, in relation to those objections, but there are other objections that are taken as well.

PN12043

MR DIXON: Then the other question would be if our orders are granted then they may impact and it might be preferable for all of that material to be heard at one time.

PN12044

JUSTICE ROSS: Happily for me I am not dealing with those, but at 12.15 - we will come to it at the conclusion of the evidence, and I would certainly encourage a conversation, a broader conversation between all of the parties and if collectively there's a preferred alternate course then we would certainly want to hear about that. Thank you.

PN12045

MR SECK: Your Honour, there's just one more issue, at least from the Guild's point of view; the unions have now filed their lay evidence in these proceedings. Two lay witness statements have been filed, one by the SDA and one by APESMA in relation to the pharmacy industry.

PN12046

JUSTICE ROSS: They were to be filed by 5 or 6 October, weren't they?

PN12047

MR SECK: I think that's right, your Honour. APESMA have filed one statement and it has been anonymised, so it's hard - we're in the position where we can't really do any preparation. We have written to APESMA on numerous occasions to obtain a de-identified copy which is shown to the solicitors so we can at least

do some preparation in respect of that witness and ascertain whether or not it's necessary to serve any notices - - -

PN12048

JUSTICE ROSS: Yes, I am not sure how we would be assisted by an anonymous statement.

PN12049

MR SECK: Indeed.

PN12050

JUSTICE ROSS: If there's a reason for confidentiality or some form of suppression of the name then we can deal with that. APESMA is not here. Their witness won't be heard for some time.

PN12051

MR SECK: I think in two weeks' time, your Honour, so there's no degree of urgency involved other than having to issue any notice to produce against the witness or any other party.

PN12052

JUSTICE ROSS: You can direct the notice to produce against APESMA for the moment.

PN12053

MR SECK: We can do that, your Honour, but what we would be seeking, your Honour, so we can do further research is a copy which is not anonymised.

PN12054

JUSTICE ROSS: No, that's fine. What we will do is we will deal with that matter at 9.30 on Wednesday of this week. We will inform APESMA of our intention to deal with it and they can be here and hear what you have to say. In the meantime you should talk to them and see if you can deal with it that way.

PN12055

MR SECK: We will do it that way, your Honour.

PN12056

JUSTICE ROSS: All right.

PN12057

MR MOORE: Your Honour, Ms Forsyth is going to deal with some of these preliminary matters for the SDA.

PN12058

JUSTICE ROSS: Sure, thanks. Yes, Ms Forsyth.

PN12059

MS FORSYTH: Your Honour, the SDA does have some limited objections to what is being sought by way of the notices to produce. Your Honour, we have been served with notices to produce from two sources; one from FCB Lawyers on behalf of the ARA & Co, and additionally a notice to produce that has been served

by Meridian Lawyers on behalf of the Pharmacy Guild. If I can turn to just deal in short compass with the first tranche being the ARA & Co.

PN12060

The documents fall into four categories. We don't have any difficulty with providing category 1, being the payslips and the rosters, save for the fact that we say asking for those documents over a two month period is somewhat onerous and should be restricted to a month period. We don't really see the relevance of the witnesses needing to produce their contracts of employment, but don't - - -

PN12061

JUSTICE ROSS: Of if they had one, yes.

PN12062

MS FORSYTH: Indeed. The group certificates we are happy to provide, but we do take issue with the fourth category and that is with respect to the notices of assessment from the Australian Tax Office. We say in light of the fact that the employers will be in receipt of our witnesses payslips as well as the group certificates that should more than suffice in order to attest the evidence of our witnesses.

PN12063

JUSTICE ROSS: All right. The employers can take that on notice and the matter can be dealt with at 12.15.

PN12064

MS FORSYTH: And I take it, your Honour, in that case you intend to deal with the notice to produce with respect to our Pharmacy Guild witness similarly at 12.15?

PN12065

JUSTICE ROSS: Yes.

PN12066

MS FORSYTH: At least it will be down then and we will see what transpires from all the rest of it, but the notices to produce in respect of the lay witnesses are at least more confined and the nature of the objections narrower.

PN12067

MS FORSYTH: Thank you, your Honour.

PN12068

JUSTICE ROSS: Have you had a discussion about the objections to the evidence?

PN12069

MR SECK: My learned friend and I have had discussions, your Honour, and we have sought to reach agreement. It will be necessary for the Commission to at least make rulings on the first statement before we can come to an agreement on other issues.

PN12070

JUSTICE ROSS: All right, well let's deal with the objections in the first statement.

PN12071

MR SECK: My learned friend Mr Dixon would like just to address on one point before I go ahead.

PN12072

MR DIXON: I appreciate - I didn't mean to interrupt my learned friend. In relation to SDA objections to the fast food evidence, your Honour, there are two very small matters that are outstanding. We think that that will be capable of resolution. We would ask that they not be dealt with now, and on that basis may we be excused to return at 12.15?

PN12073

JUSTICE ROSS: We will obviously deal with any objections to the witnesses today. We would expect that the rulings that we make on that will send a sufficient message to the parties as to our intent and they can take that on board and have further discussions between themselves and I would be confident they would be able to resolve any outstanding objections.

PN12074

MR DIXON: On that basis may I be excused to return later?

PN12075

JUSTICE ROSS: Certainly.

PN12076

MR DIXON: If the Commission pleases.

PN12077

JUSTICE ROSS: We have read the objections in relation to Mr Tassone. Is there anything further you want to say about those, Mr Moore?

PN12078

MR MOORE: Your Honour, we have narrowed the controversy somewhat, so objection was taken to paragraphs 5 and 6.

PN12079

JUSTICE ROSS: Yes.

PN12080

MR MOORE: We don't press those objections, really by way of background.

PN12081

JUSTICE ROSS: Yes.

PN12082

MR MOORE: Paragraph 11, it has been agreed that that paragraph won't be read.

PN12083

JUSTICE ROSS: All of it?

PN12084

MR MOORE: Yes.

PN12085

MR SECK: That's so, Your Honour. As I understand it, your Honour, from the Commission's previous rulings anything in the nature - - -

PN12086

JUSTICE ROSS: No, that's true.

PN12087

MR SECK: Employee hearsay will not be allowed, but community hearsay will. So on the basis of those rulings we have not read that paragraph.

PN12088

JUSTICE ROSS: That's broadly right, yes. Mr Moore?

PN12089

MR MOORE: That leaves in controversy two subject matters. The first is paragraphs 13 and 14.

PN12090

JUSTICE ROSS: You say that's an argument at the conclusion.

PN12091

MR MOORE: Well we have two grounds for objection; the first is that it's an argument and conclusion advanced without any basis, and it's an assertion and an argument about the effect of penalty rates.

PN12092

JUSTICE ROSS: Well, on their business.

PN12093

MR MOORE: On their business, that is so, but there's no basis provided for that.

PN12094

JUSTICE ROSS: That might go to the weight that's attributed to it.

PN12095

MR MOORE: It may. The second basis of challenge is you might note, the Bench notes there's a reference in the second line to challenging, it's challenging to maintain a sustainable level of profit. We have an objection to these assertions which appear throughout the witness statements around penalty rates impacting upon profitability on the basis that, as we understand it, the Commission has determined in relation to a notice to produce issued seeking production of documents relating to assertions of profitability that those assertions are not relevant to the proceeding. If that's so and the SDA hasn't had the opportunity to obtain production of documents underpinning and supporting claims of profitability, well it must follow that the claims made by witnesses to the same effect are also not relevant.

PN12096

COMMISSIONER LEE: Mr Moore, the ruling in relation to profitability we said that those documents were not relevant because it wasn't a capacity to pay case, that's why we didn't want the material. It was in that context, where we said there is sufficient to cross-examine on what is left.

PN12097

MR MOORE: My understanding, your Honour, is if it's understood as not being a capacity to pay case that is, in my respectful view, a descriptor of a category of evidence that a witness proposes to give. That category of evidence is in relation to her assertions of profitability. So in my view if it's called a capacity to pay case that doesn't change - if that label is applied to this evidence that doesn't change the substance of the ruling on the obtaining of those documents revealing or going to profitability. I mean, we're in a situation where - - -

PN12098

JUSTICE ROSS: But look, in in relation to paragraph 13, I'm not sure how much weight we could give to a statement that - leave aside the questions that you've raised, but I'm not sure, speaking for myself, how much weight I would give to a statement that says it's challenging to maintain a sustainable level of profit.

PN12099

MR MOORE: Yes.

PN12100

JUSTICE ROSS: Because it doesn't say it can't be and it doesn't say what a sustainable level of profit is or what their current level of profit is.

PN12101

MR MOORE: That's so, your Honour. A number of the other witnesses are more specific.

PN12102

JUSTICE ROSS: They are, yes.

PN12103

MR MOORE: And they go further and don't use the word "challenging".

PN12104

JUSTICE ROSS: No.

PN12105

MR MOORE: And go, in an unqualified way, to say it is not profitable to trade in certain hours.

PN12106

JUSTICE ROSS: Yes.

PN12107

MR MOORE: So squarely put in issue the question of profitability of trading and extended hours. Now, the SDA has not had an opportunity to test those claims by obtaining production of documents in respect of those matters.

PN12108

JUSTICE ROSS: You can seek specific information from each of the witnesses.

PN12109

MR MOORE: Yes.

PN12110

JUSTICE ROSS: They've said that it's not profitable for them to trade on a Sunday. You can ask them for the details of their expenses on the Sunday.

PN12111

MR MOORE: That is so. That's how we put the objection.

PN12112

JUSTICE ROSS: Yes. Okay. Anything, Mr Seck.

PN12113

MR SECK: Nothing further, your Honour.

PN12114

JUSTICE ROSS: Is it only 13 and 14, Mr Moore?

PN12115

MR MOORE: The remaining objection in this statement is paragraph 19.

PN12116

JUSTICE ROSS: That's a community hearsay issue.

PN12117

MR MOORE: I've heard that phrase this morning, and was rather puzzled. I don't know. That's a notion that's somewhat alien - completely alien to me.

PN12118

JUSTICE ROSS: Look, it's hearsay, it's - but it has been admitted in previous - similar statements have been admitted in respect of previous statements on the basis that really, it's a matter of weight, and the witness can be asked what the basis is of it if you choose. It's probably more of the basis that they live in the community and they deal with them in their role as a pharmacist.

PN12119

MR MOORE: Well, in paragraph - I understand how - - -

PN12120

JUSTICE ROSS: Look, the employee hearsay is - - -

PN12121

MR MOORE: It's a different category, as I understand it.

PN12122

JUSTICE ROSS: It is, yes.

PN12123

MR MOORE: I can't say any more than identify it being hearsay.

PN12124

JUSTICE ROSS: No. Yes.

PN12125

MR MOORE: That's the extent of the objections.

PN12126

JUSTICE ROSS: All right.

PN12127

MR MOORE: And I can indicate, as your Honour observed, that following on from the ruling in relation to these paragraphs, we will apply ourselves in a pragmatic and sensible way to apply the same approach to the remainders.

PN12128

JUSTICE ROSS: No, I thought you would.

PN12129

MR MOORE: There might be the odd additional objection, but - - -

PN12130

JUSTICE ROSS: No, there are some that perhaps stray outside the boundaries of our previous rulings, I've noted in one of the other statements. All right. Thank you. Anything further from you, Mr Seck?

PN12131

MR SECK: No, your Honour.

PN12132

JUSTICE ROSS: Mr Moore, we don't propose to uphold the objections on paragraphs 13 and 14. As we've said, the witness can be asked questions in relation to those matters, and ultimately it will be a question of weight. Similarly in relation to 19, the witness can be asked questions about the basis of his - the view he there expresses. We accept that it's hearsay and we accept that that will reduce the weight that we would normally attach to a statement from a witness.

PN12133

MR MOORE: If the Commission pleases.

PN12134

JUSTICE ROSS: Can we call the first witness, Mr Tassone.

PN12135

MR SECK: May I call Anthony Tassone.

PN12136

JUSTICE ROSS: Can I just get any other witnesses here can be excluded from the room.

PN12137

MR SECK: We've asked them to remain outside, your Honour.

PN12138

JUSTICE ROSS: Yes. All right.

PN12139

THE ASSOCIATE: Please state your full name and address.

PN12140

MR TASSONE: My name is Anthony Vincent Tassone. My address is (address supplied)

<ANTHONY VINCENT TASSONE, SWORN [10.05 AM]

EXAMINATION-IN-CHIEF BY MR SECK [10.05 AM]

PN12141

MR SECK: Mr Tassone, what's your current occupation?---I'm the co-proprietor at Casey Central Pharmacy, Narre Warren South. And I do have a role with the Pharmacy Guild, as well as their branch president of the Victorian branch of the Guild.

PN12142

Mr Tassone, you have prepared a statement in these proceedings. That's correct?---Yes.

PN12143

It's a statement which was sworn on 10 August 2015?---Yes.

PN12144

Do you have a copy of your statement with you in the witness box?---Yes.

PN12145

Have you read that statement recently, Mr Tassone?---Yes, I have.

PN12146

Do you wish to make any changes to your statement?---It's just for the benefit of the Full Bench that the trading hours of my business that are covered in section 10 as of next week will be reduced to closing at 7 pm as on Monday, 19 October, just to give context. And also I make mention to an upcoming opening of a medical centre in the area, that I make mention that it could be a 24-hour, seven day a week practice. It appears likely that it's more likely to be a late night medical centre, closing at 11 pm or midnight, not 24 hours. So I just wanted to give that update of context since I swore this affidavit.

PN12147

JUSTICE ROSS: Sorry, what's the change to the closing date again?---From on weeknights, your Honour - - -

*** ANTHONY VINCENT TASSONE

XN MR SECK

PN12148

Monday to Friday?---Monday to Friday, closing at 7 pm.

PN12149

Instead of 9 pm?---Yes. And also on public holidays we have chosen to close - to open from 9 am to 1 pm.

PN12150

MR SECK: Just for the record, Mr Tassone, the references to the 24/7 medical centre?---Yes.

PN12151

Can you confirm which paragraphs they're mentioned in?---There's a mention in paragraph 16 and paragraph 27.

PN12152

Mr Tassone, I understand you also wish to make an addition to paragraph 21 of your statement about the lease?---Yes.

PN12153

Yes. For the Full Bench's benefit, my pharmacy is located in a shopping centre, with the lessor being Westfield. It's currently undergoing a redevelopment. I had to surrender a lease recently due to a demolition and redevelopment. I'm in a current lease, which is what we call a bridging lease, which is a temporary lease during the redevelopment, and I have signed and agreed to a 10-year lease that will commence on the opening of the new shopping centre in March 2016. In my previous lease and the 10-year lease that commences from March 2016 there are core trading hours that are explicitly stated within the lease document. In the bridging lease that I currently have, which is basically from August to the anticipated opening of the new centre, being in March, there isn't the same explicit details of core business hours that the centre expects because it's during a redevelopment phase, but there is an expectation of trade over seven days that we do need to have some mutual agreement with the landlord, but it's just not as explicitly stated in my current bridging lease leading up to my new lease commencing in March 2016.

PN12154

JUSTICE ROSS: But you have entered into the 10-year lease, haven't you?---Yes. That has been executed.

PN12155

Which is the same - provides the same core hours as your current lease, not the bridging one?---Yes. Largely the same, yes.

PN12156

MR SECK: Mr Tassone, do you wish to make any further changes to your statement?---No, I don't.

*** ANTHONY VINCENT TASSONE

XN MR SECK

PN12157

Are the contents of your statement true and correct to the best of your knowledge and belief?---Yes.

PN12158

May it please the Commission. I tender the statement of Anthony Tassone sworn 10 August two thousand - - -

PN12159

JUSTICE ROSS: We note that paragraph 11 has been struck out.

PN12160

MR SECK: Yes, your Honour. Subject to that.

PN12161

JUSTICE ROSS: We will mark that exhibit PG2.

**EXHIBIT #PG2 WITNESS STATEMENT OF ANTHONY TASSONE
AS AMENDED DATED 10 AUGUST.**

CROSS-EXAMINATION BY MR MOORE

[10.09 AM]

PN12162

MR MOORE: Mr Tassone, you became president of the Victorian branch of the Pharmacy Guild in about 2013. Is that right?---Yes.

PN12163

Yes. And am I right in thinking that you became the proprietor of the Casey Central Pharmacy in 2006?---Yes.

PN12164

The trading hours that you set out in paragraph 10, and I note somewhere in your statement you refer to a change with New Year's Day?---Yes.

PN12165

Putting that to one side, the trading hours that you've listed in paragraph 10, have those hours pretty much remained constant since you became the proprietor in 2006, or have they changed?---Public holidays weren't 9 am to 6 pm, when I first become a co-proprietor of the business. There was occasions when we did open on Good Friday.

PN12166

Right?---Apart from that, the other hours did not – haven't changed.

PN12167

So the Monday to Sunday trading hours have been unchanged throughout your proprietorship?---Yes, up until the change commencing next week, yes.

PN12168

Yes, thank you. I understand you've got a bridging lease now. When did that start, approximately?---End of July, early August, because of transitions or relocation.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12169

I see, and the core trading hours that are in your lease that was before the bridging lease- - -?---Yes.

PN12170

- - -they reflect, at least Monday to Sunday, the hours in paragraph 10?---In paragraph 10, the core hours of the centre, to my best recollection in the lease, do not impose 9 pm closing on week nights, except for a Friday night, to the best of my recollection.

PN12171

So your practice, over the period of your proprietorship to trade until 9 pm on weekdays, has been in excess of your core lease requirements, at least from Monday to Thursday?---Yes.

PN12172

I was just looking at the – I note that you say that there's four proprietors. You're in partnership, are you?---I am in partnership and – I apologise. There's five co-proprietors but only four of them actually work within the business. There's a-
- -

PN12173

So there's actually five partners?---There is five co-proprietors within the business, but only four work within the business.

PN12174

I see?---My apologies, your Honour, for that.

PN12175

And you say that the four who work in the business, one of whom is you, I take it?---Yes.

PN12176

You work part-time?---Yes.

PN12177

The four of you work part-time?--- Yes.

PN12178

And so how many hours a week do you work in the business?---I work every Friday and one to two Saturdays a month, so it varies, but at least 9 to 10 hours a week, on average.

PN12179

And is that typical of the other three partners?---It varies amongst them. Some work two to three days a week, some might only work one or so days a week.

PN12180

And do you have interests in any other pharmacies, as a partner or proprietor?---Not at this point.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12181

Have you over the past 9 years?---Yes. So from 2006 to 2009 I had an interest in two other pharmacies in the Narre Warren area. And I say not at this point, because I'm anticipating opening a new pharmacy in December of this year, a Greenfield site.

PN12182

I see. Looking at the number of employees you've set out, you say in paragraph 7 that the pharmacy employs 19 people. And when I add up the four co-proprietors you refer to in paragraph 8 and then those listed in paragraph 9, I get 14?---Mm-hm.

PN12183

Are you able to explain the difference? You say there's 19 employed. Who are the other five?---There is a full-time retail manager that hasn't been reflected in the nine. Excuse me, so four co-proprietors, plus one, six, seven, 11, 12 – in 9(c), it says:

PN12184

One full-time and five part-time.

PN12185

There's an error in my mathematics, is it? It looks like it is. Thank you for that. Now, the Greenfields Pharmacy that you referred to, that's not currently open?---No.

PN12186

Now, you say in paragraph 17, at the end of the paragraph:

PN12187

Therefore the pharmacy has to open when the business may not be profitable and this may be on a Sunday morning or on some public holidays.

PN12188

And in paragraph 13 you refer to the current penalty rates making it challenging to maintain a sustainable level of profit. I take it from the words you've used there, that you haven't specifically examined and determined whether it's profitable, whether the pharmacy is profitable on a Sunday?---To my best recollection, on past examination of some public holidays, it hasn't been profitable for a day's trade.

PN12189

I was asking you about Sunday?---Sorry. On Sundays, I wouldn't say it's consistently unprofitable. There are occasions where it may not be profitable on a Sunday.

PN12190

This is your impression, is it?---It's based on what I have reviewed of the figures previously, but I haven't examined them closely very recently.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12191

I see, so what you say in paragraph 17 isn't the result of any specific examination that you've undertaken in recent times about the profitability of trading Sunday?---Not very recently.

PN12192

And nor is it the basis of any specific examination or consideration you've undertaken in recent times about the profitability of the trade on public holidays?---Public holidays we have a greater, or I have a greater level of confidence to say that it hasn't been profitable to trade on those days, particularly with having a recent public holiday.

PN12193

A greater level of confidence?---Yes, yes, so that examining the gross profit levels of trade for that day, that they weren't at a level that would necessarily cover the wages and costs of operating that day.

PN12194

Are you talking about a particular public holiday of recent times in Victoria?---This year. Yes, the public holidays this year.

PN12195

So public holidays this year?---Yes.

PN12196

You're not just referring to one, but a number, are you?---Yes. Queen's Birthday and the recent Grand Final eve public holiday that Victoria instigated.

PN12197

So your conclusions about, or your claim that it's not profitable or may not be profitable to trade on public holidays is based upon your consideration of matters related to those two public holidays?---Well, they're recent examples, but there are other examples that have presented over the course of being a co-proprietor where there has been – may not have made a profit, but they're two recent examples that come to mind.

PN12198

Well, when you looked at those two recent examples, did you calculate the additional amounts that you paid in penalty rates on those days, beyond the ordinary time rate of pay?---Well, the public holiday rates of pay are double-time and a half and those additional rates of pay constituted in the hundreds – in a level that did make it unprofitable to trade on that day.

PN12199

All right, so how did you calculate these amounts that were paid on that day?---Through our- - -

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12200

To staff?---Yes, through our – we have a payroll system that can determine rates paid on a given period and our point of sale software can produce reports and figures that show gross profit levels from trading for a period.

PN12201

At a point in time?---For a point in time, yes.

PN12202

Gross profit on a particular day?---Yes.

PN12203

So did you determine the gross profit on these two particular public holidays, did you?---Well, it was in the negative.

PN12204

No, I am asking you did you determine using the payroll system - - -?---I'm sorry, sorry, I - - -

PN12205

- - - the gross profit on those two days?---So the gross profit - sorry, the gross profit, yes, but the net profit, sorry, was showing a loss.

PN12206

What's the difference between the gross profit and the net profit?---A gross profit is a profit level that is from the result of trade, so the profit between the price of the good being sold and what you pay for it, and the net profit accounts for expenses.

PN12207

So you examined, did you - is your evidence that you looked at the net profit of the two days trade associated with the Queen's Birthday weekend and the recent grand final public holiday?---Well, I determined that we would have made a loss.

PN12208

Did you look at the payroll system that you described before that showed that?---In consultation with my co proprietor who does the bookkeeping and wages we determined we would have made a loss. I can't specifically say right now what the magnitude of that loss would have been.

PN12209

So you traded on those two days?---Yes.

PN12210

So your evidence to this Commission is that on the basis of the payroll system you say your records show that you made a net loss on those two days?---That's my understanding.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12211

I call for the production if the Commission pleases of the payroll records to which the witness has referred detailing the net profit or loss in relation to the Queen's Birthday weekend in 2015 and the recent grand final public holiday.

PN12212

JUSTICE ROSS: Can you provide that material, Mr Tassone?---Yes.

PN12213

I appreciate you won't have it on you at the moment?---Yes, your Honour.

PN12214

All right. If you can provide it to those who are instructing - the party that's called you and then they will provide it to Mr Moore.

PN12215

MR MOORE: Thank you. As a proprietor since 2006, Mr Tassone, you understood that the Pharmacy Industry Award 2010, the modern award, commenced operation in 2010?---Yes.

PN12216

And you understand that before that time minimum terms and conditions for employees were prescribed by different awards?---I have a recollection that there would have been some provisions like that, yes.

PN12217

Does it ring a bell that before 2010 the pharmacists that you employ their minimum terms and conditions were prescribed by the Community Pharmacy Award 1998?---Yes.

PN12218

And the pharmacy assistants that you employ their terms and conditions before 2010 were prescribed the Shop Distributors and Allied Employees Association - Victorian Pharmacy Assistants Award 2000?---I was aware that there was separate awards and the modern award brought agreements together.

PN12219

Yes. So before the modern award there was one award that I referred to before that covered the pharmacists and there was another award which covered the pharmacy assistants?---Yes.

PN12220

And that award I can tell you was called the Shop Distributors and Allied Employees Association - Victorian Pharmacy Assistants Award 2000. Does that ring a bell?---Yes, I believe so.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12221

You understood that both of those awards before the current award commenced operation in 2010 that both of those awards prescribed an entitlement for employees to payment of double time for work on Sundays?---I would have

obliged by the obligations of the award. So if that was what it was at the time then yes.

PN12222

You recollect that - - ?---Yes, there would have been, yes.

PN12223

Well, coming at it more generally currently the Pharmacy Industry Award 2010 requires you to pay double time for work on a Sunday?---Yes.

PN12224

And I am suggesting to you that that was the same obligation you were under before 2010?---Yes.

PN12225

Thank you. I take it that your pharmacy has generally been profitable since you started running it in 2006?---This year has been a somewhat challenging year for a number of factors, but prior to this year it has been profitable, but this year has been some exception.

PN12226

JUSTICE ROSS: When you say this year which period are you referring to, this financial year?---This - the latter part of the most recent financial year, for a range of reasons, your Honour.

PN12227

MR MOORE: It's been a tough year financially, 2015, has it, the calendar year?---The second half of the most recent financial year has been a difficult year financially for our business.

PN12228

Would I be right in surmising that in your mind that that would be because of these works that are occurring in the shopping centre at which the pharmacy is located?---That's one of several factors, yes.

PN12229

Coming back to the awards do you agree with this, when I look at the awards, the current award, that is the modern award, the Pharmacy Industry Award 2010, when I look at that award as against the two awards that I referred to before which applied before 2010 the only provision in respect of penalty rates that is more onerous for you as a pharmacy proprietor was in relation to public holidays, which now under the modern award fixes an entitlement of employees of double time and a half, whereas under the pre-existing arrangements it was double time. Do you agree with that?---I apologise I don't have a firm recollection of penalty rates from previous award agreements. I'm not - - -

PN12230

So you're not sure?---I'm not sure, I'm sorry.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12231

Can I suggest to you - if you don't know you don't know - can I suggest to you that the modern award has in fact reduced your payment obligations in relation to certain times of the week, let's deal with Mondays to Fridays. Do you understand that the modern award imposes lesser burdens or obligations on you as an employer than the previous awards did in relation to work between 6 and 7 pm Monday to Friday?---I have to be honest I haven't scrutinised the comparison. I don't really know, I'm not sure, I'm sorry.

PN12232

All right, to be more specific under both the award applying to pharmacists and the award applying to pharmacy assistants those imposed a penalty of time and a quarter for work performed between 6 pm and 7 pm Monday to Friday. Does that ring a bell?---I have a recollection of something like that, but as I said I can't say I can specifically nail down penalty rates from previous award agreements five or six years ago, and part of the reason is, is that whilst being a co-proprietor and having obligations of course one of my co-proprietors handles the payroll more so than I do.

PN12233

I see, so of the five co-proprietors the question of - Mr Tassone, I was asking you about your co-proprietors. So one of the other co-proprietors has within it a portfolio of responsibilities, employment and payroll matters, not you?---Yes. Yes, they do it more so than I do. I have a good understanding of the - I have a better understanding of the current penalty rates regime than compared to previous agreements.

PN12234

When you say previous agreements they were always awards?---Sorry, my apologies.

PN12235

Have you had employees under Australian Workplace Agreements?---No, we haven't. Sorry for the confusion.

PN12236

Any other type of agreement?---Not to my knowledge.

PN12237

With your better understanding of provisions provided for by the current modern award, you would understand that for 6 pm to 7 pm, Monday to Friday, there is no penalty, is there?---My recollection is that there is a time and a quarter loading from 7 pm to 9 pm, off the top of my head.

PN12238

That wasn't my question?---Yes.

PN12239

Do you want me to repeat the question?---Please, yes.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12240

So between 6 pm and 7 pm, you understand that there is no obligation to pay penalty rates Monday to Friday?---Yes, I do understand that.

PN12241

Before 2010, you had an obligation to pay penalty rates of time and a quarter in those hours. You understand that?---I'm not disputing. I can't recollect.

PN12242

Okay. Thank you?---Yes.

PN12243

Monday to Friday between 7 pm and 8 pm, there is an obligation under the modern award to pay employees time and a half. Do you understand that?---Is that under the current award?

PN12244

Yes?---From 7 pm until?

PN12245

8 pm?---On which days, sorry?

PN12246

Weekdays?---I'd have to double-check what the specific loading is. I would have to double-check whether it was time and a quarter or time and a half for that period, but - - -

PN12247

Yes, I understand you don't necessarily have that information at the forefront of your mind. Can I suggest to you that between 7 pm and 8 pm on weeknights, the applicable penalty rates for pharmacists have been reduced under the modern award from double time to time and a half. Do you accept that that is so?---Yes. I'm not disputing whether there's a change from previous awards.

PN12248

Can I turn to pharmacy assistants on Saturdays. Do you recall that before the modern award commenced in 2010, hours worked under the Pharmacy Assistants Award after midday on Saturdays were treated as overtime? Do you recall that?---Can you repeat the question? Particularly the second part.

PN12249

Certainly. Do you recall that before 2010 under the award that governed pharmacy assistants, that work performed after midday on a Saturday was to be treated and paid as overtime?---I do have some recollection of that type of - - -

PN12250

Yes?---Some significantly bigger loading after midday, yes.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12251

It was significant, wasn't it? Do you recollect that it was time and a half in the overtime provisions before 2010 for pharmacy assistants for the first three hours

of overtime - so that would be the first three hours after midday on a Saturday - and then double time thereafter?---Consistently with my previous answers, I apologise. I can't really recollect the penalty rate regimes from the previous award thoroughly. I'm not disputing it, but - - -

PN12252

All right. Do you accept that the penalty obligations for pharmacy assistants under the modern award for Saturday afternoons are substantially less than what they were prior to the modern award?---They are less, yes.

PN12253

You now have to pay time and a quarter - - -?---Yes.

PN12254

- - - between 8 pm and 6 pm?---Yes.

PN12255

Before 2010, you had to pay overtime after midday?---Yes. I'm not disputing the overtime from which part of the day it commenced, but I do recall something of that nature.

PN12256

Yes?---Yes.

PN12257

In light of what I've just taken you through about the differences between the awards that applied prior to 2010 and the provision made by the modern award now, do you agree that the modern award has brought about substantial reductions in your minimum obligations in respect of penalty rates?---I personally feel that on Sundays and public holidays there remains a significant obligation, but I don't - - -

PN12258

Well, Sundays is the same, is it not?---Can you repeat that question?

PN12259

Sundays is the same. You accepted before that there has not been any change in the Sunday penalty rate?---I guess what I'm trying to say is that in the current modern award, there is - from an employer's perspective - a significant difference in pay for a Sunday to public holiday compared to a base award rate. I don't dispute that there have been changes to penalty rates in other parts of the week compared to a previous award regime.

PN12260

You agreed that you understand there has not been any change in relation to Sunday penalties before and after 2010?---As I said to you previously, I can't recall specific penalty rates from previous awards, but I do feel that the current penalty rates provisions are of a nature that does make it challenging for businesses and a disincentive to open on Sundays and public holidays.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12261

You have come to this Commission to assist it in its review, have you not?---Yes.

PN12262

Have you not endeavoured to direct yourself to considering how there has been any change and the extent of any change in relation to minimum award obligations since 2010?---(No audible reply)

PN12263

You don't really know, do you?---You're asking me questions, with the utmost respect, prior to 2010 that I admit I don't have the full recollection of exact penalty rates. I have come here to assist the Commission in a modern award review since 2010.

PN12264

Mr Tassone, the submission will be put in due course to this Commission that your pharmacy has enjoyed significant reductions in penalty rate obligations since the introduction of the modern award. Do you agree with that?

PN12265

MR SECK: Objection. He says the submission will be made - you can put factual propositions to him, but you can't put, "Do you agree with the submission being - - -"

PN12266

JUSTICE ROSS: He's putting the witness on notice that that will be the submission that will be made and he's asking if he has got anything he wants to say about that.

PN12267

MR MOORE: I was just being fair.

PN12268

MR SECK: I withdraw the objection.

PN12269

MR MOORE: I'm happy to be unfair to the witness if he wants.

PN12270

MR SECK: He needs to answer the question.

PN12271

MR MOORE: Would you like me to repeat the question?---Yes, please.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12272

The submission will be put in due course to this Commission that your pharmacy has enjoyed significant reductions in penalty rate obligations since the introduction of the modern award. Do you accept that that is so?---What I understood this review to be about was assessing the place of penalty rates in current society and ways of doing business and practice. I'm not disputing there

have been changes to penalty rates, but that was my understanding of the purpose of this modern award review and the penalty rates case.

PN12273

I wasn't asking about your understanding of this review. I'll ask the question a third time. The submission will be put to the Commission in due course that your pharmacy has enjoyed significant reductions in penalty rate obligations since the introduction of the 2010 modern award compared to what previous applied. Do you accept that that is so?---I accept that there have been, for parts of the week, reductions in penalty rates compared to previous awards.

PN12274

Is there any reason why you didn't advert to that in your statement?---Reverting back to my previous answer, I gave evidence around giving a context of penalty rates in modern society and ways of doing business, and whatnot, that where - comparative times of the week when compared to normal business hours, I did not consider going back to previous - - -

PN12275

JUSTICE ROSS: Can you just consider the question that is being put to you and answer that question?---Can you please repeat it.

PN12276

MR MOORE: My question is why did you not refer in your statement to the change in penalties which occurred since 2010 that you acknowledge you were aware of?---I'm not sure why, to be honest with you - - -

PN12277

Is that - sorry, did you complete your answer?---Yes, I did.

PN12278

Might the reason be that you did not, is because your statement is a piece of advocacy for the position of the Guild in this review?---I'm here as a co-proprietor of Casey Central Pharmacy and to be a member of the Pharmacy Guild, you need to be an owner of a business - pharmacy business. That's what I am and that's the basis that I'm here.

PN12279

You're a public spokesman for the Pharmacy Guild Victorian branch, aren't you?---Yes.

PN12280

That's the position you're articulating in your evidence to this Commission, I suggest to you?---I mentioned it on opening, alongside my role as a co-proprietor of Casey Central Pharmacy.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12281

In short, the only additional obligation your pharmacy has been under in relation to penalty rates since the introduction of the modern award is that public holidays

have gone up from double time to double time and a half. That's so?---That's my understanding of that side of it.

PN12282

Now, in your statement at paragraph 15, you say that:

PN12283

Staffing is likely to be reduced on Saturday and Sunday mornings if the current penalty rates regime is maintained.

PN12284

You also say that:

PN12285

Penalty rates will impact on the likelihood of being able to maintain the current trading hours on weekends.

PN12286

You have acknowledged, I think, that there was no difference in Sunday penalty rates under the modern award and those that applied before. That's right?---Yes.

PN12287

You've acknowledged that there has been a reduction in Saturday penalty rates award obligations since the introduction of the modern award?---Yes.

PN12288

You've been profitable until this year in your pharmacy. That's so?---Was the question have I been profitable this last year?

PN12289

In the business?---In the business.

PN12290

Except for this year. Well, you've had more difficult challenges, I think you put, with your profitability this year?---Yes.

PN12291

So your sense then that staffing is likely to be reduced, I take it, must reflect your judgment about the impact of other commercial considerations on your pharmacy rather than any change in award obligations?---There has been increases in cost of doing business over the time, yes, but part of - to answer your question, there are increases in cost of doing business in other areas.

PN12292

Yes?---Yes.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12293

I'm suggesting to you, in simple terms, you have run a profitable business for nine years or thereabouts. Sunday penalties haven't changed. Saturday penalties under the modern award have reduced. I assume what you're saying in paragraph 15 is

that any issues about the likelihood of reducing staff are really caused by broader commercial pressures that your business is under?---In part.

PN12294

All right. You say in paragraph 17 that penalty rates may mean you're not able to and will have difficulty in extending your current trading hours, despite the requests by the shopping centre and the nearby medical centre soon to be opened. These requests by the shopping centre - you already trade outside of their requirements, don't you?---Yes.

PN12295

They require you Monday to Thursday to trade to 6.00 and you trade to 9.00?---Yes. Soon to change, yes.

PN12296

So there is no pressure being applied to you to extend your trading hours by the shopping centre, because you are already doing that?---Yes, so I understand.

PN12297

That's right?---Yes.

PN12298

So really what you're talking about here in paragraph 17 is just what your thoughts are in relation to your aspirations around the commencement of this extended hours medical centre?---What it tries to address is that if there was a late night medical centre open, the penalty rates regime as they stand will make it challenging for the business to expand its offering to service the public and deliver a health service.

PN12299

The only real scope that you're looking at expanding, as I understand it from your witness statement, is to try to trade to some extent with the extended trading hours of this proposed medical centre. That's the only thing that is really on your horizon. Is that right?---I wouldn't be looking to extend my trading hours on a Sunday if it wasn't for the medical centre.

PN12300

So that's really what we're talking about here; looking to extend your Sunday trading hours beyond 6 pm?---I'm attempting to make the point that it is difficult for a pharmacy to consider extending its offering to try and provide additional service to the public with that penalty rates regime.

PN12301

I'm just focusing on your business?---Yes, from my business's perspective.

PN12302

I'm just trying to understand this interest you have in extending your trading hours. You have indicated - and it's plain - that you already trade extended hours. That's right?---Well, if you could define what you mean by extended.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12303

All right?---Do you mean beyond the core business hours of the shopping centre?

PN12304

Yes?---We currently trade beyond the core business hours of the shopping centre.

PN12305

Do you have any firm plan or ambition to further extend your trading hours or is it really a sort of hypothetical possibility that you're giving consideration to?---If there was a medical centre - to answer your question, yes, we would like to seriously explore extending our trading hours of hour pharmacy. That would be more likely if there was the medical centre trading late.

PN12306

I presume your understanding of this medical centre has changed. It was going to be 24/7. It's now going to be to midnight, I think you said?---Yes.

PN12307

So presumably what you'll do is once the medical centre gets underway, you'll make a judgment about the level of custom and trade in the area to ascertain whether or not it's going to be in your commercial best interest to extend your trading past 9 pm on weeknights?---Yes.

PN12308

A critical thing will be there whether there is going to be sufficient demand for your services?---Yes.

PN12309

In paragraph 20, you say:

PN12310

The majority of the pharmacy's trade comes from prescription medical sales.

PN12311

You see that?---Yes.

PN12312

And that:

PN12313

The price provided by government subsidy is fixed and can't be altered upwards.

PN12314

?---Yes.

PN12315

Do you know what something called the Sixth Community Pharmacy Agreement is?---Yes.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12316

I understand that you had some involvement in at least the preparations for those negotiations between the Commonwealth of Australia and the Guild?---Yes.

PN12317

Were you directly involved in the negotiations?---I wasn't a negotiator.

PN12318

No, you were involved on the Guild side in preparing for those negotiations?---Yes, but others were more involved.

PN12319

I take it you have pretty good knowledge about the Sixth Community Pharmacy Agreement?---Yes.

PN12320

That's an agreement made between the Commonwealth and the Guild?---Yes.

PN12321

Could the witness please be shown this document?---Thank you.

PN12322

Mr Tassone, you'll see that I've handed to you a document which – it's numbered at the bottom right. And if you go to page 26, you should have a signing page. Do you have that?---Yes.

PN12323

And it's signed by the Honourable Sussan Ley, the Minister for Health and Minister for Sport, on behalf of the Commonwealth and it's also executed by the National President, Executive Director of the Pharmacy Guild of Australia. Do you see that?---Yes.

PN12324

And the remaining pages are appendix A?---Yes.

PN12325

Is that a copy of the Sixth Community Pharmacy Agreement?---It appears to be, yes.

PN12326

I tender that, your Honour.

PN12327

JUSTICE ROSS: I'll mark that Exhibit SDA 8.

EXHIBIT #SDA 8 COPY OF SIXTH COMMUNITY PHARMACY AGREEMENT

PN12328

MR MOORE: SDA 8, was it?

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12329

JUSTICE ROSS: Eight.

PN12330

MR MOORE: Thank you, your Honour.

PN12331

JUSTICE ROSS: Well, I think it's eight.

PN12332

MR MOORE: Could the witness please be shown this document? I've just handed to you a document which isn't numbered. The first page has the heading, "Sixth Community Pharmacy Agreement" and- - -

PN12333

JUSTICE ROSS: Can you just wait a moment, Mr Moore, sorry.

PN12334

MR MOORE: I'm sorry, your Honour. There's a problem with the video conferencing link to Melbourne. We might just adjourn for 10 minutes while we find out what's going on with that. But perhaps Mr Seck, if your interest can talk to Mr Wheelahan and see whether he's distressed by not being on the video-link, well he'll be able to get the transcript in due course, because it's not his witnesses but let's try and find out. We might be able to establish a telephone link in the absence of a video-link.

PN12335

MR SECK: We'll try to make contact with him, your Honour.

PN12336

MR MOORE: Your Honour. To use the time – I was about to ask the witness a question- - -

PN12337

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

PN12338

MR MOORE: - - -which involved him reading part of the document.

PN12339

JUSTICE ROSS: Well then, let's do that.

PN12340

MR MOORE: If there's a short adjournment- - -

PN12341

JUSTICE ROSS: No, certainly.

PN12342

MR MOORE: - - -it might be convenient.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12343

Mr Tassone, if you go to the last page of the documents I've handed to you, do you see a document which is on – has a heading "Sixth Community Pharmacy Agreement" and the Pharmacy Guild of Australia and the heading "Benefits of the Sixth Community Pharmacy Agreement"?---Yes.

PN12344

All right, and that goes to over the page to paragraph 20?---Sorry, the last page on the document I have has 10 points.

PN12345

I see. Well it seems we have a problem with logistics.

PN12346

JUSTICE ROSS: So we can all use the adjournment productively.

PN12347

MR MOORE: Yes, thank you.

PN12348

JUSTICE ROSS: All right, we'll just stand down for 10 minutes, thanks.

<THE WITNESS WITHDREW [10.53 AM]

SHORT ADJOURNMENT [10.53 AM]

RESUMED [11.05 AM]

<ANTHONY VINCENT TASSONE, RECALLED [11.05 AM]

CROSS-EXAMINATION BY MR MOORE, CONTINUING [11.05 AM]

PN12349

JUSTICE ROSS: Mr Wheelahan has asked to be excused till 12.15, so that avoids the need to maintain the link.

PN12350

MR MOORE: Okay. If I could hand to the bench - I think the document that was handed up was missing the last page, which was the second page of the document, "Benefits of the Sixth Community Pharmacy Agreement."

PN12351

Mr Tassone, the documents that I've handed to you, can I tell you what they are: they are what are called 6CPA fact sheets which were obtained from the Pharmacy Guild of Australia's web site?---Yes.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12352

Did you read the last page? I withdraw that. If you look at the bottom of each page you will see on the first page there are letters in small font, V1 26 May 2015, and so on through the document, although on the third document it's V1 27 May

2015, and then it goes back to 26 May and 27 May. Can you - you've had a chance to read points 1 to 10 on the last page, "Benefits of the Community Pharmacy Agreement"?---Yes.

PN12353

And could I ask you just to read to yourself the last page, paragraphs 11 to 20?---Yes.

PN12354

Thank you. Are you generally aware that the Guild published on its web site and made available these fact sheets about 6CPA?---Yes.

PN12355

Have you seen some of these before?---Yes.

PN12356

Thank you. I tender those - that bundle, if the Commission pleases.

PN12357

JUSTICE ROSS: I will mark that exhibit SDA9.

EXHIBIT #SDA9 BUNDLE OF DOCUMENTS SIXTH CPA FACT SHEETS

PN12358

JUSTICE ROSS: And we will simply staple the last page the earlier document.

PN12359

MR MOORE: Thank you.

PN12360

With points 1 through to 20 on the last page of the document, having read that, do you agree that that is an accurate summary of the benefits of the Sixth Community Pharmacy Agreement?---Yes.

PN12361

Thank you. Can I now show you another document. The document that you've been handed is a copy of some slides headed, "Sixth Community Pharmacy Agreement Overview July 2015," and has the name Pharmacy Guild of Australia and the Sixth Community Pharmacy Agreement on it. And you will see that the pages are numbered, bottom right, and there are nine pages. Can I tell you that this set of slides was also obtained from the Pharmacy Guild of Australia web site. And are you aware generally that such information was available on the web site?---I wasn't aware of this slide being available from the web site.

PN12362

All right. Have you seen it before?---Yes.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12363

Can I ask you - you can look through the document as you wish, but I want to ask you a question about the last page, page 9, if you could read that, in particular, to yourself. If you need to familiarise yourself further with the document, please do so?---Yes.

PN12364

Yes. Do you agree that the Sixth Community Pharmacy Agreement confers significant benefits for community pharmacies, including the dot points set out at page 9 of this document?---Yes.

PN12365

I tender this document, if the Commission pleases.

PN12366

JUSTICE ROSS: Mark that exhibit SDA10.

EXHIBIT #SDA10 SET OF SLIDES FROM PHARMACY GUILD OF AUSTRALIA WEB SITE

PN12367

COMMISSIONER LEE: Mr Tassone, just while you've got that document - and the other three documents refer to "location rules"?---Yes, sir.

PN12368

Do you know what that's a reference to?---Yes. I know what location rules are, sir.

PN12369

Can you just describe them for me?---Location rules are rules that govern where a pharmacy can have a PBS approval number, authority to dispense Pharmaceutical Benefits Scheme subsidised medicines. The location rules aim to try and distribute pharmacies evenly across Australia to prevent clustering in specific areas, to try and increase equity of access for the Australian public to Pharmaceutical Benefits Scheme subsidised medicines from pharmacies.

PN12370

MR MOORE: Thanks, your Honour.

PN12371

One of the effects - just to follow up the Commission's question - one of the effects of the location rules is that a business can't simply go up and set up shop, as it were, as a pharmacy at a location which it might choose?---With respect, that's - a pharmacy can open in any location it chooses if it meets the state regulatory requirements for a licence, but it may not qualify for a PBS approval number.

PN12372

I see. So the capacity for a pharmacy - capacity for a business to set up and operate a pharmacy is dependent at least on two things: one is that it has to be administered or owned by a pharmacist?---Yes.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12373

Secondly something akin to a licence needs to be provided by the Commonwealth to permit it to set up in a certain location?---There are state regulatory authorities that govern the licensing for the premises, and the Commonwealth governs the PBS licence to supply Pharmaceutical Benefits Scheme medicines.

PN12374

Yes. And the retention of existing location rules has been a matter of hot concern for the Guild over many years?---Yes.

PN12375

And the Sixth Community Pharmacy Agreement preserves and continues those existing provisions until the end of the 6CPA, which is in 2020?---Yes.

PN12376

Although location rules may generate public benefits in relation to the provision of community pharmacy services, one effect of them is to limit competition in the provision of pharmacy services. Do you accept that?---The main driver of location rules is around equity of access. I don't agree that a priority is to limit competition.

PN12377

I wasn't asking you if it was a priority. I simply asked you if one effect of the location rules - notwithstanding whatever public benefits may be generated by those rules, one effect of the location rules is to limit competition in the provision of community pharmacy services. Accept?

PN12378

MR SECK: Objection. The question of whether or not there's any limitation of competition is an economic question ultimately. It is a question which requires the witness to express an opinion. It has to be established that he has specialised knowledge about the markets of pharmacies and the economic effect on the market of those issues.

PN12379

JUSTICE ROSS: He has knowledge about the markets of pharmacies and he has got an understanding of the community agreement, so why can't he answer the question?

PN12380

MR SECK: He has an understanding of the community agreement, but he doesn't necessarily have expertise in the question of the impact on the marketplace.

PN12381

JUSTICE ROSS: He can answer the question.

PN12382

MR SECK: May it please?---Can you please repeat the question.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12383

MR MOORE: Notwithstanding whatever public benefit may be generated by the location rules, one effect they necessarily have is to restrict and limit competition in the provision of pharmacy services. Do you agree with that?---There's a possibility in some cases that can happen.

PN12384

I see. The agreement, which is exhibit SDA8, was made on 24 May 2015 and commenced operation on 1 July this year. That's right?---Yes.

PN12385

You made your statement on 10 August 2015. That's right?---Yes.

PN12386

I'm sorry, your affidavit. And you were involved, at least, in the preparation of negotiations leading to the making of the Sixth Community Pharmacy Agreement, and you're obviously well aware of it?---Yes.

PN12387

Is there a reason why, so far as I can see, you make absolutely no reference to the 6CPA in your affidavit?---I can't provide a specific reason why I didn't refer to the sixth agreement. If I may, the line of questioning was commenced from paragraph 20 in my affidavit where I expressed that pharmacies are price takers and not price makers. And I was trying to express that the majority of a typical pharmacy's business is dispensing prescription medicines, the majority of which are Pharmaceutical Benefits Scheme subsidised medicines - governed by the agreement, yes - but unlike other businesses, such as a café or restaurant, who could potentially add a surcharge on particular periods of trade to offset impacts of penalty rates, pharmacies cannot, when they're delivering Pharmaceutical Benefits Scheme subsidised medicines.

PN12388

You referred in paragraph 20 to the provision of government subsidy for the dispensing of medications?---Yes.

PN12389

And the fact is that under the 6CPA over the term of the five-year agreement, that subsidy is going to increase in the vicinity of \$2.4 billion. Is that so?---That subsidy offsets other significant losses in real terms of profit from the fifth agreement.

PN12390

Is your answer to my question yes?---The answer to the question is yes, but qualified with other context.

PN12391

All right. So we have a situation where this government subsidy to which you refer is about to increase by \$2.4 billion. You accept that?---Yes.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12392

And so you thought that it was going to assist the Commission, did you, to talk about government subsidies without advertizing in any way to the massive increase in those subsidies that your business and other pharmacies would enjoy over the coming five years. Is that right?---I had no intention to mislead the Commission or otherwise. It was - I can't offer a reason why I didn't refer to the sixth agreement in my affidavit.

PN12393

Would that reason be that the making of the sixth agreement does not assist the Guild's case? Would that be a reason why you didn't refer to it?---I don't believe so. From personally - when - I don't believe that's the case from my personal reasons in providing this affidavit.

PN12394

Can I suggest to you that the picture you paint in paragraph 20 in the first sentence is incomplete and misleading. Do you accept that?---I felt with my explanation to the Commission, that I don't think it's misleading. That's my personal opinion.

PN12395

The effect of the Sixth CPA, do you agree, is to improve the sustainability and profitability over time of pharmacies like yours?---Yes.

PN12396

You accept that that would therefore make this a most significant part of the picture to inform the Commission about when, in your statement, in your affidavit, you depose to the various pressures, claimed pressures on the profitability of your business. Do you accept that that, in retrospect, was something that you should have referred to in your statement?---In retrospect, I could have referred to the Sixth Agreement, albeit we are one month – we were one month into a 5 year agreement at that point in time as well.

PN12397

Thank you. I want to ask you some questions about rent?---Yes.

PN12398

Which you deal with in paragraph 21 and which you gave some further evidence about this morning. I think your evidence this morning was that you entered into a lease for a 10 year period which commences, I think, in March you said. Is that's right?---Next year, yes.

PN12399

And I take it that reflects your confidence in your ongoing – the confidence you have in your business as a sustainable and ongoing profitable concern?---Partly that and partly to be able to secure tenure to be able to sell the business to another interested party, should I decide to dissolve the interest as well.

PN12400

Are you aware of a report that the Pharmacy Guild of Australia publishes call the 2015 Pharmacy Rental Report?---Yes.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12401

You would have read that?---Yes.

PN12402

It states that since 2001, between 2001 and 2014, rents have increased substantially in both nominal and percentage terms?---Yes.

PN12403

And you agree that that is so?---Yes.

PN12404

And that would be something that you've experienced in your business?---Yes.

PN12405

JUSTICE ROSS: Does it say "Nominal and percentage" or "Nominal and Real"?

PN12406

MR MOORE: I'll clarify that, I'm sorry. It doesn't use the word "nominal" I apologise, that's my mistake. It says simply that pharmacy rents have increased substantially in the last decade and it goes on to identify those increases as being substantial in percentage terms. To clarify, do you accept that pharmacy rents, in general, have increased substantially over the period 2001 to 2014?---Depending on the location, yes.

PN12407

Yes. And they have also increased substantially in percentage terms?---Depending on the case, yes.

PN12408

And in your case, they have increased both in dollar terms and also in percentage terms?---Yes.

PN12409

And you agree with me then that in terms of the factors that bear upon what you call the sustainability of your business, increases in rents and increases in the proportion of your expenses referable to rents, has been one of the most significant factors which has affected and will affect the sustainability of your business?---To date, yes. I'm hopeful that my 10 year agreement has gone some way to addressing that.

PN12410

I see, thank you. You refer in paragraph 22 to your pharmacy being a Chemmart Pharmacy. That's a chain or a franchise?---Yes.

PN12411

Is that's right?---Yes.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12412

And as being – and you say in paragraph 22 in the first sentence, you're on the top level of discount for Chemmart Pharmacies, through Symbion Wholesaler. So

that means that you get the highest level of discount that one can get, through your distributor?---Yes.

PN12413

I see. And they are, so far as you would understand it, discounts that you're able to enjoy which, for example, pharmacies who are not part of the Chemmart chain, are not able to enjoy?---That's to my understanding.

PN12414

And does being part of the Chemmart group give you other benefits in relation – in the conduct of your business?---Yes.

PN12415

Do those benefits include the provision of equipment?---From time to time. Like to deliver health services and professional services, that may be the case, yes.

PN12416

Yes. And financial and staff management systems?---Can you define what you mean by – sorry.

PN12417

Well, administration systems, perhaps computerised systems which aid management of your financial records?---Chemmart don't provide the system.

PN12418

Right?---We have to install and subscribe to it.

PN12419

What other benefits does Chemmart provide you in the conduct of your business?---Assistance with marketing and promotion, assistance with staff training and development.

PN12420

So with marketing promotions, does that mean that they will pay for some portion of marketing and development?---Sometimes they may contribute, but generally that comes at the pharmacy's expense.

PN12421

I see. Now, paragraph 23 to 25, you deal with services that your pharmacy offers or provides and you refer to a number of them. Are some of those services that you refer to in paragraph 23 to 25 funded through Community Pharmacy programs provided under the, what is now the Sixth CPA?---Some are.

PN12422

Can you tell the Commission which are?---So the filling and delivering of those administration aids, a pharmacy can claim a component of the cost of delivering that service, which is organising medicines in a weekly organiser from the- - -

PN12423

Yes- - -

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12424

JUSTICE ROSS: Is that a Webster-pak?---Yes. Yes, your Honour. A portion of that does come from the Sixth Community Pharmacy Agreement. We also charge the consumer a fee for service.

PN12425

MR MOORE: I see. So it's subsidised, then you charge a fee for service?---Yes.

PN12426

I see?---And it was remiss of me not to mention it in this affidavit, but we do deliver home medicine reviews which I personally deliver, which is funded under the – has been funded under the Fifth Community Pharmacy Agreement and will continue to be under the Sixth Community Pharmacy Agreement.

PN12427

What is that, in short terms?---Yes. A general practitioner can refer a patient to a pharmacy for a pharmacist to visit them at their home to discuss their medicines and identify any possible medicine-related problems or other issues with their therapy, and write a report for the doctor and then the doctor and the patient go through an agreed management plan with their medicines and health.

PN12428

So that's funded through the Community Pharmacy Agreement?---Yes.

PN12429

Do you also charge a fee for service for that?---No.

PN12430

Any of the other services that are funded through the Community Pharmacy Agreement?---Not the ones I've mentioned there.

PN12431

I see. Are there other services that you provide that are funded under the CPA?---The document that you raised as evidence earlier, there are other medication management programs such as what's called MedsCheck that we do provide at the pharmacy. We- - -

PN12432

And they're funded, are they?---Yes.

PN12433

Yes?---Staged Supply, where a pharmacy will give a portion of supply on an agreed interval, whether it's daily or weekly, at the prescriber's discretion. We provide that service as well.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12434

All right. And looking back at your statement there in paragraphs 23 to 25, are any of those other services that you provide, beyond the filling and delivering of the dose administration aids, the Webster-paks, do you charge a fee for service for any of those other services?---Yes. So for example, screening services, so blood

pressure and glucose measurement, like a health check, that's a fee for service to the community.

PN12435

Which one is that?---The first sentence of paragraph 24.

PN12436

Thank you. I see. Any others?---I didn't list all the services we provide, but to answer your question and give another example, we provide a weight management service that we charge a fee for. It's called Impromy and it's been endorsed by CSIRO, but that's just another example.

PN12437

All right. Coming back to the Sixth CPA you understand that that provides for the maintenance of funding for existing Community Pharmacy programs?---Yes.

PN12438

And you understand that it also provides for the provision of an additional \$600m for new and expanded Community Pharmacy programs?---Yes.

PN12439

Thank you. In paragraph 27 you say that if the Guild proposal is adopted it would be possible to extend trading hours on week nights, weekends and possibly public holidays, and that if they were extended existing staff would be offered additional hours and new positions could be made available. The way you put that I take it, Mr Tassone, indicates that these are changes, the changes to which you refer, are things you might think about in the event that the Guild proposal was accepted. You are not saying that they're a likelihood in the event that the Guild proposal was accepted?---I think in reference to our earlier discussion around the medical centre I think it would be fair to say my pharmacy's case, assuming they're opening and trade as a late night medical centre with adoption of the recommended penalty regime of the Guild, what the Guild has submitted, we are far more likely and would want to seriously explore doing so. It's an intention to want to provide additional service for the community and create opportunity.

PN12440

I see. So what you set out in paragraph 27 are a statement of your general plans or expectations, they're not specific commitments to do things in the event that the Guild proposal is accepted?---Because of other factors being in play I didn't feel it was appropriate to give a firm commitment.

PN12441

In terms of your business in particular it sounds as if a more significant factor which is going to bear upon the extent of any change in your commercial operations is what happens with this neighbouring medical care facility?---Yes.

*** ANTHONY VINCENT TASSONE

XXN MR MOORE

PN12442

And whether or not that's going to give you sufficient increase in custom to justify an increase in trading hours?---Yes, we will await that medical centre opening and assess accordingly.

PN12443

Thank you. I take it that if there was an increase in trading hours you would see that as translating first into offers of additional hours of work to your existing employees?---Yes.

PN12444

And then you would see if there would be anything left over as it were for additional persons to be employed?---Yes, and that's been our practice with our proposed Greenfield in December, we've offered employment to our existing employees before advertising.

PN12445

I see. You refer in paragraph 29 to the possibility of the offering of more specialist services, which I take it you're saying that if trading hours were extended as a result of the Guild proposal being accepted by this Commission is it the case that those services could be provided by your pharmacy now, is that so?---Some are.

PN12446

I see?---Yes, some are, but an expansion of which can with further extension of trading hours.

PN12447

I see, so which of those services are already provided?---The nutritionist advice service is not currently provided, but the others are.

PN12448

Thank you, Mr Tassone. Excuse me one moment. Thank you.

PN12449

JUSTICE ROSS: Any re-examination?

PN12450

MR SECK: Just one or two questions, your Honour.

RE-EXAMINATION BY MR SECK

[11.34 AM]

PN12451

MR SECK: Mr Tassone, you were asked questions about the sixth Pharmacy Community Agreement. Do you recall that?---Yes.

PN12452

My learned friend Mr Moore took you directly in the fact sheet that there was going to be a \$2.4b increase?---Yes.

PN12453

In answer to the question you said:

*** ANTHONY VINCENT TASSONE

RXN MR SECK

PN12454

The profits were offset as a result of things in the fifth Community Pharmacy Agreement.

PN12455

Do you recall giving that answer?---Yes.

PN12456

Could you explain your answer, please?---During the fifth agreement period the government as a savings measure for Pharmaceutical Benefit Scheme medicines undertook a process of price disclosure, which means that the price that the government paid more reflected the market price the pharmacies were acquiring the goods at. During the fifth agreement period there was a further acceleration of the price reduction schedule that was outside the bounds of previous expectations and agreements with the Guild, and it's believed that there was a 16 per cent reduction in real remuneration terms for pharmacies over the fifth agreement period, which I recall reading from a senate hearing of the Department of Health when they appeared before a senate committee following the signing of a sixth agreement. So this subsidy that's increased - an increase subsidy in the sixth agreement is really a reinvestment of the savings that the government has made as a result of the reduced prices they pay for goods which pharmacies traditionally relied upon as a main source of their income and profit.

PN12457

One more question, Mr Tassone; in your cross-examination you referred to in answer to a question about whether or not you would work, you would open on Sundays and public holidays, the increases in costs of doing business in other areas. Do you recall giving that answer?---Yes.

PN12458

Can you explain to the Commission what costs you're referring to and the amounts?---With - with our pharmacy we - a pharmacy can't open without a pharmacist being on duty of course, but we also have a dispensary technician that we roster on with a pharmacist on weekends to assist with the workload of dispensing prescriptions. I'm really mindful of not rostering too many inexperienced staff together at the same time, because 16 year olds - myself personally, because I just feel that there could be difficult and challenging for them in meeting the consumer needs and what not and being able to refer to the pharmacist. So the costs I was talking about were to do with staff primarily, but trying to give a picture that the mix of staff that you need may need to be more experienced and have not - with more experienced staff that comes with of course a need to remunerate them at the appropriate level.

PN12459

No further questions.

PN12460

JUSTICE ROSS: Mr Tassone, can I just ask you a question about the fifth agreement?---Yes.

*** ANTHONY VINCENT TASSONE

RXN MR SECK

PN12461

What period did that cover?---From 2010 - from July 1 2010 to 30 June 2015, your Honour.

PN12462

And I think in answer to questions put to you by Mr Moore you said that your pharmacy was profitable over that period, is that right?---It was profitable in that period. The last part of that five year period was very challenging and difficult for our business.

PN12463

And that's the beginning of this year really?---Yes.

PN12464

Yes, all right. Anything further from the witness? No. Thank you, you're excused?---Thank you, your Honour.

<THE WITNESS WITHDREW

[11.38 AM]

PN12465

MR SECK: Your Honour, just because we're running behind schedule we are wondering if we can move Mr Paul Keane to next in the batting order as it were. Mr Keen has come from interstate and he has to fly out later this afternoon. So if we can move Mr Keane to - and I have spoken with my learned friend, he has no issue. So I call Mr Paul Keane.

PN12466

JUSTICE ROSS: Do you want to deal with any objections to his statement before we bring the witness in? I might just ask the witness to stay outside for a moment if you wouldn't mind.

PN12467

MR MOORE: I think there are - remain a couple of objections, your Honour. I haven't had a moment to see how the Bench's ruling might translate into the objections.

PN12468

JUSTICE ROSS: Do you want to take five minutes to do that and have a discussion with Mr Seck?

*** ANTHONY VINCENT TASSONE

RXN MR SECK

PN12469

MR MOORE: I can probably deal with it straight up if that's convenient. Paragraphs 13 and 14 we object to that on the basis of hearsay and speculation. It might be said, I apprehend, that this falls into this species of community hearsay. Paragraph 13, I would submit, is in a different class. That is more squarely hearsay. Paragraph 14 is I suppose otherwise objectionable, but the witness is deposing as to his overall sense of why people visit the pharmacy and would, I would accept, fall within the previous category. Paragraph 13 though is more squarely an old-fashioned hearsay category and we would say in light of the ruling

before I would accept that paragraph 14 can remain in, but we press our objection to paragraph 13.

PN12470

With paragraphs 15 to 17 they were the subject of objection. We don't press the objection to paragraph 17, and in light of the ruling before it would follow that paragraphs 15 and 16 would stay in. So I think that the only controversy then is 13. Sorry, there is 20 as well, the last sentence in paragraph 20. It's an opinion about the benefits for the broader community. I suppose it doesn't fall into the community hearsay category as it were, it's just opinion as to what benefits are said to flow. We press that objection.

PN12471

JUSTICE ROSS: Anything you want to say?

PN12472

MR SECK: Your Honour, in our submission paragraph 13 is not relevantly different to paragraph 14. Whilst they're directed to different matters they are still based on what Mr Keane understands the customers require, and in my submission paragraph 13 is the same as paragraph 14 in that sense, they're just directed to two different subject matters.

PN12473

As to paragraph 20, your Honour, the second sentence we accept is a submission, but it's a submission which Mr Keane is entitled to make as a pharmacist who operates in the community. In the sense that it reflects what he thinks the community wants it does fall within the category of community hearsay.

PN12474

JUSTICE ROSS: Do you have something further that you want to say?

PN12475

MR SECK: No, nothing further, your Honour.

PN12476

JUSTICE ROSS: Mr Moore, we will uphold the objection to paragraph 13 on the basis of the specificity of what's put there. We accept the submission that it's different, qualitatively different from the other forms of community hearsay that have been admitted. Paragraph 14 will still go to weight, and we reject the other objections taken.

PN12477

MR MOORE: Thank you.

PN12478

JUSTICE ROSS: Can we call the witness.

PN12479

MR SECK: I call Paul Thomas Keane.

PN12480

JUSTICE ROSS: Just while the witness is coming in given the time taken we will still deal with, or at least adjourn shortly at 12.15 to deal with the objections. The conference that was to be held at 3.25 we are looking to reschedule that to 4 pm tomorrow to allow us to get through the witnesses that are scheduled today.

PN12481

MR SECK: Thank you, your Honour.

PN12482

JUSTICE ROSS: So we will need to find a way of advising the other parties with an interest in the 3.25 conference and perhaps that can be done over the luncheon adjournment.

PN12483

MR SECK: Yes, your Honour. We will try to facilitate that.

PN12484

JUSTICE ROSS: Thank you.

<PAUL THOMAS KEANE, SWORN [11.47 AM]

EXAMINATION-IN-CHIEF BY MR SECK [11.47 AM]

PN12485

MR SECK: Mr Keane, what is your current occupation?---A pharmacist.

PN12486

What is the name of the pharmacy that you own?---The pharmacy is Barmera Pharmacy.

PN12487

Mr Keane, you have prepared a statement in these proceedings, that's correct?---I have.

PN12488

Sorry it's an affidavit which was sworn on 8 August 2015; that's so?---That's correct, yes.

PN12489

Do you have a copy of your statement with you?---I do.

PN12490

Now, Mr Keane, you wish to make some changes to your affidavit, that's correct?---Yes, there are two changes there, sir.

PN12491

Can you take us to your changes?---The clause 7 we have - since this affidavit was made we've lost one pharmacy assistant, so the number of pharmacy assistants at Level 2 is now seven, not eight, and clause 14 I believe there's a bit of a typo there:

*** PAUL THOMAS KEANE

XN MR SECK

PN12492

Customers who visit the pharmacy for medications and other goods which they could otherwise obtain from supermarkets because they receive professional advice and assistance from our staff and myself.

PN12493

So after the word "could" should be inserted the word "otherwise"?---"Otherwise", yes.

PN12494

Do you wish to make any further changes, Mr Keane?---No.

PN12495

Are the contents of your statement true and correct to the best of your knowledge and belief?---Yes, they are.

PN12496

I read the affidavit.

**EXHIBIT #PG3 AFFIDAVIT OF P.T. KEANE DATED 15/08/2015
NOTING THAT PARAGRAPH 13 IS STRUCK OUT**

PN12497

May it please.

PN12498

JUSTICE ROSS: Mr Moore.

CROSS-EXAMINATION BY MR MOORE

[11.49 AM]

PN12499

MR MOORE: Mr Keane, Barmera is up on the Murray, is it?---Yes, we are about 230 kilometres from Adelaide on the Sturt Highway which runs between Adelaide and Sydney.

PN12500

You're driving back there tonight, are you?---I'm flying back at about 3 o'clock, so thank you for the concession to bring me in early.

PN12501

Barmera is a small town of about 3,000 people?---About 3,000 people in a geographical region of about 35,000 people called The Riverland.

PN12502

How long have you owned Barmera Pharmacy?---About 29 years. I went there in 1986.

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12503

And do you own or are you a partner in any other pharmacies?---Yes, I am. A neighbouring town called Berri, which is 15 minutes' drive up the road, I'm a one-

sixth partner of two pharmacies in that town. My own pharmacy at Barmera, I'm in partnership with my wife who is also a pharmacist.

PN12504

I see. So you're in partnership with your wife in Barmera, in that pharmacy, Barmera Pharmacy and you are a one-sixth partner in two other pharmacies in Berri?---That's correct.

PN12505

And the ones in Berri, approximately how many do they employ?---They each have a managing pharmacist and I would think they've got seven or eight- - -

PN12506

Well, you employ- - -?--- - - -part-time.

PN12507

I'm sorry?---Part-time pharmacy assistants.

PN12508

I was going to try and assist you by drawing your attention to the fact that you say in your affidavit that Barmera Pharmacy employs 11 people. Do the pharmacies in Berri, broadly speaking, employ about the same number or more or less?---I would think so, yes.

PN12509

About the same? And how long have you been a partner in those other businesses?---Since 2012, although historically, I was a partner in those pharmacies back before the year 2000.

PN12510

I see, so in the period between 2000 and 2012 when you weren't a partner in those businesses, but prior to 2000 you had been? You bought back in 2012, did you?---Yes, there was a disruption of the partnership and a partner stepped out at that stage, so- - -

PN12511

I see?---Yes, we had some changes.

PN12512

And the Barmera Pharmacy, over – I'm sure over your 29 years, it's had its ups and downs, but I take it it's a profitable ongoing concern? I'm sorry, you just need to speak your answer for the transcript?---Yes, yes. We've had a profitable period to allow the lifestyle we look for.

PN12513

Yes, and the profitability of the Barmera Pharmacy presumably enabled you to buy back into these two pharmacies in Berri?---Yes.

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12514

And are they profitable businesses as well?---Not – no, not as much as my existing pharmacy.

PN12515

But they're profitable- - -?---Yes.

PN12516

- - -just not as – yes? I'm sorry?---Yes, they are profitable.

PN12517

And is there any reason why you didn't refer to your interest in two other pharmacies in your affidavit?---No. The questions I was asked about the affidavit just referred to my main work situation. I have an everyday work attachment to the Barmera Pharmacy. I don't actually work in the pharmacies in Berri.

PN12518

I see?---So I physically attend Barmera Pharmacy every day.

PN12519

I take it that your trading times – I'm now taking you just back to the Barmera Pharmacy?---Yes.

PN12520

My questions will just be about Barmera unless I make it clear otherwise?---Yes.

PN12521

With the Barmera Pharmacy, your trading times are set out in paragraph 8. I take it that those trading times have been unchanged over your years of operating the pharmacy?---No, that's not correct.

PN12522

I see?---In the years 2000 to 2009, the pharmacy did open on Sundays between 10 am and 1 pm and on public holidays, the same hours.

PN12523

And I take it that that practice of opening in those additional hours on Sundays and public holidays between 2000 and 2009, wasn't something you continued because the level of business and custom didn't justify it commercially?---Yes, you could say that's correct.

PN12524

Thank you. I assume that in Barmera, as a small country town in the Riverland, most shops shut at midday on Saturdays or 1 o'clock – midday, 1 o'clock?---This is something that has changed since I've been there. People now shop 7 days a week. The supermarket next door to our pharmacy is open 7 till 7, every day of the week. My customers and the customers I see in the town sort of regard every day as a shopping day now. I think it's something that's changed that Saturdays, Sundays used to be reserved for sport, home activities, family activities, but that is something that's really changed in our town.

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12525

I'm taking you back to just the reality of trading in the town. If one puts aside – and I take it the supermarket to which you refer is a large supermarket run by one of the two major supermarkets?---No, it's an independent.

PN12526

It's an independent, I see. Aside from the supermarket, which has those extensive – more extensive trading hours, do most of the other shops in Barmera trade the similar hours to you?---Yes, most of the other shops are trading similar hours to me.

PN12527

Okay, thank you. You say in paragraph 9 that the pharmacy isn't open on public holidays due to the high cost by penalty rates that are incurred. But I understood your evidence before to be that the reason the shop doesn't open on public holidays is because the level of trade and custom doesn't support it. That's the underlying reason, is it not?---No, there are other pharmacies open in our regional area which offer that after hours service.

PN12528

I'm sorry, go on?---When there are other pharmacies open, it would make it difficult for me to compete on the same basis.

PN12529

How many other pharmacies are there in Barmera?---There are no other pharmacies in Barmera. The next town, Renmark, which is 30 minutes away by car, do have a pharmacy which operates extended hours.

PN12530

But your market for customers is Barmera?---The majority of it is, yes.

PN12531

And I'm suggesting to you that underlying your decisions about trading hours, is the assessment that you must make that in a town of 3,000-odd people, there's not enough business, not enough custom to justify trading on public holidays. Is that so?---It is marginal. We have been asked by the local doctors to provide a Sunday and public holiday service and I get repeated requests from customers. They say to me, "Well, why don't you open on Sundays anymore?" And I said, "It is purely the cost of the wages".

PN12532

Well, when you say it's the cost of the wages, that what you say in relation to Sundays. And have you sat down and worked out the additional amounts you'd pay for staff on Sundays over what you would otherwise pay?---I have.

PN12533

Pardon?---I have.

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12534

All right, and have you sat down and done some sort of analysis or calculation to work out why it's purely the cost of wages that means you don't open on the Sundays?---On a Sunday or a public holiday, I would have to employ a pharmacist and an experienced shop assistant.

PN12535

I'm just asking you if you've sat down and done the calculation?---I have. I have done the calculations, yes.

PN12536

All right. How did you do the calculation?---Compared to my normal trading hours.

PN12537

All right?---The hours which are on the affidavit.

PN12538

And what documents did you look at in working this out?---I looked at my sales figures, my gross profit figures and my wage percentages.

PN12539

And in relation to what time period?---I've – I've would have looked at in the last four financial years.

PN12540

You've done it on an annual basis, have you?---I actually look at wage percentage on a daily basis.

PN12541

Right, but this assessment you've made that it's purely wages that you don't open on Sundays, you've looked at sales figures, gross profits, and wages - I'm sorry, wage percentage. Have you done that in relation to specific days, or over periods of time?---As I said, I look at that daily. I look at our wage figure daily compared to our daily sales.

PN12542

When did you most recently make this analysis?---Every day of the week. I attend the pharmacy every day.

PN12543

In preparing this statement - this affidavit, I'm sorry - and saying that it's purely the cost of wages which means you don't open on these days, did you undertake a specific analysis - - - ?---Yes.

PN12544

- - - to be able to say that?---Yes, I have.

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12545

All right. And in doing that you looked at your sales, gross wages, and wages percentages?---I looked at my sales, my gross profit, my percentage of wages to gross profit, my percentage of wages to sales, and my wage percentage.

PN12546

And you did that in relation to - and I right in understanding - a four-year period, or have I misunderstood your evidence?---No, I've looked at each financial year. Every financial year I review my figures and see where we were out in our pharmacy.

PN12547

So it would be - in order for me to examine this, I could - the place to look would be the documents recording the information you just outlined?---Profit and loss statements will detail - - -

PN12548

Profit and loss statements?--- - - - will detail that.

PN12549

With the detail of the matters that you just referred to - - - ?---Absolutely.

PN12550

- - - over the last four years?---Yes.

PN12551

I call for them to be produced.

PN12552

JUSTICE ROSS: Do you have any difficulty in providing that information?---No, that is available to the Commission. Not here today, but it is available.

PN12553

Perhaps if you can provide it to the Guild representative, and they can provide it to Mr Moore. Thank you?---Thank you.

PN12554

MR MOORE: The additional services that you offer in your pharmacy which are referred to in paragraph 10, you refer to four there; do you charge customers a fee for service for any of those?---On the advice and counselling on medications, one of the main criteria of our business has been to provide extensive counselling to all patients. In fact, every patient that gets a prescription is actually seen by a pharmacist, and we make an attempt to actually counsel every patient on medications that are purchased as well. The treatment of minor illness - - -

PN12555

My question was: do you charge a fee for service?---No. No, we don't. We don't charge for that.

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12556

And in relation - - - ?---That is inclusive of our service. That is our offer - our offer in our pharmacy.

PN12557

I follow. And in relation to (b), (c) and (d), do you charge any of those - charge fee for service for any of those?---The medication checks, staged supply have fees attached to them.

PN12558

The customer pays?---No, the medication checks are subsidised by the government agreement.

PN12559

The community pharmacy agreement?---The staged supply, the patient does contribution towards that.

PN12560

The staged supply, the patient pays something?---Will make a contribution, yes. And methadone and buprenorphine supply, the patient does make a contribution to that as well.

PN12561

And the Commonwealth funds the methadone and - I can't pronounce the - - - ?---Buprenorphine.

PN12562

Thank you - provides funding for that service?---No, the Commonwealth provides no funding for that service.

PN12563

The Commonwealth provides funding for medication checks, did you say?---Yes. They're called MedsChecks.

PN12564

MedsChecks. I see. Thanks. Was this affidavit prepared for you by someone else?---No, I think all the information on there is what I've provided. Are you meaning - - -

PN12565

Did you write - - -?---What do you mean?

PN12566

Did you write it? I know you've affirmed to it or sworn to it, but did you write it?---No. No, I didn't write this.

PN12567

So someone wrote it for you, did they?---Yes.

PN12568

Someone from the Guild?---Well, I presume so, yes.

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12569

From paragraph 15 you will see that in the last sentence you say:

PN12570

Currently penalty rates restrict service offered on Saturdays, Sundays and public holidays.

PN12571

Do you see that?---Yes.

PN12572

But that's not actually accurate in relation to Sundays, is it, because there is no restriction on service, you don't offer any service on Sundays?---No, we - the pharmacy currently doesn't offer that service on Sundays. I do get called in. I have customers phone me. I've had doctors request that I come in.

PN12573

But that's a one-off type thing?---Yes. Frequent, but yes.

PN12574

Yes. And you don't - other than one-off calls of the type you refer, you don't trade and public holidays either, do you?---No.

PN12575

So there's no restriction on your trading hours on Sundays, you just don't trade then?---We elect not to trade then.

PN12576

Yes. You elect not to. You refer to the Sixth Community Pharmacy Agreement in paragraph 17. You're familiar with that, I take it, in general terms?---Yes. Yes, I think I have kept up with that.

PN12577

Can the witness please be shown SDA9. It's already - sorry, we don't have another copy. I apprehended - thank you.

PN12578

Mr Keane, the document that has just been shown to you is in evidence before the Commission. And so you understand what it is, it's a series of fact sheets obtained from the Pharmacy Guild of Australia web site. You can look through it if you wish, but I want to ask you about the last page, which is headed, "Benefits of the Sixth Community Pharmacy Agreement"?---Yes.

PN12579

You will see that on that page and the following there are 20 paragraphs. Do you see that?---Yes.

PN12580

Have you read that before?---Yes, I think I have.

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12581

I can invite you to read it, but my question to you, which you might be able to answer before you read it again, do you accept that to be an accurate summary of the benefits of the 6CPA?---I'm not sure.

PN12582

Read it if you like?---I guess in our own situation certainly where it mentions dispensing remuneration, I can see that that is accurate.

PN12583

That's point 2?---Yes.

PN12584

Averaging dispensing remuneration will be \$1.13 more perks which and in 2015 and it would have been.

PN12585

That's a significant improvement from what was?---That is, but the consequences of the 5CPA were quite drastic for my pharmacy. It's most likely just bringing my pharmacy back to where we were before 2014.

PN12586

I see. So you saw 6CPA as putting things right?---Yes.

PN12587

Do you accept that - and perhaps if you take a moment to read through paragraphs 1 to 20?---Yes.

PN12588

Thank you. Do you accept, so far as you understand it, that that is a reasonable summary of the benefits that 6CPA offers?---Yes.

PN12589

And do you accept that the benefits of 6CPA are substantial to pharmacists?---It would be an individual situation, I think.

PN12590

I see?---Some pharmacies will have greater benefits than others.

PN12591

Which pharmacists, notionally would, as you would see it, benefit most from 6CPA?---Pharmacies with, perhaps, a high dispensing volume would benefit.

PN12592

Typically for pharmacies, as I understand it, about 70 per cent of income that a pharmacy receives comes from dispensing?---Yes.

PN12593

Yes?---My particular situation is over 80 per cent.

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12594

I see. So the greater proportion of your income for a pharmacist's income is referable to dispensing, the greater the benefits of 6CPA. In general terms?---In general terms, but I also carry out MedsChecks, obviously, and home medicine reviews, which are - - -

PN12595

And you get funded for those under the 6CPA?---Which are other income streams, yes - funded.

PN12596

And those other income streams, community pharmacy programs are to be extended under 6CPA?---I believe so.

PN12597

Yes. I'm just not sure, Mr Keane, having referred to the Sixth Community Pharmacy Agreement in paragraph 17, why you did not refer the Commission to the substantial benefits which flow from it to pharmacies generally. Can you explain that?---As you've already alluded to, there is a point where we've got some comeback from our losses over the last two years from the previous agreement.

PN12598

In preparing this affidavit was it suggested to you that it wasn't a good idea to refer to the broader benefits of 6CPA?

PN12599

MR SECK: Objection. Firstly it doesn't identify who suggested it; but secondly, to the extent that there has been communications with the lawyers on the issue, that is subject to client legal privilege.

PN12600

MR MOORE: Well, I haven't referred to lawyers at all.

PN12601

MR SECK: Well, I think there were questions about the drafting of the statement and that he had liaised with Guild, and I think it can be taken that Meridian Lawyers were - - -

PN12602

MR MOORE: That's your words.

PN12603

MR SECK: Hold on.

PN12604

JUSTICE ROSS: You don't know that, and neither does the witness.

PN12605

MR SECK: The question does invite a consideration - - -

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12606

JUSTICE ROSS: Rephrase your question in relation to who suggested what. Let's deal with it that way.

PN12607

MR MOORE: Did you speak to anyone from the Guild in preparing this?---I can't recall that I did, no.

PN12608

All right. I will move on.

PN12609

In paragraph 17 you refer to the expectation that customers have for improved access to community pharmacies. Do you see that?---Yes.

PN12610

In saying that, is it your understanding that this expectation relates to patient access generally to pharmacy services, or access under the Commonwealth pharmacy programs?---I think, yes, there's a general understanding by the public that yes, pharmacies are doing more these days for the public, and that certainly the pharmacy programs are a huge part of that. I think that's creating a greater awareness. So the pharmacy programs are definitely influencing that.

PN12611

What are you referring to here with this expectation in paragraph 17? Is there something specific?---No, I think it's just a generalised feeling amongst the community that they will have 24-hour access, seven days a week, as has happened in lots of retail and commercial industries. There now seems to be a greater expectation that people will have more access to services.

PN12612

I see. So the expectation you're referring to is your general understanding about community expectations?---And obviously there are programs in that sixth pharmacy agreement which people will want to take advantage of.

PN12613

Do you understand that under 6CPA there will be a 70 per cent increase in funding to community pharmacy programs?---If that is what the document says, well that's probably the case. As I've said, not all pharmacies will have access to all of that, though. It depends on the mix of business in that pharmacy.

PN12614

In paragraph 19 you say that if the - you deal with the Guild proposal and you say that you would open the pharmacy earlier and close later on Saturdays and also open on Sundays and public holidays?---Yes.

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12615

So you say that you would open the pharmacy earlier, close later on Saturdays, and also open on Sundays and public holidays. I take it, then, in saying that, that you have undertaken an analysis of the costs and benefits of those increased

tradings in light of the Pharmacy Guild proposal, if it was accepted?--- Yes, I have. I have staff that are willing to do those hours.

PN12616

My question is whether or not you have undertaken an analysis. Have you undertaken an analysis?---Yes. I've undertaken an analysis that we would be better than the current situation.

PN12617

You've done an analysis, have you?---Yes.

PN12618

What forms that analysis take?---It is, again, looking at gross profit and wage percentages, expected wage percentages, expected gross profit, and expected sales.

PN12619

All right. So you've looked at that information. And did you look at the Guild proposal as well to form that view?---Yes.

PN12620

Is this documented, this analysis that you've undertaken?---Yes, it would be. Yes.

PN12621

In what form?---My partner is - my wife, pharmacist - as owners of the business, we've sat down and looked at those proposals.

PN12622

All right. And you've sat down and looked at those proposals, and the analysis is documented?---Yes. We would have notes to that effect.

PN12623

And you have the - in addition to the notes - the notes you made that constitute the analysis, is that right - - - ?---Yes.

PN12624

- - - was undertaken by reference to other data of the type you just referred to before?---Yes.

PN12625

I call for the production of that material, if the Commission pleases.

PN12626

JUSTICE ROSS: Are you able to provide that material, Mr Keane?---Yes.

PN12627

Maybe in the way we previously discussed, if you provide it to the Guild representative, then it will be provided to Mr Moore.

*** PAUL THOMAS KEANE

XXN MR MOORE

PN12628

MR MOORE: Thank you.

PN12629

You say it would be possible - this is in paragraph 19 - to hire new staff. I assume that what you would principally see in your own mind, in the event that the Guild proposal was adopted by this Commission, would be that any increase in hours or firstly and principally translate to increase hours of work to existing staff?---I would think no.

PN12630

You would think no?---No to my existing pharmacy assistant staff, because there is a conscious effort to keep staff wages and hours within the parameters to minimise the overtime that would be available. So my existing staff would possibly go into overtime period if they - some of my existing staff would go into overtime if they did additional hours on a Sunday or public holiday, for example. My pharmacists are willing to do extra hours, but it would probably mean a reduction of weekday hours.

PN12631

So there would be - as you would - - -?---Some trade-offs.

PN12632

There would be some increased hours for some workers, but in other cases you would say that you might have to put on other staff?---Yes.

PN12633

In paragraph 20, you say that if the proposal was accepted, the pharmacy could offer additional services to patients on weekends and public holidays. I take it by that what you mean is that the services you already provide could then be provided on those days?---Yes.

PN12634

Nothing further.

RE-EXAMINATION BY MR SECK

[12.20 PM]

PN12635

MR SECK: Mr Keane, in answer to a question about the Sixth Community Pharmacy Agreement, you said - to use the words of my learned friend Mr Moore - it was putting right the consequences of the Fifth Community Pharmacy Agreement. Could you explain to the Commission what you mean by that?---Sir, I noticed in the financial year 2014-15, we had suffered a net reduction of net profit of \$92,000. I felt that this could majorly be attributed to the changes in remuneration under that fifth agreement.

*** PAUL THOMAS KEANE

RXN MR SECK

PN12636

When you say there were changes to remuneration under the fifth agreement, can you explain to the Commission, to the best of your knowledge, what those changes were?---There was a process called price disclosure, where the price of molecules is continually reviewed and reduced. When that happens, the

profitability or the gross profit on those items also reduces. That reduction in gross profit feeds right through to the bottom line of the pharmacy - the net profit of the pharmacy.

PN12637

Thank you, Mr Keane. No further questions, your Honour.

PN12638

MR MOORE: Your Honour, I omitted to raise with the previous witness that in light of the calls for production of documents - although there's obviously a need to deal with the witnesses being excused at this point - it may be necessary for them to come back.

PN12639

JUSTICE ROSS: Yes, I follow. All right.

PN12640

Thank you for your evidence. You're excused.

<THE WITNESS WITHDREW

[12.22 PM]

PN12641

JUSTICE ROSS: We might adjourn for two minutes and then we will reconstitute the bench to deal with the objections to the notices to produce.

SHORT ADJOURNMENT

[12.22 PM]

RESUMED

[12.31 PM]

PN12642

VICE PRESIDENT CATANZARITI: Thank you. There are two matters I want to deal with this afternoon. The first is - if the parties are all back here - to deal with whether the Pezzullo matter which currently was at 3.25 this afternoon and has now been shifted to 4 o'clock - whether that is the right timing. We have had a discussion amongst - well, I'm worried about tomorrow's hearing. Is it better that it be done during the luncheon adjournment tomorrow?

PN12643

MS FORSYTH: I think it probably is, your Honour, if that's convenient for the bench.

PN12644

VICE PRESIDENT CATANZARITI: Are we getting close to getting agreement in regard to those issues?

PN12645

MS FORSYTH: We are getting closer to agreement on what I'd describe as the marginal issues, particularly you'll recall some of the objections as they pertain to the literature of (indistinct) but the parties are still very much at odds insofar as the bulk of the objections are concerned.

*** PAUL THOMAS KEANE

RXN MR SECK

PN12646

VICE PRESIDENT CATANZARITI: Right. So it may mean that we deal with it at 1 o'clock and, if it's not resolved, then it will go to a hearing on Wednesday.

PN12647

MS FORSYTH: Yes. That's as I understand it.

PN12648

VICE PRESIDENT CATANZARITI: We'll list that matter for 1 o'clock tomorrow.

PN12649

MS FORSYTH: Thank you, your Honour.

PN12650

VICE PRESIDENT CATANZARITI: Rather than at 4 o'clock.

PN12651

MR SECK: Thank you, your Honour. That's suitable.

PN12652

VICE PRESIDENT CATANZARITI: All right. If we then go to the notices to produce. Are there any agreements been reached in relation to these?

PN12653

MS FORSYTH: I take it that these are the notices to produce - - -

PN12654

VICE PRESIDENT CATANZARITI: For the lay witnesses.

PN12655

MS FORSYTH: - - - for our lay witnesses.

PN12656

VICE PRESIDENT CATANZARITI: That's right.

PN12657

MS FORSYTH: Your Honour, there hasn't been an attempt as yet or time to have a discussion with my learned friends, but our objections are - and can be dealt with in short compass. There are effectively two bundles of notices to produce, one bundle that has been received by us from FCB. That is in relation to the ARA and Co. Then there is also an additional notice to produce that has been made on behalf of the Pharmacy Guild with respect to a final witness, Ms Carlene Weiner.

PN12658

VICE PRESIDENT CATANZARITI: The only main issue on the FCB one, is that the notice of assessment document that - - -

PN12659

MS FORSYTH: Not quite, your Honour. There are a few other issues to discuss, but the notice of assessment perhaps is the primary objection. Perhaps if I can

start at category 1. We're happy to provide the pay slips and the rosters in relation to each of the witnesses, but we say that - - -

PN12660

VICE PRESIDENT CATANZARITI: But you want it down to one month.

PN12661

MS FORSYTH: Exactly.

PN12662

VICE PRESIDENT CATANZARITI: What is the problem in relation to that?

PN12663

MR SECK: I think they're in Melbourne, your Honour.

PN12664

VICE PRESIDENT CATANZARITI: They are in Melbourne, are they, yes.

PN12665

MR WHEELAHAN: Sorry, I thought you were addressing my learned friend, your Honour. Rhetorically, what's the problem with two months? The rosters as they are, are fortnightly. If we only go one week - it seems that if you'd like to get it one month, you may as well get two months. We don't think it's overly onerous to get two months.

PN12666

VICE PRESIDENT CATANZARITI: We will have a discussion about it. You're pressing for your two months.

PN12667

MS FORSYTH: Your Honour, we don't press it firmly, but we press it.

PN12668

VICE PRESIDENT CATANZARITI: Right. If you don't press it firmly, then given it is two months on the pay slips, let's knock that one over.

PN12669

MS FORSYTH: Understood.

PN12670

VICE PRESIDENT CATANZARITI: Move onto the second category.

PN12671

MS FORSYTH: The second is in relation to the contracts of employment. We don't really see those as being necessary. There isn't reference to contracts of employment within the witness statements themselves. If our opponents have pay slips and rosters, as well as group certificates - which we're happy to provide - we don't really see any additional benefit in handing over any contracts as they may exist with respect to each of the witnesses.

PN12672

VICE PRESIDENT CATANZARITI: Right.

PN12673

MR WHEELAHAN: Your Honour, one would imagine a contract of employment will only be one, maybe two or three pages. Again, it's not a very onerous task and it's plainly relevant to their statements about what their terms and conditions of employment are in those contracts, particularly with regard to when hours might be worked and choices of flexibility with those hours. It's not an unusual request and it's relevant, in my submission.

PN12674

VICE PRESIDENT CATANZARITI: We don't think it's an onerous request. If there is material, it's possible that there may be a contract and the contract might, for example, be limited. It might say, "You are only going to work on a Sunday." We don't know, so whatever is available, should be produced.

PN12675

MS FORSYTH: As the Commission pleases. In relation to the third category of documents, that's the group certificates, we are happy to provide those, your Honour. In relation to the fourth category, which is the notice of assessment from the Tax Office, our position is this: that each of the witness will have handed over their pay slips, as well as their group certificates. We really don't understand any additional requirement or benefit that might be gained from the production of notices from the ATO.

PN12676

VICE PRESIDENT CATANZARITI: What do you have to say about the notice of assessment? What is the purpose for it?

PN12677

MR WHEELAHAN: The witness statements give evidence about their capacity to meet their expenses and clearly what they earn is relevant, whether it be from this job or other sources of income. Again, we've only asked for one year. We deliberately have not tried to be overly onerous. Given my learned friend's remarks about the ease of obtaining other documents, again we don't think it should be a difficult task to obtain the last year's notice of tax assessment.

PN12678

DEPUTY PRESIDENT ASBURY: Mr Wheelahan, can you just clarify, is it because you think they're working elsewhere?

PN12679

MR WHEELAHAN: I don't know what other work they have, but they have put in issue their earnings and their capacity to meet expenses. Intermixed with their income are various other payments, whether it be Family Tax Benefits or otherwise. My learned friend is putting to you that really we should be able to comprise this from the documents we already have. In my submission, it's not really an answer to why one should not provide a notice of assessment for one financial year.

PN12680

DEPUTY PRESIDENT CATANZARITI: We propose to reject category 4. If you feel you wish to cross-examine about it in some way making it relevant then you ask questions about other sources of income, et cetera.

PN12681

MR SECK: If your Honour pleases.

PN12682

DEPUTY PRESIDENT CATANZARITI: That deals with that notice to produce.

PN12683

MS FORSYTH: Thank you, your Honour. I will move then to the second notice to produce which was filed on behalf of the Pharmacy Guild of Australia. That's in relation to Ms Caroline Weiner. Your Honour, we're happy to provide the category 1 documents, namely the payslips, but again we say that the period is somewhat onus being from 1 May to 31 August this year. We say one month should suffice in that regard.

PN12684

DEPUTY PRESIDENT CATANZARITI: We are going to make it two months like the other one I think, make it two months for consistency.

PN12685

MS FORSYTH: Yes, thank you, your Honour.

PN12686

MR SECK: We accept two months, your Honour, but we would like also a payslip prior to 30 June 2015. We need to reflect that that was a national wage increase as of 1 July 2015, and it may be relevant in terms of Ms Weiner's financial position and know what it was prior to the national wage increase. So we accept two months and perhaps it can also include a payslip for the week immediately prior to 30 June 2015 as well.

PN12687

DEPUTY PRESIDENT CATANZARITI: Do you have any problem?

PN12688

MS FORSYTH: No, your Honour.

PN12689

DEPUTY PRESIDENT CATANZARITI: We will grant that, Mr Seck.

PN12690

MR SECK: May it please, your Honour.

PN12691

MS FORSYTH: With respect to the second and third categories of documents there is no reference in Ms Weiner's statement to quotations with respect to private health cover and contents insurance respectively, and we say that those categories of documents should not remain the subject of production.

PN12692

COMMISSIONER LEE: What was the second one, sorry, private health insurance and - - -

PN12693

MS FORSYTH: Private health insurance as well as contents insurance. Quotations are being sought for both, your Honour.

PN12694

MR SECK: If the Commission has a copy of Ms Caroline Weiner's statement dated 5 October can I ask the Commission to go to paragraph 7 of that statement the Commission will see that Ms Weiner deposes to how she spends her income in the first and second sentences of paragraph 7, presumably to demonstrate that she relies chiefly on her penalty rates for working on weekends and public holidays to pay for those basics. Then she says in the last sentence:

PN12695

I cannot afford private health cover or contents insurance.

PN12696

So what we're seeking in paragraphs 2 and 3 of the draft order for production is documents relating to any quotations. Now if she hasn't sought any quotations for private health cover or contents insurance there should be nothing to produce, but in my respectful submission categories 2 and 3 directly relate to the last sentence of paragraph 7.

PN12697

VICE PRESIDENT CATANZARITI: Mr Seck, it's our view you can cross-examine in relation to that. We are not going to order any production.

PN12698

MR SECK: May it please your Honour.

PN12699

MS FORSYTH: Then finally, your Honours, in relation to categories 4 and 5 we are happy to accept production for both invoices and receipts with respect to each of the items identified therein and referred to in paragraph 7 of Ms Weiner's statement, save to say that the timeframe that is required we say is oppressive and we ask that it be restricted to what would sensibly be a quarter.

PN12700

MR SECK: We're happy with that restriction, your Honour.

PN12701

VICE PRESIDENT CATANZARITI: Yes, well that's how we will deal with that.

PN12702

MS FORSYTH: Thank you, your Honour. That deals with the objections that we have certainly received regarding the lay - - -

PN12703

VICE PRESIDENT CATANZARITI: Who is next, anybody left in relation to these lay witnesses?

PN12704

MS FORSYTH: We haven't received anything from Australian Business Industrial with respect to notices to produce, but we anticipate that if they were to be forthcoming they would have been filed in accordance with the directions.

PN12705

VICE PRESIDENT CATANZARITI: They should have been - - -

PN12706

MR SECK: I can confirm there's no notices to produce in respect of lay witnesses.

PN12707

VICE PRESIDENT CATANZARITI: Mr Dixon, is there anything you wanted to address?

PN12708

MR DIXON: May it please the Commission. Your Honours, the notices to produce directed at a number of experts I can deal with this most efficiently by asking members of the Bench to have regard for a document that was filed on behalf of the Ai Group, and it's a document headed "The members submission" - -
-

PN12709

VICE PRESIDENT CATANZARITI: Yes, I have that in front of me.

PN12710

MR DIXON: The Commission will see that the SDA has in respect of the orders that were made on 22 September by the residing member filed an affidavit and claimed privilege in respect to some of the documentation, and have proposed that that matter be dealt with by another member of the tribunal, as has occurred in the past. We accept that proposal subject to a few qualifications. May I invite the Commission to go to paragraph 13 of this document.

PN12711

In paragraph 12 you will see a reference to what his Honour the Vice President directed or required in a previous situation where the matter went to another member. So we would request that the Commission make a direction of the kind set out in paragraph 13 in response, so that when the other member of the tribunal comes to deal with the matter it is on a more informed basis.

PN12712

It does however require, we respectfully submit, perhaps an inclusion of such a process in respect of what we have said in paragraph 14. Paragraph 14 we note that the Ai Group filed five form F52s with the Commission in respect of the experts list of that. Those orders have not yet been issued when this document was prepared on Friday evening. We are advised by the Commission today that such an order will be made returnable this coming Friday.

PN12713

VICE PRESIDENT CATANZARITI: Yes, I understand, that was drawn to my attention about five minutes ago.

PN12714

MR DIXON: So what we are suggesting, your Honour, is that in the event that there are any issues arising from those notices of the same kind that arose from the 22 September orders that the SDA provide an affidavit and the information in respect of similar information to that in paragraph 13 so that the objections can be dealt with together at one time by another member in an informed way. The next issue - perhaps I can just - - -

PN12715

VICE PRESIDENT CATANZARITI: Let's just deal with that first. Ms Forsyth, is there any problem with that proposal?

PN12716

MS FORSYTH: We would oppose that suggestion, your Honour.

PN12717

VICE PRESIDENT CATANZARITI: On what basis, because we are going to be consistent with what's previously occurred?

PN12718

MS FORSYTH: Well, as I understand it the affidavit of Mr Macken has been accepted as establishing prima facie privilege over the three volumes worth of documents that we say are subject to privilege. It's not understood that any such further affidavit was required by way of the process that was undertaken by Commissioner Johns with respect to the experts, and we say simply that - - -

PN12719

VICE PRESIDENT CATANZARITI: We weren't a part of what happened before Commissioner Johns.

PN12720

MS FORSYTH: No, certainly, and ultimately it will be a matter for - - -

PN12721

VICE PRESIDENT CATANZARITI: Then all we want to ensure is that what happened before Commissioner Johns he was informed in the same way.

PN12722

MS FORSYTH: Yes.

PN12723

VICE PRESIDENT CATANZARITI: Are you putting to us that there was no such affidavit?

PN12724

MS FORSYTH: I understand that there was no such affidavit that was provided.

PN12725

MR DIXON: I'm sorry to interrupt my friend, I think she may have misunderstood what I'm suggesting.

PN12726

MS FORSYTH: I understand that there was certainly an affidavit akin to Mr Macken's affidavit currently before the Bench with respect to establishing legal client privilege. What there wasn't was what I understand that AiG Group to now be seeking, which is essentially an itemised affidavit if you like that deposes to when each draft as it may be contained in the privileged documents was made and when each of the communications that might be in the privileged documents was made. We see that that wouldn't greatly assist the Bench, but we will ultimately be guided by what you might view, your Honour, as of assistance in that matter.

PN12727

VICE PRESIDENT CATANZARITI: Yes. Mr Dixon.

PN12728

MR DIXON: I think my friend may have misunderstood our reference to an affidavit, if the Commission pleases. You will see from paragraph 12 that in order to facilitate the matter in previous objection, his Honour the Vice President on the confidential transcript made directions, the effect of which we have set out in paragraph 13.

PN12729

Now, when I've mentioned the question of an affidavit, it is possible that in respect of the matters that are referred to in paragraph 14 that the SDA on behalf of itself or the other witnesses may wish to claim legal professional privilege on the same basis as they have in respect of the 22 September orders. What we are suggesting is that in that event Mr Macken (? 12.51.18) can file an affidavit to a similar extent - to a similar form to the earlier one if it applies and to avoid the matter coming back, paragraph 13 applies in respect of the orders to be issued here and then the matter goes off in an informed manner to another member of the Tribunal to deal with, as was the case as we understand it in previous situations.

PN12730

VICE PRESIDENT CATANZARITI: I don't think there's an issue in relation to paragraph 14 that, in other words, there will be obviously another affidavit by Mr Macken (? 12.51.51) in relation to those matters when appropriate. It's really an understanding of what went - just that deals with paragraph 13 which we were not involved with and I want to make sure that Johns C has this matter ready to run.

PN12731

MR IZZO: Your Honour, may I assist, because I was involved in what occurred last time.

PN12732

VICE PRESIDENT CATANZARITI: Yes, Mr Izzo.

PN12733

MR IZZO: What occurred last time was that an affidavit, certainly in relation to the ABI and New South Wales Business Chamber documents - an affidavit was

filed. There is a difference between the affidavit filed by ABI and New South Wales Business Chamber compared to what's been filed by Mr Macken and that is that the ABI and New South Wales Business Chamber affidavit listed each communication individually, over which privilege has been claimed. That has not been done in the Macken affidavit to date. However, in those proceedings, the Pharmacy Guild also claimed privilege and my understanding is that in the documentation filed by the Pharmacy Guild which was in the affidavit, I don't think they actually had an itemised list of communications, even though they've both been done by ABI and New South Wales Business Chamber. So that's what occurred there.

PN12734

In relation to what's been sought in paragraph 13, my understanding is that's what the president may have suggested on the very first day of this hearing in some comments about the privilege issue, but those actions didn't actually end up converting into directions, so to speak. He suggested that would be a perhaps prudent course of action, but directions were never made to that effect and certainly no party actually did that before Johns C. What Johns C had before him was an affidavit from New South Wales Business Chamber and ABI, which as I said, was itemised communication by communication and an affidavit from the Pharmacy Guild, which may not have been as itemised. So that's my understanding of what occurred previously.

PN12735

MR SECK: Can I indicate what happened in relation to the Pharmacy Guild? It is slightly more detailed than what is contained in Mr Macken's statement. It was at the suggestion of Johns C. What in effect is set out is a chronology of the correspondence that went back and forth between Deloitte and my instructing solicitors Meridien Lawyers to establish that the documents produced were for the dominant purpose of litigation or legal advice. So whilst it didn't itemise each correspondence it did set out a chronology of the major communications between the lawyers and the expert in order to establish the dominant purpose of the communications between the parties.

PN12736

If it's intended that the same process be followed in relation to the SDA experts, then I think there needs to be a slightly more detailed chronology of those communications in line with the statement which has been - or affidavit can be prepared by Ms Pezzullo and Ms Wellard on behalf of the Pharmacy Guild.

PN12737

VICE PRESIDENT CATANZARITI: Ms Forsyth.

PN12738

MS FORSYTH: Your Honour, that may well be the case for the experts although, as you noted earlier, we're yet to be issued with those notices to produce. However, with respect to some form of chronology being given, if that would be of assistance, then I'm sure we can facilitate that.

PN12739

VICE PRESIDENT CATANZARITI: I think what we should do is we should facilitate that there be a chronology prepared for Johns C, at least to a limited basis as suggested by Mr Seck.

PN12740

MS FORSYTH: Yes, I mean, I suppose our primary position is that the affidavit of Mr Macken asserts legal/client privilege - - -

PN12741

VICE PRESIDENT CATANZARITI: Yes. Well, if it doesn't go far enough then Johns C (indistinct) didn't deal with it. So that's the way we'll leave it.

PN12742

MS FORSYTH: As the Commission pleases.

PN12743

VICE PRESIDENT CATANZARITI: Mr Dixon, anything further from you?

PN12744

MR DIXON: A similar issue arises, your Honour, in respect of the ACTU's material.

PN12745

UNIDENTIFIED SPEAKER: I apologise to interrupt, but we're having a lot of trouble hearing Mr Dixon here in Melbourne. So if we could get the microphone -
- -

PN12746

VICE PRESIDENT CATANZARITI: Just so we're clear, is the last item then just the ACTU now? We've dealt with everything with the SDA?

PN12747

MS FORSYTH: As I understand it, your Honour, it's just a matter for another member of the Bench to deal with. I do have USB sticks containing the privileged material to hand up, if now is the appropriate time to do that.

PN12748

VICE PRESIDENT CATANZARITI: Yes, you can give them to my associate.

PN12749

MS FORSYTH: Just for the sake of clarity, there are two USB sticks here; one being the non-privileged material which I understand was produced in accordance with the order by way of Dropbox. The second being relevant to the privileged material that will be considered in due course. Thank you, your Honour.

PN12750

VICE PRESIDENT CATANZARITI: Yes, Mr Dixon.

PN12751

MR DIXON: May it please, your Honour. Just before I turn to the ACTU, can I just clarify the position in respect of the form, the notice to produce orders that would go out today which we refer to in paragraph 14. What we were

contemplating is that if there are going to be similar objections then they should be dealt with in the same way.

PN12752

VICE PRESIDENT CATANZARITI: And they will be.

PN12753

MR DIXON: If your Honour pleases. In relation to the ACTU - - -

PN12754

VICE PRESIDENT CATANZARITI: We're not bringing them back. The orders will be issued and then what will flow will flow before Johns C.

PN12755

MR DIXON: Thank you, your Honour. In relation to the ACTU, paragraphs 27 and following of our note, the issues appear to be the same although the ACTU has not identified in any way the basis upon which such an objection will be made. If it is to be on the same basis that the SDA has done, then we would respectfully submit that the most prudent course is that we file an affidavit and adopt the same processes we have suggested in relation to paragraph 13 and so that that matter can be dealt with accordingly.

PN12756

VICE PRESIDENT CATANZARITI: Yes, and we'll hear from the ACTU in relation to (indistinct).

PN12757

MS FORSYTH: I think that there's - just in respect to the, I guess, pending notice to produce from the Ai Group, there is some overlap between that and the order dated 2 September in terms of the documents which are sought. So I anticipate that our view in relation to the same document - our view will be the same. We indicated in correspondence to the Commission that we are yet to receive the documents from Prof Markey, so we would - we seek an opportunity to review those documents to ascertain whether or not privilege - whether or not we assert privilege in respect of those documents.

PN12758

VICE PRESIDENT CATANZARITI: Well, I think the argument is if you are going to assert privilege, then it should go through the same process for Johns C.

PN12759

MS FORSYTH: Of course. That's fine and that's precisely, I think - we haven't provided an affidavit, but in the documents which we have provided to the Commission we have catalogued them and provided a chronology accordingly. So we'll adopt the same process with respect to any further documents from the Ai Group.

PN12760

If it's - - -

PN12761

MR DIXON: Have you finished in Melbourne?

PN12762

MS FORSYTH: No, that's - I was just going to go on to make some comments just in respect to the other - the order dated 2 September, but if there's something further in respect to the AiG's pending notice to produce, then it might be easier to deal with that now.

PN12763

VICE PRESIDENT CATANZARITI: I think we will deal with that first. Mr Dixon.

PN12764

MR DIXON: I was going to just deal with the other documents. There's a question of redacting material which we've referred to here. There doesn't seem to be any basis for the whole document being withheld if there is privilege that can be redacted. And so we deal with that in our paragraph 29 and it should not be a problem at all.

PN12765

MS FORSYTH: In relation to that - in relation to that document, I know that the Ai Group doesn't press for any documents, and I understand that the other employer parties also don't press for any documents which pertain to the first retainer, Prof Markey. That specific document, which we refer to as ACTU6B, does pertain to the first retainer. So on the basis of what we understand the employer's submissions are, it wouldn't be produced anyway.

PN12766

MR DIXON: I don't think that was the basis - - -

PN12767

VICE PRESIDENT CATANZARITI: I didn't follow that.

PN12768

MR DIXON: I'm sorry, your Honour.

PN12769

VICE PRESIDENT CATANZARITI: I didn't think that's what you were saying, Mr Dixon. I thought you wanted them produced.

PN12770

MR DIXON: We wanted it produced. I don't think the objection makes it clear that it's entirely related to the first retainer. If there are matters in respect of the first retainer in the document, then they can be redacted; but the balance, if it does not relate to the first retainer, should be produced.

PN12771

MS FORSYTH: I apologise. To be clear, that particular correspondence deals with two matters: one which pertains to the first retainer; and other matters which pertain to entirely separate award review proceedings, nothing to do with the

penalty rates case and/or the report of Prof Markey. And it's on that basis that we say it's not relevant and shouldn't be produced.

PN12772

MR DIXON: We don't have the document, so I can't take it any further. I think the Commission has.

PN12773

VICE PRESIDENT CATANZARITI: I think the safest course is that the document be produced before Johns C and the argument be had before Johns C.

PN12774

MR DIXON: We would be very content with that course. Thank you.

PN12775

VICE PRESIDENT CATANZARITI: Understand that?

PN12776

MS FORSYTH: Yes. Yes, that's - - -

PN12777

VICE PRESIDENT CATANZARITI: Because you're telling us what the document says. We don't know what it says. And if it doesn't say that, then it does raise issues, and he's dealing with all the other issues in relation to the documents. That's where it should go.

PN12778

MS FORSYTH: Yes, that's fine, your Honour. And, your Honour, just for my benefit, I assume, then, that I will treat the document different to the other documents which I understand aren't being pressed from the other employer parties in relation to the order of 2 September. If I can just - it might be helpful if I can come back a step and probably deal with that order and what I understand the position to be.

PN12779

We have seen the submissions which were filed in response by the Australian Business Lawyers and Advisers, and we understand that the employer parties are not pressing for documents, as I've indicated, that pertain to the first retainer. That would - that simply means for the ACTU for the documents within the ACTU's possession, that covers the vast majority of communication between us and Prof Markey. The way in which - and for the transcript, that would mean that all documents - say for ACTU24, which I will come to, would fall under the first communication with respect to the first retainer. And so I understand that that's no longer being pressed.

PN12780

Our objection in relation to ACTU24 is one of relevance, in that that's correspondence which pertains to the retainer of Dr Martin O'Brien. And whilst it might be the case that that would be producible under a notice to produce, which has been foreshadowed by the Ai Group, we say that it's not something which is

relevant to the report which has been filed by Prof Markey, and so we object to it being produced on that basis.

PN12781

In relation to - and I've indicated earlier - in relation to the categories that relate to Prof Markey's and any documents which are within the possession of Prof Markey, we're hoping to receive those, and we already have received some of those documents today, and we expect that we will receive more tomorrow. And we would then review those documents and provide the chronology to the Commission in the way in which it has been discussed previously. Those are our submissions in relation to that order.

PN12782

VICE PRESIDENT CATANZARITI: Anything you want to raise, Mr Dixon?

PN12783

MR DIXON: Your Honour, if the ACTU24 is objected to on the grounds of relevance and not privilege, then we should be able to see it. We would do it on a confidential basis so that we can make a submission about whether it is relevant or not.

PN12784

VICE PRESIDENT CATANZARITI: I think that's right. I think that document 24 should be produced before Johns C so that he has got the whole context of the material. So you have to produce that document.

PN12785

MS FORSYTH: Yes. Okay. Thank you, your Honour.

PN12786

VICE PRESIDENT CATANZARITI: Then you can have the argument before Johns C as to whether it's relevant or not, and come back to us at that point.

PN12787

MR DIXON: Can I raise one other matter, if the Commission pleases?

PN12788

VICE PRESIDENT CATANZARITI: Yes.

PN12789

MR DIXON: And that is what we've dealt with in paragraphs 16 and following, the objections from Prof Charlesworth and Dr McDonald. The Commission will see that they were concerned about confidentiality, given the codes upon which they operate. Those codes do exclude disclosure as required by law. As we point out in paragraph 22, Ai Group has no difficulty in maintaining confidentiality with an appropriate confidentiality order. The type of evidence that we seek has clearly been produced before.

PN12790

We note in paragraph 23, for example, that in respect of Dr Sands' report, there was the top line notes that was referred to in proceedings. And in our respectful

submission the concerns of Prof Charlesworth and Dr McDonald can be dealt with on the basis that confidentiality orders be put in place. And obviously if the matter - any of that material is relied upon in cross-examination, the same confidentiality provisions would prevail.

PN12791

VICE PRESIDENT CATANZARITI: Yes. What do you say about that?

PN12792

MS FORSYTH: There's no issue.

PN12793

VICE PRESIDENT CATANZARITI: No. Then those confidentiality orders can be made. Any other matters, Mr Dixon?

PN12794

MR DIXON: May I just get clarification on one matter? In relation to objections to the Pezzullo evidence, can we take it that I correctly understood the position there will be no other matters dealt with this afternoon?

PN12795

VICE PRESIDENT CATANZARITI: That's correct, because we're running behind schedule.

PN12796

MR DIXON: I understand that.

PN12797

VICE PRESIDENT CATANZARITI: And we need to finish the witnesses, so it has been agreed that we will not do that this afternoon and we will do it at 1 o'clock tomorrow.

PN12798

MR DIXON: And that will be the only matter dealt with tomorrow in relation to -
--

PN12799

VICE PRESIDENT CATANZARITI: Unless there are any other - are there any other matters outstanding apart from Pezzullo tomorrow?

PN12800

MS FORSYTH: Not as I understand it, your Honour. And just for the sake of clarity, I should note that insofar as my learned friend's comments regarding confidentiality orders pertain to the ACTU - - -

PN12801

VICE PRESIDENT CATANZARITI: You don't understand that.

PN12802

MS FORSYTH: I can't speak on the ACTU's behalf. But insofar as you are looking for any sort of response from the SDA about confidentiality generally - - -

PN12803

VICE PRESIDENT CATANZARITI: The ACTU understands the confidentiality point will be made in relation to that.

PN12804

MS FORSYTH: It may in fact be RMIT that was - in relation to - - -

PN12805

VICE PRESIDENT CATANZARITI: That's right. RMIT will need confidentiality orders, you're quite right. Would you make sure that anybody who's not here knows that the 4.15 is not happening this afternoon - sorry, the 3.25 is not happening this afternoon.

PN12806

MS FORSYTH: Indeed. And I should note, your Honour, I do believe that the bench is aware of this, that RMIT is being separately represented by their in-house counsel.

PN12807

VICE PRESIDENT CATANZARITI: That's right.

PN12808

MS FORSYTH: So insofar as I stand here today, I stand here for the SDA, not for Ms McDonald or Ms Charlesworth.

PN12809

VICE PRESIDENT CATANZARITI: All right. Let's make sure there's nothing outstanding. Anything further outstanding from the ACTU?

PN12810

MS FORSYTH: No, thank you, your Honour.

PN12811

VICE PRESIDENT CATANZARITI: Anything else in Melbourne?

PN12812

UNIDENTIFIED SPEAKER: No.

PN12813

VICE PRESIDENT CATANZARITI: Anything else in Sydney? No. The Pezzullo issue will be dealt with at 1 o'clock tomorrow. In relation to the other notices to produce, they will be issued probably later today, Mr Dixon, and then the same process falling before Johns C will occur in relation to those when the objections are on.

PN12814

MR DIXON: If your Honour pleases.

PN12815

VICE PRESIDENT CATANZARITI: Thank you. The Commission is adjourned until 2 o'clock.

LUNCHEON ADJOURNMENT

[1.09 PM]

RESUMED

[2.02 PM]

PN12816

JUSTICE ROSS: I should just mention that the APESMA witness for the redaction has been dealt with and I think you have been forwarded the unredacted version and APESMA's been copied into that.

PN12817

MR SECK: Yes, your Honour, thank you for that.

PN12818

JUSTICE ROSS: They were content for that course, so there's no need for the hearing whenever we foreshadowed it, Wednesday at 9.30.

PN12819

MR SECK: May it please, your Honour. Your Honour, in terms of the batting order given that we're running behind schedule, can I inform - - -

PN12820

JUSTICE ROSS: Mr Moore will pick up his pace. He's just moving into his afternoon spell, it should be fine.

PN12821

MR SECK: I'm sure he will. Can I indicate the order this afternoon that's been proposed.

PN12822

JUSTICE ROSS: Sure.

PN12823

MR SECK: Angelo Pricolo, he is based in Victoria so he will be called next because he does have a flight this afternoon. Then we have by video link Mr Greg Da Rui from Western Australia. He will continue to be at 2.45. After that will be Mr David Heffernan and following Mr Heffernan will be Mr Quin On.

PN12824

JUSTICE ROSS: All right..

PN12825

MR SECK: If it please, your Honour. The next witness then is Mr Pricolo, your Honour. I understand from my learned friend he wishes to deal with the pressed summary objection so I'll allow him to address on those points.

PN12826

MR MOORE: If the Commission pleases, there were a number of objections to Mr Pricolo's affidavit. In light of the rulings this morning, we won't press those save for two of them we'd ask the Bench to rule on. The first is paragraph 21 in the last sentence.

PN12827

Those patients are very appreciative we are open. It's either us or a very long stay at the public hospital.

PN12828

We say that's a bridge too far to be speculating about what's in the minds of these patients and put in such a general speculative way. Likewise we press our objection to paragraph 35, and it's really in the same character. It's an attempt, the witness is seeking to put himself in the mind of these patients and to give evidence about this, which he can't do, even accepting some liberality in approach.

PN12829

MR SECK: Your Honour, in my submission the matter dealt with in both paragraph 21 and 35 shouldn't be dealt with in any different way to the community hearsay that the Commission has ruled upon, both in the hospitality phase and earlier on this morning. It doesn't fall within the same category as the objection which was upheld by the Full Bench earlier this morning which was directed to specifics as to opening hours. Paragraph 21, the last sentence, merely reflects Mr Pricolo's understanding of the views of patients in keeping the pharmacy open beyond the ordinary opening times. Paragraph 35, again deals with merely Mr Pricolo's understanding and belief as to why customers choose to attend the pharmacy. That is a far cry from the issue which is addressed in the earlier statement about specific times.

PN12830

JUSTICE ROSS: Do you want to say anything further, Mr Moore? No. I appreciate some of these matters are matters of what might be call fine judgment, Mr Moore, but we decided to dismiss both objections. We accept the substance of what you say about their hearsay nature and that will go to the weight that we'll attribute to them.

PN12831

MR MOORE: Commission pleases.

PN12832

MR SECK: If the Commission pleases, I call Angelo Pricolo.

PN12833

THE ASSOCIATE: Could you please state your full name and address.

PN12834

MR PRICOLO: Angelo Pricolo, (address supplied).

<ANGELO PRICOLO, SWORN **[2.08 PM]**

EXAMINATION-IN-CHIEF BY MR SECK **[2.08 PM]**

PN12835

MR SECK: Mr Pricolo, what's your current occupation?---Pharmacist.

*** ANGELO PRICOLO

XN MR SECK

PN12836

Which pharmacy do you operate?---Tambassis Pharmacy in Brunswick.

PN12837

Mr Pricolo, you have prepared a statement in these proceedings, that's correct?---Yes.

PN12838

That statement is dated 6 August 2015, that's correct?---Yes.

PN12839

Do you have a copy of that statement with you in the witness box?---I do, yes.

PN12840

Have you read that affidavit recently?---I have, yes.

PN12841

Do you wish to make any changes to the affidavit?---No.

PN12842

In paragraph 14, did you - - -?---Other than those two that I - - -

PN12843

Can I just take you to those changes, Mr Pricolo?---Yes, yes, sure.

PN12844

Do you wish to make a change to paragraph 14?---Mm-hm.

PN12845

Can you just tell the Commissioner what change you wish to make to paragraph 14?---I just wanted to be a little bit more general in that statement. When I said that, I felt as though it states that only the penalty rates were responsible for the trading hours and they're responsible in a big part but, you know, there are other reasons as well.

PN12846

So if we amended paragraph 14, Mr Pricolo, by putting the words after the word "due in part"?---Yes.

PN12847

That will address your concerns?---Wonderful, thank you.

PN12848

As I understand it you also wish to make a change to paragraph 20, that's right?---Yes.

PN12849

Sorry, 19?---Nineteen, yes.

*** ANGELO PRICOLO

XN MR SECK

PN12850

What change do you wish to make to paragraph 19?---Rather than "most of those hours" I'd just change it to "many".

PN12851

And that's in the last line?---Correct.

PN12852

Besides those two changes, Mr Pricolo, do you wish to make any other changes?---No, I'm happy with that, thank you.

PN12853

Are the contents of your affidavit true and correct to the best of your knowledge and belief?---Yes.

PN12854

I read the affidavit.

EXHIBIT #PG4 AFFIDAVIT OF A PRICOLO

PN12855

No further questions, your Honour.

CROSS-EXAMINATION BY MR MOORE

[2.10 PM]

PN12856

MR MOORE: Mr Pricolo, I just want to understand your trading hours a bit better - it's paragraph 8 - 8 am until midnight seven days a week and every public holiday, so lengthy trading hours?---It is, yes.

PN12857

As I understand it, because you deal with this in paragraph 22 as well, this is the picture, is it, that since 2010 you have maintained those trading hours referred to in paragraph 8, that is 8 to midnight seven days a week plus public holidays. For five years before 2010 you operated 24 hours a day?---No.

PN12858

No?---No, it was earlier than that. We were - 24 hour - I don't have the exact dates, but I'd say it was something like '97 to 2002, but I'm guessing, but it's about that five year span.

PN12859

So it's some greater time ago?---Yes.

PN12860

So '97 to 2002, thereabouts?---Yes.

*** ANGELO PRICOLO

XXN MR MOORE

PN12861

So that would mean that from 2003 - since 2003 you have operated the trading hours in paragraph 8?---Pretty close. I reckon we probably did 2 am for a year or two, but, yes, you're testing me now, that's going back a while, but we did play

with the idea of staying a bit longer than midnight. Back then there were a few more pharmacies that were upon until midnight, so we thought, well, you know, let's go for that point of difference and go a couple of hours extra, but it's been midnight for quite a while.

PN12862

Eight am until midnight seven days a week and every public holiday, what, for about the last 10 years, is that a fair summary?---Absolutely.

PN12863

Thank you for that. Now, you have operated the pharmacy - when did you become - you're one of a number of partners in the pharmacy?---M'mm.

PN12864

How many are there?---At this point five.

PN12865

I see. When did you become a partner?---About 2000 I think.

PN12866

Do you own or are you partners in any other pharmacies?---I am, yes.

PN12867

How many?---Three altogether, so this and another two.

PN12868

Including this one?---Yes.

PN12869

What are the other two?---Tullamarine and Brunswick pharmacies.

PN12870

Do they have similar operating hours to Tambassis, 8 to midnight?---No.

PN12871

No?---No, they're more you're sort of 9 to 5 or 9 to 6 and Saturday - Saturday morning I think - - -

PN12872

Nine to 6 Monday to Friday?---Monday to Friday. I think Tulla might do Sunday morning as well, but I'm - I don't have as hands on an operational kind of role, so I can't tell you for sure, but I'm pretty - I think we might - might be doing Sunday mornings there as well.

PN12873

I see. So you're obviously a partner in these two other pharmacies, you're not the sole proprietor?---Correct.

*** ANGELO PRICOLO

XXN MR MOORE

PN12874

Do either of them trade on Sundays?---As I say I think Tullamarine trades Sunday morning, Brunswick pharmacy doesn't.

PN12875

Are they similar in terms of the number of employees as Tambassis?---No.

PN12876

Are they smaller, are they?---Much smaller. Sorry, this is going to sound a bit silly but I'm a partner in Barkly Square Pharmacy as well, sorry, so that's four.

PN12877

Barkly Square Pharmacy?---Which is also in Brunswick.

PN12878

How many pharmacies are there in Brunswick?---Heaps. I can't give you a number, a lot of pharmacies. It's a very dense population.

PN12879

Is Barkly Square Pharmacy open on Sundays?---It is also, yes.

PN12880

Does that open 8 to 12?---No, much shorter hours.

PN12881

I see. Is it similar staffing as Tambassis or less?---Probably a little bit less, although it does have quite a bit of staff because it's quite a big pharmacy in a shopping centre.

PN12882

Barkly Square, Tullamarine and Brunswick have you had an interest in those for some time?---Yes. I took over Barkly, a share in that when I took in - when I went into Tambassis Pharmacy as well. That's quite some time ago.

PN12883

So these are long standing businesses that you've had an interest in as a partner?---Yes.

PN12884

And I take it all four of them including Tambassis are profitable?---I don't - I don't know whether we need to go into the absolute specifics. Barkly is not particularly profitable.

PN12885

I am just asking if it's profitable or not, that is each one of the four?---Well, I would say that Barkly is not profitable and the other three probably are. In general terms that word profitable means different things to different people I suppose.

*** ANGELO PRICOLO

XXN MR MOORE

PN12886

Surely you see or have produced profit and loss account for each financial year?---Yes.

PN12887

That shows, does it, in most recent times at least a profit being generated by all of the pharmacies save for Barkly Square, is that what you say?---Yes. What I mean - what I mean to say is that at Barkly Square we're not doing particularly well, so I wouldn't call it as profitable as the other three. That's what I was trying to say.

PN12888

I see. So Barkly Square would record a profit, it's just not as good a profit as the others?---Correct.

PN12889

So they're all profitable in an accounting sense?---Yes. Okay, yes.

PN12890

And they have been for some time I assume?---Yes.

PN12891

You talk about in your affidavit the effect of penalty rates provided by the Pharmacy Industry Award on the Tambassis Pharmacy. So I take it you have some reasonable working knowledge of the provisions made by the Pharmacy Industry Award?---Yes, I have a reasonably good understanding, yes.

PN12892

And I take it you would have a reasonably good understanding of the award provisions which existed and applied to those pharmacies before 2010, that is before the Pharmacy Industry Award commenced?---Look I do remember changes coming in at about that time, but I mean I can't be specific on the exact - on the exact changes, but, yes, I do recall changes taking place.

PN12893

Do you recall in general terms that before 2010 the minimum award conditions for pharmacists were those prescribed by the Community Pharmacy Award 1998?---Not specifically, but I'm not doubting it.

PN12894

And there was a different award, the Shop Distributors and Allied Employees Award - Victorian Pharmacy Assistants Award 2000 which prescribed minima for pharmacy assistants. Does that ring a bell?---Again not specifically, no.

*** ANGELO PRICOLO

XXN MR MOORE

PN12895

All right. Now, can I just put this generally to you; the four pharmacists, putting aside pharmacy assistants for the moment, the only increase in award conditions that applied to your pharmacies in Victoria for pharmacists following the introduction of the modern award, the Pharmacy Industry Award, the only increase in penalty provisions was in respect of public holiday rates of pay. Do you accept that?---I accept it, but I don't have a specific recollection that that was the case, but if you're telling me that's fine, yes.

PN12896

That is what I am telling you, I'm just - - -?---Okay, yes. Okay, sure, sure.

PN12897

Do you also understand that with the introduction of the modern award, the Pharmacy Industry Award 2010, there are in fact a good number of reductions in penalty rates that would otherwise have to be paid to pharmacists and pharmacy assistants?---You're saying as a result of the 2010 changes?

PN12898

Correct, yes?---Okay, yes.

PN12899

Do you understand that?---Yes.

PN12900

So for example tell me if you're aware of this, for pharmacists between 7 am and 8 am on weekdays the pre-existing award provisions provided for double time to be paid between 7 and 8 in the morning and that's reduced to time and a half under the modern award. Do you understand that?---Yes.

PN12901

So in your statement, in your affidavit when you refer to the possibility of opening earlier would you accept that if you did that that would in fact be at a lower cost than what you used to have to confront under the pre-existing award?---I accept that, yes.

PN12902

The modern award provides that between 6 and 7 pm weekdays there are no penalty rates. Under the pre-existing awards that I referred to before pharmacy assistants and pharmacists themselves were entitled to time and a quarter between 6 and 7 pm on weekdays. You understand that?---Yes.

PN12903

So you accept that because you trade in those hours, between 6 and 7 pm, in terms of award obligations they cost you less in terms of the penalties that apply than what they used to?---Yes.

PN12904

Do you also recall in relation to pharmacy assistants that before the modern award started in 2010 on Saturdays hours after midday were treated as overtime. Do you recall that?---I don't specifically recall it, but - - -

PN12905

What the award provided is that after midday on Saturdays overtime rates of time and a half for the first three hours after midday and then double time would apply to work performed by pharmacy assistants, and now all of those hours on Saturday are time and a quarter. Do you understand that?---Yes.

*** ANGELO PRICOLO

XXN MR MOORE

PN12906

So you accept that the award provisions are more generous to you than they used to be in relation to Saturday afternoons?---Yes.

PN12907

Thank you. So do you accept then that your capacity to operate profitably before 8 am and after 6 pm on weekdays and on Saturday afternoons has been improved by the modern award?---In terms of those multiplication factors, yes, but I do recall when the changes came in in 2010 that I was offsetting those changes by increasing the base rate to employees who had been with me for a while and as a result were going to have their pay reduced. So although that's true in essence when you do the multiplication it not necessarily - it didn't necessarily play out that way for me.

PN12908

So there were grandfathering provisions, were there, is that what you mean?---Well I - I'm not putting it into legal context, I'm just saying that the staff that I had so that I didn't have to reduce their pay I increased their base rate.

PN12909

I see. Now you say that you operate at a loss after 9 pm on weekdays, that's your evidence?---I - my statements are of a general nature so, you know, I don't - I can't produce specific figures, but when I look across my numbers and I look across what my wages are costing me, the fact that I'm paying extra because I've got a security guard as well, I am - I'm under no doubt that some of my trading hours after 9 pm are definitely non-profitable, which means I make a loss.

PN12910

All right, so let's just be clear about this. At paragraph 20 you say:

PN12911

As it gets later on trading days around after 9 pm and ordinary rates increase by 50 per cent, 75 per cent for casuals, we operate at a loss.

PN12912

?---I don't think - yes, I apologise, that statement is probably not perfectly accurate. We do certainly operate at a loss in some of those hours, I have no doubt.

PN12913

What are the hours you operate at a loss, do you know, or you are not sure?---Well I can't tell you specifically because they alter from - from day to day. They alter depending on the staffing level at the clinic next door to me, they alter depending on the temperature that day and whether people are willing to come out. So there's variability in what I do and I suppose what I do is - first of all I suppose I'd say a pharmacist first and a businessman second unfortunately, so I look at the - the figures overall and make valued judgments based on the number of scripts I'm doing and the turnover and my staffing levels.

*** ANGELO PRICOLO

XXN MR MOORE

PN12914

All right. In paragraph 19 you don't make any reference to the vicissitudes of weather and business in the street and so forth, you make a clear statement. Should the Commission disregard that?---Can I read the statement?

PN12915

Paragraph 19?---Yes. That's where I've changed that word from "most" to "many" and I'm not retracting that.

PN12916

I see, for many of those hours. Do you know what hours become loss making?---Well as I said it varies, it varies. I mean I can have particularly quiet nights between 9 and midnight where for instance the clinic next door might be shut and I do very few scripts, so I'll look at my script count the next day and I'll maybe have done, you know, 20 or 30 scripts compared to what I would hopefully want to do, which would be, you know, 15 or 20 in an hour, and I would make a judgment based on that that, you know, those hours are unprofitable.

PN12917

I see. So sometimes the hours after 9 pm are unprofitable - - -?---Yes.

PN12918

- - - or loss making?---Yes.

PN12919

And other times they are not?---Correct.

PN12920

I take it that because sometimes the hours after 9 pm are profitable and sometimes they are not that in the long arc of your business it is generally profitable rather than loss making or you wouldn't open at that time?---I think that's a fair statement although partially the late hours are because historically that's what I've always done so I'm known as a late night pharmacy and it's - it's difficult to give that up in my - in my setting, and also because there's a value to staying open late in that people when it comes to health don't look at their watch they just like to have the comfort of knowing that you're there, and the reliability of knowing that you're there until midnight probably adds to your business between 6 and 9 if that makes sense.

PN12921

In paragraph 25 you say:

PN12922

It would be impossible for us to keep our pharmacy open longer than we do due to the impact of penalty rates.

PN12923

You already trade very extensive hours?---M'imm.

*** ANGELO PRICOLO

XXN MR MOORE

PN12924

In effect the only further ways you might expand it might be to open a bit earlier than 8 am or to trade - - -?---Of course.

PN12925

- - - well into the early morning hours. So you're talking about approaching or being a 24 hour operation. That's really what the options are for you in terms of expanding?---Yes.

PN12926

The penalty rate you would accept don't make it impossible for you to do that because you used to do that, that is trade 24 hours?---The penalty rates are one of the reasons I think it's impossible to do that. Impossible is probably not the right word because everything is possible, but from an economic sense, yes, I don't think it's possible, and one of the reasons it's not possible is because of the penalty rates.

PN12927

Well Mr Pricolo, you have accepted that the change from the pre-modern award award conditions to the pharmacy industry award conditions brought with it various reductions in penalties but an increase in public holidays. I'd suggest to you that given that you traded for 24 hours a day I think you said for five years under the previous regime, it follows that these more beneficial penalty rate provisions would mean that it would be - certainly would be possible for you to trade 24 hours a day if that was what you wanted to do commercially?---I suppose what you're leaving out of the equation is that the other parts of the business and the profitability of the business compared to 10 years ago, and so there are a lot of other factors to consider before I was to say yes.

PN12928

There may be other changes in commercial circumstances - - -?---Correct.

PN12929

- - - which inform what you say in paragraph 25?---Correct. For instance, as I alluded to earlier I mean the clinic that trades next door to me was also 24 hour. It no longer is 24 hour. So that's definitely a factor.

PN12930

You refer in paragraph 24 to the sixth pharmacy agreement. You're a committee member of the Victorian branch of the Guild, aren't you?---Correct.

PN12931

So you're pretty familiar with the provisions made by the sixth CPA if I can refer to it in those terms?---Sure. Yes, I have a reasonable understanding of them.

*** ANGELO PRICOLO

XXN MR MOORE

PN12932

Can the witness please be shown exhibit SDA9. I'm sorry, I didn't realise we should have copies at hand each occasion. Mr Pricolo, just so you understand this is a document which is in evidence before the Commission, and it is a set of fact sheets which were obtained from the Pharmacy Guild of Australia website. If you

could go the last page in that bundle you should see a document headed "Benefits of the sixth community pharmacy agreement"?---Mm-hm.

PN12933

Do you see that? Have you seen that before?---I probably have.

PN12934

If you could look over that page, you can see it goes over to paragraph 20 and if you need to read through it carefully please do. I just want to ask you a question about that. If you would just take a moment to - - -?---Do you want me to read it first? All right. Yes, I've got a reasonable understanding, yes.

PN12935

Thank you. My question to you is this, do you agree generally with that summary of the benefits conferred by the 6CPA?---Yes.

PN12936

In another document I can show you if you wish, which is a document obtained from the Pharmacy Guild website, it concludes and identifies what's referred to as "significant benefits for the community pharmacies from 6CPA". Do you agree that 6CPA conferred significant benefits for community pharmacy operators?---Broadly speaking I think that the 6CPA was a good agreement for pharmacy, yes.

PN12937

It's going to make your life easier as a pharmacy proprietor than 5CPA is it not?---Easier?

PN12938

Commercially easier?---Pharmacy's pretty hard yakka. We work pretty hard.

PN12939

I'm sure you do?---But it is - I think what the 6CPA did is it probably gave us some security for the next five years. I think that's the basis of these agreements is that at least it gives us five years looking forward. Because we sign agreements, we sign leases, we have dealings with banks and we need security in what we do from a business point of view. So the 6CPA has given us that opportunity to at least feel comfortable for the next five years in our dealings with third parties, and I think that's really what the 6CPA has done is given us that security.

PN12940

In paragraph 24 of your affidavit you've made reference to a specific requirement in the 6CPA but you've not made any reference whatsoever to these other benefits, these other substantial benefits which are conferred on community pharmacy by that agreement. Is there a reason why you didn't do that?---Can I just read my paragraph 24, please.

*** ANGELO PRICOLO

XXN MR MOORE

PN12941

Certainly?---I don't know that that was the point where I needed to expand on it. I think the point I was making was that I understood that part of the 6CPA was community pharmacy taking on that responsibility of trying to improve community pharmacy programs. So I'm not sure what you mean.

PN12942

What I'm suggesting to you is that you have decided in paragraph 24 to refer to a specific - what you say is a specific aspect of the sixth pharmacy agreement and completely overlooked or failed to make any reference to the significant benefits provided for by that agreement, for people like yourself who operate pharmacies?---I don't think I was avoiding that. I was just trying to specifically look at the increased opening hours and the idea of increased patient access to community pharmacy. So I wasn't deliberately trying to exclude anything, I was just making a point of one part of the agreement.

PN12943

There's substantial increases in funding conferred by the 6CPA aren't there for various programs?---For various programs, yes.

PN12944

I think there's \$600 million extra for community pharmacy programs. You understand that?---I understand that.

PN12945

I think there's an extra \$2.4 billion in funding for pharmacists in relation to dispensing medicines?---Yes, but it's compared to - I suppose those numbers are compared to where we were before price disclosure reduced the amount that we were getting paid for a lot of our dispensing. So I think that those numbers refer to the difference after that hefty amount was taken out by what price advanced or accelerated price disclosure did to our remuneration package. So although I'm not disputing the numbers, they're not necessarily all that accurate because from my point of view a lot of what we received in the 6CPA was kind of giving back what we lost over the last, I think, you know, maybe it was the last year or year and a half of the previous agreement.

PN12946

The additional benefits provided by 6CPA including the extra \$2.4 billion in funding in relation to medications and the \$600 million in relation to community pharmacy programs, they are all benefits are they not which will bear upon in a positive way on a pharmacist's bottom line?---Yes, yes.

PN12947

What I'm suggesting to you is in this affidavit you make all sorts of claims about profitability and you have failed entirely to address the substantial positive benefits on profitability, which the 6CPA has the capacity to deliver for your business and other pharmacy businesses. I'm asking you why did you not refer to those broader benefits?---Well I didn't think this was the document that required me to go into the 6CPA. It was about - - -

*** ANGELO PRICOLO

XXN MR MOORE

PN12948

But you felt this was a document which was relevant to talk about your profitability?---In some instances, although as I say the main part of the document was to talk about the effect of penalty rates on my profitability.

PN12949

Can I suggest to you, you didn't include any reference to the broader benefits conferred by the 6CPA because you saw that as unhelp to the Guild's case?---No, I just didn't see it as relevant.

PN12950

Can I ask you about paragraph - one of your pharmacies, the Tambassis Pharmacy provides some community pharmacy programs?---Yes.

PN12951

They receive funding by the commonwealth?---Yes.

PN12952

I think one of the - you make reference to the issuing of medical certificates, this is paragraph 27?---Yes.

PN12953

They're issued on the spot, are they?---Yes.

PN12954

How many of those does Tambassis Pharmacy issue a day?---Some days we don't do any but in a month maybe we do - I'm guessing but in the order of between 10 and 20.

PN12955

They're issued on the spot so the patient - it's a several minute consultation?---It varies but it would usually be at least five, probably a bit longer.

PN12956

Between five and 10 minutes?---On average I would say 10 minutes, yes.

PN12957

How much do you charge for those?---I think it's \$20 but it could be 25. I think it's 20 though.

PN12958

That's a good earner isn't it?---Sorry?

*** ANGELO PRICOLO

XXN MR MOORE

PN12959

It's a good earner for five or 10 minutes work?---I didn't say five or 10 minutes. I said an average of 10 and I also said we do between 10 and 20 a month, so a good earner in a month, not particularly but it's a service that we provide and it's been very useful for a lot of patients who didn't want to wait for an hour or two or sometimes longer to see a doctor. So overall we were probably saving the system

quite a bit of money compared to a Medicare swipe and possibly a two minute consultation to see a doctor to get a medical certificate.

PN12960

Now in paragraph 38 you're referring to rostering?---Sorry, paragraph?

PN12961

Thirty-eight. You refer to rostering and that rosters are based on who is available and expertise and most importantly what each trading hour costs you in wages. I take it that some hours of the day are more profitable than others?---Yes.

PN12962

I take it that what you do is make your decisions about staffing by reference to not only questions of availability and preference of the staff concerned but in economic terms, by reference to your total costs over the week?---Yes, although I probably more specifically look at just my - I'd isolate it a bit more and look at just my costs over that hour or that shift, rather than have the figures at hand and think I've spent \$10,000 on wages this week, I can't spend any more. If that's what you were getting at. Did you mean do I look at my week and have a budget and think I can't go over that?

PN12963

Well I'm suggesting to you that you make staffing decisions on the basis of considering the cost of employing staff at a particular time but you do so by reference to your total costs per week. You don't look at it purely in isolation of a particular hour of the day and what costs will be that particular hour?---I probably don't go as wide - I mean this is just the way I do it.

PN12964

Yes?---I mean I probably don't go as wide as a week or as specific as an hour but I look at a shift.

PN12965

I see. In paragraph 43, you say:

PN12966

The main reason I'm unable to reduce the cost of medicines is because they are fixed by the government, however they still change regularly.

PN12967

?---I'm not sure what I meant by that but - - -

PN12968

Did you write this?---I did, yes. I'm sorry.

PN12969

Or was it prepared for you?---No, I wrote it, yes.

*** ANGELO PRICOLO

XXN MR MOORE

PN12970

Well you understand from the questions I asked you before about the 6CPA that what you stand to get from the government in relation to medicines under 6CPA is likely to be a substantial improvement on what it has been to date?---It will be an improvement for some pharmacies, yes.

PN12971

If a pharmacy derives - the greater proportion of a pharmacy's income that is derived from dispensing, the greater the benefit of 6CPA will be. Would you agree with that general proposition?---Depending on their mix of prescriptions. It really depends on the cost of the drug.

PN12972

I see, each particular drug?---Yes. So depending on your mix of scripts and where that falls in the cost bracket, that will determine whether the agreement was more - would offer you a greater remuneration or less.

PN12973

What proportion of your income at Tambassis is earned from dispensing medications approximately?---Look, probably 70/30.

PN12974

That is 70 per cent?---From scripts.

PN12975

From scripts, 30 per cent from?---Front of shop I suppose we'd call it.

PN12976

That's other retail services?---Correct.

PN12977

Excuse me. Now in paragraph 45 you deal with - you say that if the Guild's proposal is accepted you would most likely open the pharmacy earlier, perhaps at 7 am. I've asked you some questions about that. You say you would consider reverting back to 24 hour trading. I take it that what you're saying there, in terms of trying to get a sense of what you really have in mind, is that you're saying that that's something you would think about doing, that is reverting to 24 hour trading, not necessarily something that you're likely to do in the event that the Guild's proposal is accepted?---I don't think I can - I mean I would consider reverting back to 24 hour. I mean there are a lot of considerations.

PN12978

Yes?---The penalty rates would make it more feasible.

PN12979

Yes, and you would need to make that decision in the context of the broader suite of commercial considerations that you would have to take into account?---But it would definitely alter things.

*** ANGELO PRICOLO

XXN MR MOORE

PN12980

If the proposal was accepted, the Guild proposal, and there were increases in trading hours, am I right in understanding that that would principally manifest itself by you offering further hours of work to your existing employees, rather than employing new people?---I think there would be probably a mix of both. I think if that opportunity was created people tend to come out of the woodwork. People that you think are happy with what they've got may say I want to do more hours, I've got to put someone through - child through school or - you know, I can't accurately predict but I suspect there to be a mix of both.

PN12981

Thank you, if the Commission pleases.

PN12982

MR SECK: No re-examination, your Honour.

PN12983

COMMISSIONER LEE: Mr Pricolo, you were asked about the 6CPA and the benefits that were in that and in part of your response you talked about, from your perspective, there being some change or response to changes in price disclosure. What do you mean by changes in price disclosure?---Price disclosure was a mechanism for calculating remuneration to the pharmacist for dispensing a prescription, and that was rigid in the 5CPA, so that the way the price was calculated, the price that we got paid, was fixed. But I think about 18 months before the end of that agreement, there was legislation to change that remuneration package, so that the way we got paid meant that we had a reduced remuneration, and that's what I was referring to. So for the last 12 or 18 months of the agreement we were getting paid less than what we signed off for on the fifth CPA.

PN12984

I see, thanks.

PN12985

JUSTICE ROSS: Anything arising? Anything further from the witness?

PN12986

MR SECK: No, your Honour.

PN12987

JUSTICE ROSS: Thank you for your evidence, you're excused?---Thank you.

<THE WITNESS WITHDREW

[2.49 PM]

PN12988

JUSTICE ROSS: Is the next witness in WA? We might adjourn for a couple of minutes while we get the link going.

SHORT ADJOURNMENT

[2.49 PM]

RESUMED

[3.00 PM]

ANGELO PRICOLO

XXN MR MOORE

PN12989

MR SECK: Mr Moore's just gone missing, your Honour.

PN12990

JUSTICE ROSS: Yes

PN12991

MR MOORE: The next witness, your Honour, is Mr Greg Da Rui. He's in Western Australia and available by video link. I've spoken to Mr Moore about the objections. There are no objections, subject to the Guild not reading the second sentence in paragraph 16.

PN12992

JUSTICE ROSS: Yes.

PN12993

MR MOORE: So that is- - -

PN12994

JUSTICE ROSS: This is a bizarre situation.

PN12995

MR MOORE: Indeed, your Honour.

PN12996

JUSTICE ROSS: Yes, well that's plainly a submission.

PN12997

MR MOORE: We do not read that sentence, otherwise I think Mr Moore agrees that given previous rulings, to allow the rest in.

PN12998

JUSTICE ROSS: All right.

PN12999

MR MOORE: Subject to not reading that sentence, your Honour.

PN13000

JUSTICE ROSS: All right. Well, Ms Forsyth, you happy with that?

PN13001

MS FORSYTH: Yes, thank you, your Honour.

PN13002

JUSTICE ROSS: Okay, call the witness.

PN13003

MR MOORE: I call Gregory Da Rui.

<GREGORY DA RUI, SWORN

[3.05 PM]

EXAMINATION-IN-CHIEF BY MR MOORE

[3.05 PM]

PN13004

MR MOORE: Mr Da Rui, what is your occupation?---I'm a pharmacist.

PN13005

And what's the name of the pharmacy that you're a proprietor of?---Pharmacy 777 Bayswater. I also have an interest in two other pharmacies.

PN13006

What are the two other pharmacies in which you have an interest?---Pharmacy 777 Maylands and Wray Avenue Pharmacy.

PN13007

And what is your interest in those pharmacies?---I'm a partner in those pharmacies.

PN13008

Mr Da Rui, you prepared an affidavit in these proceedings, that's correct?---Correct.

PN13009

And that affidavit was affirmed on – you don't have a date here, but you affirmed that affidavit, that's correct?---Correct, yes.

PN13010

Do you have that affidavit with you in the witness box?---Yes, I do.

PN13011

Have you read that affidavit recently?---Yes.

PN13012

Do you wish to make any changes to your affidavit, Mr Da Rui?---Yes, I do. Point 7, I omitted our delivery driver as one of the staff members, so instead of five staff, it should be six, and one of them is the delivery driver.

PN13013

So you wish to make a change to paragraph 8, adding one delivery driver?---Correct, yes.

PN13014

And is the delivery driver, to the best of your knowledge, covered by the award?---Yes.

PN13015

Do you wish to make any further changes to your affidavit, Mr Da Rui?---No.

*** GREGORY DA RUI

XN MR MOORE

PN13016

Subject to – we've taken out the second sentence in paragraph 16, Mr Da Rui, but subject to not reading that paragraph – sorry, second sentence, not reading that

sentence, are the contents of your affidavit true and correct to the best of your knowledge and belief?---Sorry, can you just explain that again? You've done what, sorry?

PN13017

What we've done is just deleted the second sentence in paragraph 16, Mr Da Rui?---Okay.

PN13018

Subject to that deletion in your affidavit, are the contents of your affidavit true and correct to the best of your knowledge and belief?---Yes.

PN13019

I read the affidavit.

PN13020

JUSTICE ROSS: I'll mark that Exhibit AG5.

EXHIBIT #PG5 WITNESS STATEMENT OF GREGORY DA RUI

PN13021

JUSTICE ROSS: Mr Da Rui, can I just take you to paragraph 11(d)? Is that word, at the end of that where it says, "inform", is that, "infirm"?---Infirm, correct.

PN13022

Yes, thanks.

PN13023

MR MOORE: May it please your Honour.

PN13024

JUSTICE ROSS: Mr Moore, we can only focus on the witness box. I don't know if anyone else is in the room. You might want to explore that. And we have a staff member that's going to show Mr Da Rui a document at some time in the next 15 minutes or so.

PN13025

MR MOORE: Thank you.

PN13026

Mr Da Rui, can you hear me?---I can, yes. My name is Moore, I'm counsel for the Shop Distributor and Allied Employees Association. Can you hear and see me all right?---Can I see you, yes I can. Do I need to stand? Sorry, do you need me to stand?

PN13027

No, you don't need to stand for me?---Okay, thank you.

*** GREGORY DA RUI

XN MR MOORE

PN13028

Can I clarify, Mr Da Rui, is anyone else in the- -?---It's actually – sorry, Da Rui is how it's pronounced, sorry. I know it's a bit of a hard one – Da Rui.

PN13029

I apologise, Da Rui?---That's okay, yes.

PN13030

Mr Da Rui, is there anyone else in the hearing room with you now?---Yes, there is, yes.

PN13031

Do you know who that is?---We have Sonya from the Pharmacy Guild of WA and- - -

PN13032

UNIDENTIFIED SPEAKER: And my name's Kylie, I'm the team leader here in Perth, to provide a document.

PN13033

MR MOORE: Right, thank you. Mr Da Rui, you're a shareholder in three pharmacies. Is that right?---Yes.

PN13034

One is the Bayswater Pharmacy, 777 Bayswater; and then there's 777 Maylands. Is that right?---Yes.

PN13035

And what was the third one?---Wray Avenue Pharmacy.

PN13036

Wray Avenue?---Yes.

PN13037

Okay. And is 777 a chain or a franchise operation?---It's actually - it's a banner group.

PN13038

I see?---So it's like Amcal, like a Chemmart; one of those guys.

PN13039

I see. Thank you. The pharmacies at Wray Avenue, I think you called it, and in Maylands, do they employ about the same number of people as the one at Bayswater, or are they different in size?---They're different in size.

PN13040

Are they larger, are they?---One's larger, one's smaller.

*** GREGORY DA RUI

XN MR MOORE

PN13041

I see. So the one at Bayswater employs six people. One of them - which one employs a smaller number of people, and how many people is that?---It's Wray

Avenue Pharmacy employs a smaller amount. Look, I don't know the exact number because I'm not the managing partner there. We have a managing partner, and he looks after the staffing.

PN13042

I see. So the Maylands one employs more than six people. Do you know how many people?---I think about 16 or 18. Again, I have a managing partner there as well, so I'm - and she runs the HR, so I'm not actually sure of the exact number, but I think about 16 to 18 full-time and part-time.

PN13043

I see. And so are you in - do you own these pharmacies in partnership with others, or are you a sole proprietor?---No, I'm in partnership. All the pharmacies, I'm in partnership with others.

PN13044

Are they in the same area in Western Australia, or are they in a range of locations?---Two of them are in the same. The two Pharmacy 777's are about probably four or five kilometres apart, and the one in Wray Avenue is in Fremantle, which is quite a distance away.

PN13045

I see. Thank you. And you've operated the Bayswater one - and I right in thinking - since about 1998?---Correct, yes.

PN13046

And Maylands, how long approximately?---Approximately 11, 12 years, probably. I'm not sure of the exact date; 2001, 2002, I think.

PN13047

No, that's fine. Thank you. And the Wray Avenue one?---Wray Avenue Pharmacy, just become a recent partner in that. That was a bit of a complicated one. I owned it originally, sold it, and now became a partner again just about a year ago.

PN13048

I see. So when you owned it before you sold it, how long had you owned it for?---I had owned it for three years.

PN13049

All right. And all of the pharmacies, I take it, are profitable businesses?---Yes.

PN13050

Thank you. Now, am I right in thinking that in the Bayswater pharmacy the entity that employs the employees is a company?---Yes.

PN13051

Is that the case with the other two pharmacies?---No, not entirely. The Maylands is one is a partnership of three, is a company and to sole proprietors; and then the Wray Avenue pharmacy is a partnership of three companies.

*** GREGORY DA RUI

XN MR MOORE

PN13052

All right. Perhaps just to be clear - you may have misunderstood my question - the legal person that employs the employees who work in Bayswater - the Bayswater pharmacy?---Yes.

PN13053

Is that a company, a Pty Ltd?---Yes. It's two companies in partnership, so the partnership would employ the staff, I guess. It's both the companies in partnership.

PN13054

And with the other two pharmacies, are they - the people who work at those pharmacies, are they employed by a company?---Again, it's the partnership that owns the business, so the partnership employs the staff, so the partnership is - like I said, slightly different structures.

PN13055

The reason I'm asking you about this is that I understand that in Western Australia there is a state award that covers some pharmacies?---Correct.

PN13056

Do you understand that to be so?---Yes.

PN13057

You say in your statement here that the Bayswater pharmacy - the employees who work in it - are covered by the Pharmacy Industry Award 2010. That's your evidence, is it?---If that's the current pharmacy industry award, yes.

PN13058

That is the award made by Fair Work Commission, the Pharmacy Industry Award 2010?---Yes.

PN13059

Your evidence is that that award applies to the employees in the Bayswater pharmacy?---Yes.

PN13060

All right. And does that award apply to the employees in the two of the pharmacies?---That's a - yes, in the Pharmacy 777. I'm unaware of the Wray Avenue one. Again, I'm a partner there are not the managing partner, so I'm unaware of what award that the staff are under there.

PN13061

All right. Thank you. Can I just also clarify you're a member of the branch committee of the Guild in WA. Is that right?---Yes.

PN13062

Coming back to the Bayswater pharmacy. I see that you only have six staff. I take it that that number of staff has been unchanged for some reasonable period of time?---No. As I stated, we used to have a dispensary technician.

*** GREGORY DA RUI

XN MR MOORE

PN13063

Yes?---She went on maternity leave and we haven't replaced her, so it has actually decreased by one.

PN13064

I see. So putting aside the dispensary technician, have your staffing levels otherwise remained unchanged for the last - - -?---Yes.

PN13065

- - - five or 10 years?---Yes.

PN13066

What does a dispensary technician do, briefly?---Basically they're involved in running the dispensary and dispensing prescriptions. So they will do all the ordering, do the stock control for the dispensary, and they will do - dispense prescriptions when they're on. So the idea is to try and free up the pharmacists so they can spend more time with their patients.

PN13067

I see. If you look at paragraph 11 of your affidavit, you say that the pharmacy provides extensive services to the community, and you set out a number of them. The express delivery of medication, that's free of charge. You see that?---That's right, yes.

PN13068

Am I right in thinking, then, that most or all of the other services that you there set out, a fee is charged to the customer or patient?---Some we do and some we don't.

PN13069

Can you identify those for which a fee is charged?---Sure. So the CPOP services, (b), there's a charge to the patient - - -

PN13070

And - - - ?---(c) staged supply - sorry?

PN13071

Go on. I interrupted you. I apologise. Please proceed?---(c) staged supply, is free of charge.

*** GREGORY DA RUI

XN MR MOORE

PN13072

Yes?---Dosage administration aged service, there's a charge for that; the advice and treatment of minor ailments, there's no charge for the service, but obviously there's a product - if there's a product - a transaction - then there's a charge for the product; the gut health appraisal, stress and anxiety assessment, wound care, again, these are services that we provide, we don't charge for; screening services, we do charge for, so there is a charge attached to the sleep apnoea, blood pressure, cholesterol and diabetes screening; weight loss program, depends again on which program they go on. In that store there there's no program that we charge for, it's just product that they pay for; the diabetes support program, there is a charge; and the flu vaccination service, there is a charge.

PN13073

Thank you. And with all of the services that are set out in paragraph 11, do you receive funding for any of them from the Commonwealth or any other government agencies?---There are some payments for staged supply and dose administration aid. The other - - -

PN13074

That's (c) and (d)?---Sorry, say again?

PN13075

(c) and (d), yes?---(c) and (d), yes. They're the only two that we get some remuneration from the Federal Government.

PN13076

I see. Thank you. And I take it that when you come to fixing the fee that you impose on a customer to acquire one of these services that you fix a fee that covers the cost and some profit component for the pharmacy, for the business?---Well, not, at all. The fees are really to cover a small amount of the pharmacist's time, but generally these services will be run probably at a loss. In the fee structure, what we charge the patient, because, you know, there's usually attached some product sales to those, because often the patients will buy some product, but generally the service themselves the fee is usually fairly nominal.

PN13077

All right. Thank you. Am I right in thinking that your offer of – sorry, I'll withdraw that – your service of offering, in paragraph 11, has expanded over time?---Yes.

PN13078

Thank you. In paragraph 13 you say that:

PN13079

The price increases and competition severely impact the pharmacy's viability in providing additional services to the local community.

PN13080

You see that?---Yes. Yes.

PN13081

What additional services do you say you do not provide due to price increases and increases in competition?---It's more about the fact that having to increase prices obviously is inconvenient for our patients. That's not, you know, very good for them. But it's also more to the fact that there is increased pressure on pharmacist time due to the fact that we have lost a staff member and hence, you know, it's very difficult to spend, you know, as much time sometimes with a patient that you need. So, in my mind, that's, you know, not as good – the service is not as good as what we could be providing.

*** GREGORY DA RUI

XN MR MOORE

PN13082

I see. So all you're meaning to say in paragraph 13 is that pharmacists can't spend as much time with patients as they might otherwise wish to?---Well, that's true. And, you know, if you can't see as much patients you – you know, see as many patients, or spend as much time, you can't service them properly, and that's going to, you know, influence your pharmacy's profitability, you know, at the end of the day.

PN13083

All right. Thank you. In paragraph 12 you say at the start of that paragraph, you've had to increase prices to offset the penalty rates. I take it by that you mean that over time you've increased prices in line with general increases in labour costs; is that what you really mean?---I think the fact that we've – you know, that the penalty rates, they've hit us so quickly and so – and in such a magnitude that it forced a pricing review – like, a bigger pricing review as opposed to just, you know, doing things gradually over time. So I think that, you know, the fact that we've had to – there was such a dramatic increase in the scale of our wage, I guess, component, it forced a – rather than just, you know, letting market forces increase prices, we've had to sort of really make a big conscious effort to say okay, well, we've got to do something with our business here to offset the fact that, you know, that these wages rates, these penalty rates have sort of hit us so quickly and so, you know, sort of forcefully. I guess that's what I'm trying to say.

PN13084

So would it be more accurate to read paragraph 12, the first sentence, as saying:

PN13085

I have had to increase prices to offset increases in wages.

PN13086

?---Not totally, no. I think some, yes. But, you know, the fact – like, I said, because penalty rates didn't just – it wasn't like, you know, just a CPI increase in wages, or award wages. It was a – you know, we've had 200 per cent on a Sunday. You know, 250 per cent on a Monday. We're open seven days a week. So they're big increases in your wage budget, so that's forced us to, you know, really focus on, okay, well, we have to, you know, get this money back somewhere to make sure that the business is profitable and able to open on these hours, and so obviously, you know, price increases is one way of managing those increase in expenses.

PN13087

I think you just said 250 per cent on Monday?---Public holidays. I think – I believe the rate is 250 per cent in WA.

PN13088

I see?---Well, as of the award. Two hundred and fifty per cent of their normal rate is what we pay on a public holiday Monday, or any public holiday.

*** GREGORY DA RUI

XN MR MOORE

PN13089

I see. So you mean on public holidays, not Mondays. You said Monday?---No, public holidays. Public holidays, sorry.

PN13090

And when you say these increases, you mean the increases that came in with the introduction of this award, the Pharmacy Industry Award 2010?---Yes.

PN13091

Following that commencing operation in 2010; is that what you mean?---Well, whenever the award came in to operation. I mean, I'm not exactly sure when that was. And previously we were on the State award.

PN13092

Yes?---And WA didn't have an obligation to go to the Federal award, so I – and, again, I'm not exactly sure what date we chose to go to the Federal award, but whatever that date was, I think we paid all the penalty rates that were on that award, and that was, like I say, from no or very little penalty rates. I am not sure if there was any penalty on the State award, to, you know, paying the full penalty rates on the PIA award.

PN13093

And you had - - -?---So that was a very big hit in one spot.

PN13094

And you had four years to transition to the full PIA rates; that's so? They were phased in over that time?---Look, if you say so. I'm not – again, I'm not 100 per cent clear on the time, because again we've got a HR manager at our admin and basically they deal with all the, you know, that sort of – that part of it.

PN13095

Well, you said that the increase of such magnitude was imposed so quickly?---Yes.

PN13096

And I just wanted to take issue with that and suggest to you, you actually had four years to adjust to the PIA minima and get your business in order; that's so, isn't it?---Well, as far as I was aware, when we went from the State award to the Federal award, we paid penalty rates immediately. That's the impression I'm under.

PN13097

The penalty rates came in in a phased way; that's correct, is it not?---You're saying that. I don't know.

*** GREGORY DA RUI

XN MR MOORE

PN13098

Well, you make a lot of claims in your affidavit about the impact of penalty rates. I would have thought, Mr Da Rui, that you would know specifically what happened with penalty rates between 2010 and 2014. Do you not really know the detail around increases in penalty rates over that time?---Well, I know that there

has been increase in penalty rates, and I know it has, you know, impacted our wages significantly.

PN13099

All right. The dispensary technician, to whom you referred before, what hours of work did he or she work before she went on leave?---It varied in the roster, because the store is open 84 hours a week, so the roster usually varies. But she did her 38 hours a week.

PN13100

I see?---Which is what she's employed for.

PN13101

I see. Thirty-eight hours a week. Were they Monday to Friday hours or were they on weekends?---Again, look, I'm not responsible for the rostering because my managing – you know, I have a manager in that store, so I can't say exactly whether it was on weekends or – you know, I would have suspected a mixture of both.

PN13102

Well, you don't know; is that the position?---Yes, correct.

PN13103

In paragraph 15 where you refer to the dispensary technician in the second sentence, and you say that – I'm sorry, it was a she, I believe, who went on maternity leave, and you haven't been able to replace her "due to the heavy impost penalty rates have on my wages budget." How did you work out the, what you refer to as, the heavy impost penalty rates have on your wages budget?---Well, how I worked it out is we have a, like, a business where our wages should - in, like, a parameter where they should be, and this particular store was way outside that parameter.

PN13104

What is this parameter to which you refer?---So generally what we have, we'll have a parameter of, say, between 33 to 37 per cent wages to GP. That's, you know, how we run a good – a business. This store is over 40 per cent, 42 to 44 per cent.

PN13105

And this was a problem – I'll withdraw that. The 42 to 40 per cent, you're saying that the proportion of wages over gross profit at this particular pharmacy in Bayswater was 42 to 44 per cent?--- Yes.

PN13106

And was that recorded in a document that you looked at in preparing your affidavit?---Yes, we have monthly, you know, profit and losses and yearly, so yes, we have got that and that fluctuated every month, because it depends, you know, your sales -it's - a business is a moving thing. Sales are - some can be up, down, so that can change, but you know - - -

*** GREGORY DA RUI

XN MR MOORE

PN13107

I take it that when you say you decided not to replace the dispensary technician, this obviously occurred after she went on leave. When was that, approximately?---She went on leave probably about six months - six months ago, I guess.

PN13108

Is your evidence that after she went on leave about six months ago it's at that point that you considered the proportion of wages over gross profit at the Bayswater store and decided not to replace her?---What's been happening is it has been increasing over time, so to make - you know, we had to make a decision, well, you know, if the business has to remain viable, and so we decided not to replace her, correct. I mean, she is on maternity leave, so she has the option of coming back.

PN13109

I see. But you made this decision by applying this parameter of wages costs over gross profit?---Not - that's not the only - well, that's not the only parameter. I mean, the fact is that, you know, that - well, yes, I suppose it is, because I mean there no - we just couldn't afford to put another person on, so I suppose we did.

PN13110

All right. So you applied this parameter of wages over gross profit and you looked at that over some period of time in the period prior to when she went on leave, is that right?---Sorry, could you just ask that question again?

PN13111

You considered the parameter of wages over gross profit over some period, not just when she went on leave, but in the period prior to that, is that right?---Yes.

PN13112

All right. Was this recorded in a document?---Yes.

PN13113

I call for its production, please.

PN13114

JUSTICE ROSS: Are you able to provide a copy of that document to the Pharmacy Guild representative there and they can pass it on to the National representative?---No, I don't have that. I don't have it here.

PN13115

No, I realise you don't have it with you, but can you obtain it later and then provide it?---Well, I'm not sure what document he would like to see, because we have lots of documents, so if you can just maybe be more specific and I can provide what you truly want.

*** GREGORY DA RUI

XN MR MOORE

PN13116

MR MOORE: Well, Mr Da Rui, as I understand your evidence, you made this decision to not replace the dispensary technician on the basis of the application of

the parameter of wages over gross profit at the Bayswater store at the period when the employee went on leave and in the period prior to that, so the documents that I call for the production of are the documents which record this analysis or calculation that you say you undertook?---Look, we have monthly P and Ls, so I mean if you want all my P and Ls for the last - I don't know how long - well, you know, that will take a bit of work to get to. I can get those, I guess.

PN13117

Well, you've given evidence, Mr Da Rui as to how you did it, and accepting that your evidence is - I withdraw that. In light of the evidence you've given, I request the documents that you have said that exist, which set out the consideration you gave?---Yes, I'm just a little bit bemused, because I'll have to give monthly - like we have our monthly P and Ls that we do every month to see how the business is tracking. Do you want a period? Do you want -I mean, there's a lot of documents. You tell me specifically what you want and I'll get it for you.

PN13118

JUSTICE ROSS: Perhaps if you just revisit the question as to the process he went through and his evidence and then we might be able to identify the document, because I don't think we're getting anywhere at the moment.

PN13119

MR MOORE: Yes. Mr Da Rui, was there a document to which you had regard in making this decision not to replace the dispensary technician to go on maternity leave?---Not one specific document, no, because like I say, we have monthly P and Ls, we track the business, how it's going monthly, you know, and you make this decision based not just on one instance, you know, you base it on how you see the business tracking. So if - for one single document, I just don't have one document, no.

PN13120

I seek, I understand. And what were the documents to which you had regard in making that decision?---So I explained, the monthly P and Ls.

PN13121

Okay, and the monthly P and Ls over what period of time?---Well, not a specific period. I don't think I made a decision based on a specific period. It could be the trending of the business. It could be over a year, it could be over two years. You know, it's trending - the wage budget is trending upwards, we have to maintain the profitability of the business, so that's the reason we decided not to replace her. So it may not have been one specific document that made me make that decision.

PN13122

I understand that. You're saying that it was the monthly P and Ls to which you had regard in making this decision and I'm simply asking you monthly P and Ls in relation to what period?---Not a - there was no specific period.

*** GREGORY DA RUI

XN MR MOORE

PN13123

I call of the monthly P and Ls for - would it be accurate to say that the monthly P and Ls to which you had regard in making this decision would have been those for the first month of 2015, prior to the leave commencing?---Probably not just those, no. I suggest that it may be further back.

PN13124

Well, may it be that you had regard to the P and Ls for the previous one year or two year? Would that be accurate?---Like I said to you before, I don't think I made the decision based on any specific time frame. It was just the trending of the business and hence why the decision was taken. I can't say that I made the decision based on one year or one month, or two year, or three years. So I can't give you exact time frame.

PN13125

Well, Mr Da Rui, I just need you to be clear about over what period of time that you had regard to in making this decision by reference to the monthly P and Ls. Do you not know?---Well, like I said, you don't make a business decision based on a particular time frame. You make the decisions over - you know, like I say, I'm not saying I looked at the P and Ls for one year and said, "I make my decision on that one year." I may have looked for three months, I may have looked for 18 months, you know. I mean the decision wasn't made based on a particular time frame, so that's why I'm a little bit unsure what you would like me to give you.

PN13126

I'm not asking you to speculate about what you might have done or might not have done, I'm just asking you to think about what you actually did do and whether or not you have any recollection of it. Can I ask this question; would it be right, in making the decision not to replace the dispensary technician that the documents you looked at included the P and Ls for the preceding months of 2015, before she went on leave?---Yes, it would include those, yes.

PN13127

I call for those documents.

PN13128

JUSTICE ROSS: Can you identify the months with some precision?

PN13129

MR MOORE: I think the witness -

PN13130

Do you recall when the dispensary technician went on leave, Mr Da Rui?---Not precisely, no.

PN13131

I think you said it was four or five months ago?---It's about that, so yes, I'm not exactly sure, so that's why I said I'm not exactly sure, but it would be about four to six months, I would suggest.

*** GREGORY DA RUI

XN MR MOORE

PN13132

I call for the production of the P and Ls for the first four months of 2015.

PN13133

JUSTICE ROSS: Are you able to provide that, Mr Da Rui?---P and Ls for the first four months of 2015. Yes.

PN13134

That's right. January, February, March and April for this year?---Yes.

PN13135

Okay, that would be great, thanks.

PN13136

MR MOORE: Thank you.

PN13137

JUSTICE ROSS: Do you want a break, Mr Moore?

PN13138

MR MOORE: Now you say that it's impossible to make a profit after 7 pm and on Sundays and public holidays. You say that in paragraph 15. Do you see that?---Yes.

PN13139

Did you do a specific calculation or analysis to reach that conclusion or is that a matter of your general impression?---I reached the - I didn't actually do a specific analysis, but what I've noticed - obviously, that is our quieter times. We have a lot less customer numbers, lower sales, and our wages are a lot higher than our normal hours. Hence why we definitely, you know, don't make a profit in those times.

PN13140

So that claim that you make is based upon your general impression of the business?---In my knowledge of the business, yes.

PN13141

In paragraph 16 you say:

PN13142

A casual pharmacy assistant who works on Sundays and public holidays earns only slightly less than a first year out pharmacist.

PN13143

Do you see that?---I see that.

PN13144

I'm going to ask for you to be shown a document. I will provide some to the bench, your Honour.

*** GREGORY DA RUI

XN MR MOORE

PN13145

Have you been provided with a document?---No, I'm just getting it now.

PN13146

Mr Da Rui, do you have in front of you a table which has the heading, "Wages and Penalties Pharmacy Industry Award 2010"?---Yes.

PN13147

This is a document you won't have seen before. It has been prepared by my client. Can I explain it to you before I ask you some questions about it. What it does is across the top you will see the various columns, being the different classifications in the Pharmacy Industry Award. Do you see that?---Yes.

PN13148

And in the first row in the first table it sets out the ordinary weekly rate of pay. You see that, for each of those classifications?---First row - on the top, yes.

PN13149

Yes. So the ordinary weekly rate of pay for a pharmacist under the PIA is \$943.90. Do you see that?---Yes.

PN13150

You can disregard the sentence under that first table. Looking at the next table you will see what this does is adopt the same approach as the first table, with the different classifications along the top, but what it then does is down the vertical - first column - identify different periods of time to which penalty rates apply under the PIA as well as the ordinary rate. Can you see that?---Yes.

PN13151

And then in the second column the applicable penalty rate prescribed by the award in relation to each of those time periods is identified. Do you see that?---Yes.

PN13152

So what it - to illustrate, it records that under the PIA a pharmacist - I withdraw that. It records that under the PIA for public holidays the applicable penalty rate is 250 per cent, and that means that for a pharmacist - a permanently employed pharmacist, not a casual, but a permanent pharmacist - would be entitled to be paid, for working on a public holiday, \$62.10. Do you follow that?---Yes.

PN13153

All right. You will see that there's some handwriting in the middle of the document. Do you see that?---Yes.

PN13154

Can I explain that to you. Under the column "Pharmacy Assistant First Level" there is typewritten \$18.99. That is the ordinary rate of pay for a permanent pharmacy assistant first level. Follow me so far?---18.99, yes.

PN13155

Yes. The dollar value written in that box by hand of \$23.74 is the casual hourly rate for a pharmacy assistant first level. Follow me?---Yes.

*** GREGORY DA RUI

XN MR MOORE

PN13156

And you understand, just to explain that, that under the award there is an entitlement to a casual loading of 25 per cent. You understand that?---Yes.

PN13157

So staying in that same column, on public holidays a pharmacy assistant first level would be entitled to - if employed as a permanent employee on a public holiday, would be entitled to be paid \$47.47. Do you see that?---Yes.

PN13158

And the entitlement for the same employee, except employed on a casual basis, would be \$52.22. Do you see that?---Yes.

PN13159

I think the only other matter I need to clarify is where the row for Sunday and the column for pharmacy assistant first level, you will see the typewritten numbers \$37.98?---Yes.

PN13160

That is the Sunday hourly rate for a first level pharmacy assistant permanently employed?---Yes.

PN13161

The casual rate for an employee of the classification is what's written by hand under there of \$42.72. Do you see that?---Yes.

PN13162

Do you understand that?---Yes.

PN13163

And the same reference is made over at pharmacy assistant fourth level where you will see for Sunday's \$41.90, and the little arrow down to \$47.14 identifies the casual rate for a pharmacy assistant fourth level for a Sunday. Do you understand that?---Yes.

PN13164

All right. So in paragraph 16 you were seeking to make a comparison about the rates of pay for Sundays and public holidays. Is that right?---Sorry. Could you just explain that again? Sorry.

PN13165

In your statement in paragraph 16 were you trying to compare the rates of pay for different classifications of employees for Sundays and for public holidays?---Yes.

PN13166

All right. So a casual pharmacy assistant who works on Sunday, looking at this table, if they're level I, would have an entitlement to be paid \$42.72. Do you agree with that?---Yes.

*** GREGORY DA RUI

XN MR MOORE

PN13167

And a pharmacist - a first year pharmacist - would you agree would be classified under the pharmacist classification; that is the third column along?---Yes.

PN13168

And you accept that that pharmacist would have an entitlement, when employed as a permanent employee, to be paid \$49.68. That's correct?---Yes.

PN13169

So your claim that a casual - I withdraw that. And do you see there are four levels of pharmacy assistants under the PIA. That's right?---Yes.

PN13170

And the highest level is level IV. That's right?---Yes.

PN13171

And looking at the table, do you agree and accept that the casual rate for a fourth level pharmacy assistant for Sunday work is \$47.14. Do you see that?---Yes.

PN13172

So you would accept, would you not, that your statement in paragraph 16 that a casual pharmacy assistant who works on Sundays and public holidays earns only slightly less than a first year out pharmacist is just wrong.

PN13173

MR SECK: Objection. I'm not sure if this needs to be dealt with in the absence of Mr Da Rui, but there is a - - -

PN13174

JUSTICE ROSS: Mr Da Rui, we're just going to turn - can we mute? We're just going to mute your link for a moment. Just bear with us for a sec.

<THE WITNESS WITHDREW

[3.49 PM]

PN13175

JUSTICE ROSS: What's the objection?

PN13176

MR SECK: The objection is this, your Honour, that there's a question about the proper characterisation as to whether or not a pharmacy first year out is in fact classified under the pharmacist classification; or if the Full Bench goes to the second-last column: "Pharmacy Interns First Half Training, Pharmacy Interns Second Half Training". Now, on my instructions and understanding, your Honour, a first year out pharmacist is, in fact an intern, and so the comparison that's being made - - -

PN13177

JUSTICE ROSS: Well can't the witness answer that and say what he meant?

PN13178

MR SECK: Well he needs to be asked that question, your Honour, just to clarify.

*** GREGORY DA RUI

XN MR MOORE

PN13179

JUSTICE ROSS: Why? I mean he's got the range. You can re-examine on it and say when he was referring to the first year out pharmacist, take him to the table, which one did he mean.

PN13180

MR SECK: I can do that, your Honour, but my only concern is this, your Honour, the cross-examination is based on a premise which may not be entirely correct.

PN13181

JUSTICE ROSS: You don't know whether it's right or not.

PN13182

MR SECK: That's my point, your Honour, and it might need to be clarified just so it proceeds - - -

PN13183

JUSTICE ROSS: Well either Mr Moore can deal with it or you can deal with it.

PN13184

MR SECK: Indeed, your Honour, but I just merely raise - - -

PN13185

JUSTICE ROSS: But in any event, I mean one of you will ask him the question when you referred to a first year out pharmacist, which of these classifications was he referring to.

PN13186

MR MOORE: I've asked that question and he's - I asked him and he said it would be pharmacist.

PN13187

JUSTICE ROSS: Yes.

PN13188

MR SECK: The point I'm making is this, your Honour. Ultimately it's a question of legal characterisation as to where - - -

PN13189

JUSTICE ROSS: He's given the evidence in his statement and he's been asked which one were you referring to here, and he's pointed to one.

PN13190

MR SECK: I don't know if he said which one are you referring to here, I don't know if it was put in those terms.

PN13191

JUSTICE ROSS: Perhaps - - -

PN13192

MR SECK: I'll re-examine on it, your Honour, that might be the - - -

PN13193

JUSTICE ROSS: Perhaps you can confirm it, Mr Moore, when he gets back and we'll deal with it that way. Can we re-establish the link or unmute him?

<GREG DA RUI, RECALLED [3.51 PM]

CROSS-EXAMINATION BY MR MOORE [3.51 PM]

PN13194

Can you hear us now Mr Da Rui?---Yes, I can.

PN13195

MR MOORE: Mr Da Rui, I just want to ask you a question. Do you accept that a first year out pharmacist under the PIA would be classified under the pharmacist classification which is recorded in the third column in the table?---Yes.

PN13196

Thank you. Going back to what I was asking you before we just had a break, looking at the Sunday rates your claim that a casual pharmacy assistant earns only slightly less than a first year out pharmacist for working on a Sunday is wrong. Do you agree?---Well, why do you say that? Because \$47.14 is only slightly less than \$49.68. That's the way I see it. Am I incorrect?

PN13197

You say that the - withdraw that. That's in relation to level 4, I follow that. For public holidays the rate is \$52.22 for a casual pharmacy assistant level 1?---Yes.

PN13198

Just excuse me a moment, if the Commission pleases.

PN13199

JUSTICE ROSS: We might just take a short break. One of us needs to attend to a conference, so we'll be adjourning for a minute and coming back while you resolve this question. Just bear with us for a moment.

PN13200

MR MOORE: Thank you.

SHORT ADJOURNMENT [3.54 PM]

RESUMED [3.55 PM]

PN13201

MR MOORE: Mr Da Rui, can you hear me?---Yes.

PN13202

Coming back to this table, your position is, is it, that when one compares the Sunday rate for a casual level 4 pharmacy assistant of \$47.14 that that is only slightly less than the Sunday rate for a permanent pharmacist of \$49.68?---Yes.

*** GREG DA RUI

XXN MR MOORE

PN13203

You don't say though that the comparable rate in relation to a level 1 pharmacy assistant of \$42.72 versus \$49.68, you don't say that that is slightly less?---I would say it's slightly less. It's not a huge difference.

PN13204

I tender the table, if the Commission pleases.

PN13205

MR SECK: Your Honour, we don't object to the table but might we reserve our rights just in case there might be some calculation issues that we can address at a later point in time.

PN13206

JUSTICE ROSS: Sure. We'll mark that exhibit SDA11.

**EXHIBIT #SDA11 WAGES AND PENALTIES PHARMACY
INDUSTRY AWARD 2010 TABLE**

PN13207

Can we just mute the witness for a moment, I just want to make an observation to counsel.

<THE WITNESS WITHDREW

[3.56 PM]

PN13208

Mr Seck - can you hear me, Mr Da Rui?---(No audible reply).

PN13209

No. The problem with your analysis is he couldn't have been referring to pharmacy interns first half or second half year of training because the slightly less observation doesn't apply. In fact the casual pharmacy assistant receives more.

PN13210

MR SECK: It could be the case, your Honour, and - - -

PN13211

JUSTICE ROSS: Well it's not - well I'm assuming the SDA's calculations are correct. If they are then a pharmacy assistant fourth level earns more than pharmacy interns in the first or second half of their training. So if he was referring to that then that's inconsistent with his evidence.

PN13212

MR SECK: I completely understand what your Honour says, yes.

PN13213

JUSTICE ROSS: Yes. I wanted to bring it to your attention before you went into re-examination on it, that's all.

*** GREG DA RUI

XXN MR MOORE

PN13214

MR SECK: Can I just say before we go, your Honour, that I suppose where the ambiguity arises is the word "first year out". Does it mean first year out of university or does it mean first year out of internship?

PN13215

JUSTICE ROSS: Yes, but the problem for you is that if it means first year out of university before he qualifies for registration or she qualifies for registration. Then it doesn't make any sense. His evidence is not consistent with that characterisation.

PN13216

MR SECK: It might be it just doesn't make any sense, your Honour, and he needs to correct it. That's really the other big thing - - -

PN13217

JUSTICE ROSS: Well be very careful about - don't lead him to that conclusion.

PN13218

MR SECK: No, your Honour, it might be that I just leave it alone to be honest and the evidence is what it is on that point.

PN13219

JUSTICE ROSS: Sure. Yes, thanks. Mr Moore.

<GREGORY DA RUI, RECALLED [3.58 PM]

CROSS-EXAMINATION BY MR MOORE [3.58 PM]

PN13220

MR MOORE: Mr Da Rui, can you hear me?---Yes, I can.

PN13221

One last question on this table. You undertook this comparison - I'll withdraw that. What you refer to in paragraph 6 is a comparison between a casually engaged employee and a permanent employee, that's so?---Yes.

PN13222

You understand that the casual employee has a higher rate of pay - I'll withdraw that. That the casual employee receives a 25 per cent loading and the permanent employee does not, yes?---Yes.

*** GREGORY DA RUI

XXN MR MOORE

PN13223

So would you accept that the more relevant apples with apples comparison is between a pharmacy assistant permanent employee, their applicable Sunday rate and the applicable Sunday rate for a permanent pharmacist?---Well at the end of the day it's what market forces is what staff you can get, so I don't think that's quite relevant. Because if I have to employ a casual on a Sunday because that's all I can get, well then I think what you just stated is not relevant because I have to pay what staff I can get and who's prepared to work on a Sunday. So you know I don't think that's quite correct because it's really the type of employee that I can

employ, so you've got to compare that. You've actually got to compare the dollar value.

PN13224

Excuse me a moment. With your pharmacists, in any of the pharmacist classifications, do you pay them over the award?---We apply the better off overall test - the BOOT test - yes, we do.

PN13225

You apply the better off overall test. Do you do that because your employees are employed pursuant to some sort of workplace agreement?---No, because we want them to be better off overall.

PN13226

I see. So in wanting them to be better off overall, what do you pay or provide to your employees which is different from the award minimum?---I don't know the exact amount, but I know we pay all our pharmacists above award.

PN13227

So their hourly rate of pay is over the minima set out. Let's say for a pharmacist classification, their ordinary rate of pay under the award, the minimum rate is \$24.84. What rate do you pay your pharmacists?---Like I said, it's better off overall, so we may pay them higher on weekdays and less on weekends, but that's calculated and they're paid above the award rate.

PN13228

I see. So do you - excuse me a moment. In relation to your pharmacists, when you talk about paying them better off overall, do you pay your pharmacists an annualised salary?---No, not necessarily. Some may be on annual salary; generally it's on an hourly rate.

PN13229

Okay. Because the Pharmacy Industry Award 2010 at clause 27 states - I won't read the whole thing to you, but the first sentence of it states:

PN13230

An annualised salary for pharmacist employees may be developed.

PN13231

That's not what you do?---No.

PN13232

I see. So what you do, is it, that you vary the hourly rate that employees are paid in ordinary hours and on penalty rate times. Is that right?---Pharmacists, yes.

PN13233

For pharmacists?---Yes.

*** GREGORY DA RUI

XXN MR MOORE

PN13234

So does that mean a pharmacist - let's say a first year - do you have a first year pharmacist?---Yes.

PN13235

So a first year pharmacist, when they're working in non-penalty rate times, what rate you pay them an hour?---Our standard rate, I think. Now, all pharmacists are different, because obviously they have differing levels of ability, so - but I think a standard first year pharmacist, \$34 an hour.

PN13236

When a pharmacist defers to your pharmacist, then works on the Sunday [sic] what hourly rate do you pay them for their hours on the Sunday?---Again, that varies with the pharmacist, so - and I can't tell you that exactly.

PN13237

You said the standard rate that you paid for ordinary time was \$34 per hour?---Yes.

PN13238

Are you able to say what the standard Sunday rate is that you paid for your pharmacist - first year pharmacists?---I don't know that.

PN13239

When you say better off overall?---Yes.

PN13240

Am I right in thinking, then, that you pay them a rate less than \$49.68 an hour for Sunday work?---Some may get less than that, some may get more.

PN13241

And with the first year pharmacist on a public holiday, am I right in thinking that some pharmacists may be paid less than \$62.10 an hour?---Yes.

PN13242

Do you understand, Mr Da Rui, that those arrangements involve you paying hourly rates contrary to the award minimum?---My understanding is that if they are better off overall, with all the hours taken into calculation, that's the test that applies.

PN13243

Excuse me a moment. Mr Da Rui, these are off overall arrangements that you apply, these are arrangements you apply for all of your pharmacists that you employ at the Bayswater pharmacy?---Yes - I would say yes.

PN13244

And is that an employment arrangement that you observe in the other two pharmacies with the pharmacist who work there?---I couldn't tell you about the Wray Avenue Pharmacy, because like I said, I have a managing partner in there and I'm not sure of the arrangements there. But yes, Pharmacy 777, yes.

*** GREGORY DA RUI

XXN MR MOORE

PN13245

That's the one in May - what's it called?---Maylands.

PN13246

Sorry?---Maylands.

PN13247

Thank you. Mr Da Rui, did you make a submission to the Productivity Commission Review on the Fair Worker?---Did I?

PN13248

Yes?---No.

PN13249

Are you a member of the Committee of Management of the West Australian branch of the Guild?---Yes.

PN13250

I want to ask you some other questions. In paragraph 19 you refer to the Sixth Community Pharmacy Agreement?---Yes.

PN13251

As a member of the Guild and a Committee of Management member of the Guild, I take it you have a pretty good working knowledge of the arrangements struck in the 6CPA?---I would like to think so.

PN13252

Some documents are in evidence before the Commission, one of which - and these are documents which have been obtained from the Pharmacy Guild web site - one of which records a conclusion in relation to the 6CPA as follows - I will read it to you because you don't have in front of you. And for the transcript, I'm reading from exhibit SDA10 at page 9:

PN13253

Conclusion: Significant benefits for community pharmacies. 2.4 billion additional investment (2.8 billion including chemo). Dispensing (AHI provides floor). CPI indexation 1 July increase. Higher dispense remuneration every year. PFDI value retained. Location rules retained to mid-2020. 70 per cent increase in Community Pharmacy Program funding. Opportunity to significantly enhance role of pharmacies. 69 per cent increase in DAA funding in 2015/16. Direct remuneration for NDSS. Chemo funded outside the Sixth CPA envelope.

*** GREGORY DA RUI

XXN MR MOORE

PN13254

I've just read from a slide which has been obtained from the Guild website. Does that summary generally accord with your understanding of some of the, if I might call it, headline elements of Sixth CPA?---Well I think, you know, Six CPA is basically maybe stabilising what we'd get – you know, it was taken away from us at the end of Five CPA with the accelerated price disclosure. So it just – the thing about Six CPA is it's giving us more certainty which, you know, at least we have

for the next 5 years and I think that's the – I guess where the strength of Six CPA is. You know, whether all those things that you read out there, some of them have not even been implemented yet, so you know, there may be funding for them but as yet, you know, it's still not worked out. So you know, I'm not really sure how that's all going to pan out.

PN13255

Well, Six CPA only commenced on 1 July, didn't it?---Yes.

PN13256

So we're only a few months in. But do you agree that with the description by the Pharmacy Guild of the matters that I've referred to as being significant benefits for Community Pharmacies?---It would be a benefit, yes of course.

PN13257

And they are benefits which will translate to benefits for Pharmacy proprietors such as yourself. That's so?---The benefits, I think, you don't want to just focus on the pharmacy proprietor. I think for the benefit of the local community where you've now got stable pharmacy business which has some stability and some certainty, that can provide the services and you know, one of the big things that you've just read out there was the increase in scope of pharmacy services. So you've got to look at that benefit as well, whereas that was very, very threatened at the end of Five CPA. So we could have lost a significant amount of pharmacies which would mean losing a significant amount of community – a community health hub. So that's where I think the benefit is, the fact that we've given the community certainty now, at least for 5 years, that their local pharmacy is actually going to stay there and not, you know, not disappear.

PN13258

I understand there may be benefits for others, but my question was simply, do you accept that the significant benefits for community pharmacies are benefits which will translate to pharmacy proprietors such as yourself?---Look, I mean, as you said it's only 3 months in. You know, there's been a lot of modelling and so really, you've just got to wait to see the reality.

PN13259

Now, can I ask you about one other matter? Paragraph 23, you say that if the Guild proposal was accepted, it would allow you to roster on additional pharmacists, meaning that they could spend more time with patients to answer their questions. You then say in paragraph 24:

PN13260

I would also look at hiring new staff.

PN13261

Your position, as I understand it, is that if the proposal was granted, it would principally translate into increased hours of work for some of your staff?---Yes.

*** GREGORY DA RUI

XXN MR MOORE

PN13262

Excuse me a moment. Thank you, nothing further.

PN13263

JUSTICE ROSS: Any re-examination?

PN13264

MR SECK: No, your Honour.

PN13265

JUSTICE ROSS: Thank you for your evidence, Mr Da Rui, you're excused?---Thank you.

<THE WITNESS WITHDREW

[4.14 PM]

PN13266

JUSTICE ROSS: The next witness is Mr Heffernan?

PN13267

MR SECK: That's correct, your Honour.

PN13268

JUSTICE ROSS: And I don't think there were any objections- - -

PN13269

MR SECK: I don't think- - -

PN13270

JUSTICE ROSS: - - -to his statement.

PN13271

MR SECK: I think that's right, your Honour.

PN13272

MR MOORE: There were some objections.

PN13273

JUSTICE ROSS: Were there?

PN13274

MR MOORE: There's one on our list, your Honour. I'm just trying to work- - -

PN13275

JUSTICE ROSS: I didn't think so.

PN13276

MR MOORE: My junior must have told me but not the rest of the world. I'll just read them and see if they- - -

PN13277

JUSTICE ROSS: Yes.

*** GREGORY DA RUI

XXN MR MOORE

PN13278

MR MOORE: No, in light of the rulings today, they're not ones to be pressed in any event.

PN13279

JUSTICE ROSS: Thank you. We'll just stand down for a couple of minutes. If you bring in the witness, we've got the Vice President re-joining us shortly.

SHORT ADJOURNMENT [4.15 PM]

RESUMED [4.20 PM]

PN13280

MR SECK: I call David Martin Heffernan.

PN13281

THE ASSOCIATE: Can you please state your full name and address.

PN13282

MR HEFFERNAN: David Martin Heffernan, (address supplied)

<DAVID MARTIN HEFFERNAN, SWORN [4.21 PM]

EXAMINATION-IN-CHIEF BY MR SECK [4.21 PM]

PN13283

MR SECK: Mr Heffernan, what is your current occupation?---I'm a pharmacist.

PN13284

Where do you work at the moment?---Culburra Pharmacy on the South Coast of New South Wales.

PN13285

You're the proprietor of Culburra Pharmacy, that's correct?---That's right, myself and another man.

PN13286

Now, Mr Heffernan, you have prepared an affidavit in these proceedings, that's correct?---That's right.

PN13287

It was sworn on 11 August 2015?---Yes.

PN13288

You just have to speak up for the record?---Yes, I believe so.

PN13289

It's being transcribed. Do you have your affidavit with you in the witness box, Mr Heffernan?---Yes.

*** DAVID MARTIN HEFFERNAN

XN MR SECK

PN13290

Have you read that affidavit recently?---Yes.

PN13291

Do you wish to make any changes to your affidavit?---Yes, on - - -

PN13292

Which paragraph?---It's number 13, where it says the reason for not opening on Sundays and public holidays is solely due to penalty rates, it's not "solely due", it's also for staff availability sometimes.

PN13293

SO if I crossed out the word "solely", Mr Heffernan, and then after the words "penalty rates" insert the words "and staff availability", that would address your concerns?---Yes.

PN13294

Subject to that amendment, Mr Heffernan, are the contents of your affidavit true and correct to the best of your knowledge and belief?---Yes.

PN13295

I tender the affidavit.

PN13296

JUSTICE ROSS: I'll mark that exhibit PG6.

**EXHIBIT #PG6 AFFIDAVIT OF DAVID MARTIN HEFFERNAN
SWORN 11/08/2015**

PN13297

MR SECK: May it please.

PN13298

JUSTICE ROSS: Mr Moore.

CROSS-EXAMINATION BY MR MOORE

[4.23 PM]

PN13299

MR MOORE: Thank you.

PN13300

Mr Heffernan, just dealing with that amendment you just made to paragraph 13 of your affidavit, I take it that one of the reasons that the pharmacy doesn't open on Sundays and public holidays is because people don't want to work then, is that what you're saying in relation to staff availability?---Well, cannot work, probably more specifically.

PN13301

Not available to work?---Not available, yes.

*** DAVID MARTIN HEFFERNAN

XXN MR MOORE

PN13302

So they make themselves not available to work on Sundays or public holidays?---Yes. They might be having something on or - yes. Most often it's

pharmacists, because you can't open a pharmacy without a pharmacist, so that's the reason.

PN13303

Okay, thank you. Now, Culburra Beach is a small coastal town?---Yes.

PN13304

2700 people I believe?---Yes, a little bit more. It's joined with Orient Point, so - -
-

PN13305

It's a bit bigger than that?---A bit bigger, yes.

PN13306

JUSTICE ROSS: And depending on the season as well?---Well, that's right, yes. It's a fairly - it's two and a half hours from Sydney, so - - - -

PN13307

MR MOORE: All right. So it's a popular spot in summertime, is it?---In summer, yes. Yes.

PN13308

And you've operated the pharmacy since about 2003?---Yes, middle of July 2003.

PN13309

As a proprietor?---That's right.

PN13310

In partnership?---Yes, yes.

PN13311

Have you operated any other pharmacies, either by yourself or in partnership with others?---I've never been an owner in that sense, but I've been, like, a pharmacist in charge, a manager.

PN13312

An employee?---Employee, yes.

PN13313

And you've set out in paragraph 8 the trading hours of your pharmacy. I take it that they have been pretty much unchanged over the period that you've operated the pharmacy?---Pretty much.

PN13314

Yes?---Pretty much.

PN13315

And I see you don't trade on Sundays. I take it that that is like most of the other businesses in the town of a similar size to yours?---I am not sure. Like, what happens in other towns - other shops in my town?

*** DAVID MARTIN HEFFERNAN

XXN MR MOORE

PN13316

Other shops, yes?---Yes, sure. Yes, not all of them open, no, on Sundays and we do try to open in school holidays, but we can't always, because of sometimes availability and so one, but - - -

PN13317

Putting aside school holidays and the summer peak season, you don't open on Sundays and most shops in the town don't open on Sundays?---No, no.

PN13318

And that's likewise the situation on Saturday afternoons?---Yes, yes.

PN13319

Thank you. Now, the reason that you - I think you say in your statement that you open occasionally in summer, and you've also just now said in school holidays sometimes, that's because, I take it, that at those times the demand for your services justifies you open?---Yes, yes. It's there's more of a swell of people.

PN13320

Yes?---Yes.

PN13321

So for the rest of the year, Sundays doesn't really justify you open?---No, it doesn't. There's not much to read in the Sunday papers, you know.

PN13322

Pardon?---Well, you just read the paper and you get a couple of people walk in.

PN13323

Yes. So when you say in paragraph 13, the reason for the pharmacy not opening on Sundays and public holidays is due to the penalty rates that are imposed on those days and staff availability, that's not really the full picture, but the rest of the picture is that you don't open on Sundays because there's not sufficient demand for your services to open on that day?---Well, when we took over the pharmacy it was open Sundays and we were trying it and such, and that's 12 years ago now, and yes, we were just losing money and so we just stopped opening Sundays.

PN13324

And what I'm suggesting to you is that the underlying reason that you don't open on Sundays is there's just not enough business to justify you opening the doors?---Look, we've been mulling opening for some time, but there's just all the mitigating factors that stop it and it's usually - well, it is the penalty rates because it prohibitive in that sense, because you lose money.

PN13325

All right. So you accept though that there's at least three factors in the decision not to open on - - -?---Well - - -

PN13326

Let me finish the question and you can answer it?---Sure.

*** DAVID MARTIN HEFFERNAN

XXN MR MOORE

PN13327

There are three factors in the decision not to open on Sundays, having heard your evidence today. One is the penalty rates that apply. Two is the fact that some staff are not available to work on Sundays, and three is diminished demand on a Sunday. Is that a fair summary?---Well, not really. I mean, if we were to open Sundays, we would advertise the fact, so that the local people know that we don't open Sundays and it's on our door, if people were visiting the town and happened to walk by, so if we were to open Sundays, we'd advertise the fact and so presumably more people would come in on Sundays instead of having to go into Nowra, which is the closest town.

PN13328

Nowra is - - -?---Nearby.

PN13329

10 or 15 K away?---Yes.

PN13330

You haven't sat down and done any calculation around the - in determining now penalty rates lead you in part to this view not to open on Sundays and public holidays?---What do you mean?

PN13331

Well, you haven't sat down and done - I'm being unclear. Let me start again, it's late in the day. Your evidence about not opening on Sundays and why you don't do with penalty rates, staff availability and demand for services, these are matters of your general impression, rather than the results of any analysis or calculation you've undertaken?---Yes. Look, it is.

PN13332

Is that's right?---It's both. Both, but yes, like I don't sit there with a calculator every week going through the numbers, so to speak.

PN13333

Well, have you sat down – when you say "both" is there an analysis that you have undertaken to inform your claim in paragraph 13?---Not like, you know, maybe sitting there with your calculator and you know, and like that, I've done that, yes.

PN13334

Back of the envelope sort of summations?---Yes, that sort of stuff, yes. It wasn't like in an official meeting. I mean, I mull it over with my partner quite often, yes.

PN13335

I see, so there's no detailed analysis that you've undertaken to lead to support your conclusion that the rates make it unprofitable to open on Sundays and public holidays?---Not – well, I haven't carried out an analysis or got someone to carry out an analysis. Like, forensically, if that's what you're getting at.

*** DAVID MARTIN HEFFERNAN

XXN MR MOORE

PN13336

Well, I'm not saying forensically, I'm just saying an analysis that you have undertaken or arranged for someone else to undertake?---Well, like an accountant's analysis or something.

PN13337

Well, your own analysis?---Well, my own analysis is very- - -

PN13338

Back of the envelope?---Yes, it's scrawled all over bits of paper.

PN13339

In paragraph 15, you say that the retirement village isn't able to be serviced outside of normal business hours due to the cost of penalty rates. You see that?---Yes.

PN13340

That reality, as you describe it, that is, the non-servicing of the retirement village, has been the case though throughout your proprietorship of the pharmacy. Is that so?---Well, they have my phone number for emergencies and the local doctors do as well, so if there is such a case, you know, I mean – and so – and that's happened once where we've been called out to the nursing home.

PN13341

What, over the last 12 years?---12 years, yes, yes. But generally, you know, if you get organised, then such, you know, things don't happen.

PN13342

But the point you seem to be making here in paragraph 15 is that because of penalty rates, you can't open on Sundays and therefore you can't service the nursing home. And what I'm suggesting to you is that you've never serviced the nursing home in the sense of opening your shop on a Sunday since you've operated. That's true?---Yes. Well we do. I mean, on Sundays we open, and I guess the context of that statement is we often have faxes in the morning of – from the nursing home requiring different things or something's happened or they query someone's pack or – yeah.

PN13343

See, penalty rates have got nothing to do with whether or not you service the Culburra Retirement Village because you didn't open the doors on Sundays to provide services to all and sundry, including the retirement village, before the Pharmacy Award commenced in 2010?---Well, the - part of the reason why we don't service the nursing home on Sundays.

PN13344

Do you understand that the Sunday penalty rates that you had to pay if you were open before 2010 – excuse me a moment. Well, less than what apply now?---I understand- - -

*** DAVID MARTIN HEFFERNAN

XXN MR MOORE

PN13345

Do you understand that the penalty rates for Sunday work for your pharmacy, if you'd opened on Sundays before 2010, are less than those prescribed by the Pharmacy Industry Award?---So the penalty rates were less before 2010?

PN13346

Yes, that's what I'm saying. Or you didn't know that?---I didn't know that. But well, it's past, but I mean, yes. Yes – no.

PN13347

Can I just suggest to you, in relation to paragraph 15, I suggest to you that you're mistaken in blaming penalty rates for not servicing the Culbarra Retirement Village because, by opening on Sundays, because you've never opened on Sundays. Do you accept that?---Not really, because you could say that, you know, that's the reason why I don't service the nursing home at midnight, or- - -

PN13348

Well, you service the nursing home now, as you've always done, by receiving emergency communications?---Well, there is – like there's strategies in place in case that is required, yes.

PN13349

All right, thank you. In paragraph 17 of your statement, you say that:

PN13350

If the Pharmacy Guild's proposal in this proceeding is accepted, it would mean that the pharmacy could open every day of the year, except for Christmas Day.

PN13351

Do you see that?---Yes.

PN13352

Am I right in interpreting you as they're saying, that if the proposal was accepted, you would think about extending your trading hours? You're not saying that you've made – it's definitely something or a decision that you would likely make?---Well, it means the parameters would have changed.

PN13353

Yes?---So – and then I would go and consider it. I mean, if I can elaborate it, it's – if I was a bigger pharmacy than I am now with all the penalty rates as there are in place, I probably would be open on Sunday. You know, I guess I'm on the precipice. You know, and – but like in the busy times, it is worth it, you know, I mean, there's a lot more traffic but in the quieter times, it's not. And so if the parameters were changed, it would justify employing more staff and therefore that would help out with the availability. You can stretch stuff out over those times.

PN13354

Again, this point you make in paragraph 17, that is, you could open every day of the year, that's something you would consider doing in that eventuality? That's what you're saying?---Mm.

*** DAVID MARTIN HEFFERNAN

XXN MR MOORE

PN13355

You just need to speak your answer for the transcript?---Yes. Well, yes.

PN13356

And again though, that view you formed is a result of a general back of the envelope assessment you've made rather than any specific calculation or analysis you've undertaken. Is that true?---Yes, would work, yes - without doing a full-on one, but for want of a better word, forensic analysis or accountant's analysis, no.

PN13357

I just want to know, if you'd sat down and done an analysis of this eventuality in paragraph 17?---No, no.

PN13358

No?---Well – but if the law did change or if the rules changed, yes, then that's what I would consider, yes.

PN13359

And you say that if – this is paragraph 18 - if the proposal was accepted you may be able to roster additional staff to provide some services that you there identify. Am I right in thinking that if you – if the proposal was accepted and you decided to extend your trading hours, the way that would likely play out would be by offering your staff additional hours rather than employing new staff?---Well no, it probably would mean employing new staff.

PN13360

Would it be a bit of both?---A bit of both, yes. I mean, you know, I've got different staff who – some aren't full-time and some are full-time. Yes and it would allow more flexibility to fill the hours, I guess.

PN13361

The services that you set out in paragraph 18, I take it your pharmacy already provides those services?---Yes, not as - not to the extent I would like to.

PN13362

I understand. What you're saying in paragraph 18 is, as I understand it, that these are services you currently provide, but you could further provide them if there was an extension in your trading hours?---Yes.

PN13363

I understand. Nothing further, thank you, your Honour.

PN13364

JUSTICE ROSS: Any re-examination?

PN13365

MR SECK: No, your Honour. Might the witness be excused.

PN13366

JUSTICE ROSS: Thank you for your evidence, Mr Heffernan. You're excused.

*** DAVID MARTIN HEFFERNAN

XXN MR MOORE

PN13367

MR SECK: The next witness, your Honour, is Quinn On. I think there might be objections to - - -

PN13368

JUSTICE ROSS: Any objections, Mr Moore?

PN13369

MR MOORE: If I could just have a moment.

PN13370

MR SECK: Your Honour, subject to the Guild not reading the first two sentences in paragraph 22 of Mr Quinn On's affidavit my learned friend informs me that the SDA has no other objections - has no objections to the affidavit. So if your Honours could cross out the first two sentences.

PN13371

JUSTICE ROSS: The first two sentences of 22.

PN13372

MR SECK: The first two sentences in paragraph 22. I call Quinn On. Your Honour, I'm told the witness has just gone to the gents for a second.

PN13373

VICE PRESIDENT CATANZARITI: I just wanted to mention, while we've got this break, now that Pezzullo is on tomorrow; there was supposed to be discussed with the parties about the other experts, which I understood to be resolved. Have they actually all been resolved, or are they still going to be debated tomorrow?

PN13374

MR MOORE: Thank you, your Honour, for raising that, because that was something I was going to raise at the end of the day. We wanted to say that the hearing in relation to the Pezzullo objections, if it be necessary - the hearing for Wednesday - we're proceeding on the basis that that hearing will be confined to the Pezzullo controversies insofar as it remains. Now, your Honour has just asked a question which might suggest that we're mistaken in that assumption, but I can tell you this - - -

PN13375

JUSTICE ROSS: What about the Altman and Markey? Are there any objections left for those two? Because they're on that third week as well.

PN13376

MR MOORE: They've been resolved, I'm told.

*** DAVID MARTIN HEFFERNAN

XXN MR MOORE

PN13377

JUSTICE ROSS: Okay. Then there's probably no need for the hearing to deal with anything other than Pezzullo, and we can - hopefully further discussions will

resolve any of the other objections prior to the hearings in November. But if not, we can allocate some time, or the parties can give some consideration to when we might hear those.

PN13378

MR MOORE: Thank you, your Honour. Because from our perspective there are controversies that remain about the proposed tender of some material by the AiG, and there's a controversy around the Productivity Commission report, which of course - - -

PN13379

JUSTICE ROSS: Which we keep pushing off. Can we deal with it this way: can I ask you to confer with the other parties, and if we deal with it at the hearing, if it's necessary this week, simply with Pezzullo. If you can confirm that the objections in relation to Altman and Markey have been resolved. And then if you can simply identify what's left. You can do that on the Wednesday. What's the scope of the objections that remain, and - - -

PN13380

MR MOORE: Yes. Bit of an audit, yes.

PN13381

JUSTICE ROSS: Well, we can either deal with them in a hearing or with short written submissions, or however. But if all counsel can give some thought to an efficient process for dealing with that, we're content with that.

PN13382

MR MOORE: Yes. Thank you.

PN13383

THE ASSOCIATE: Please state your full name and work address for the Commission.

PN13384

MR ON: My name is Quinn On. My working address is Discount Drug Store, Menai, shop C1.04 5-21 Carter Road, Menai, New South Wales.

<QUINN ON, SWORN **[4.46 PM]**

EXAMINATION-IN-CHIEF BY MR SECK **[4.46 PM]**

PN13385

MR SECK: What is your current occupation, Mr On?---I'm a pharmacist.

PN13386

And where do you current work?---I work at Menai Discount Drug Store.

PN13387

And you're a proprietor of Menai Discount Drug Store. That's correct?---That's correct, yes.

*** QUINN ON

XN MR SECK

PN13388

Mr On, you have prepared an affidavit in these proceedings. That's correct?---Correct.

PN13389

That affidavit was sworn on 6 August 2015. That's so?---Correct.

PN13390

Do you have a copy of your affidavit before you at the moment?---Yes, I do.

PN13391

Mr On, I understand you wish to make two small changes to your affidavit. That's correct?---Yes, correct.

PN13392

Can I take you to paragraph 6 of your affidavit. I understand you want to make the change to the last sentence where it says "he" and you want to change that to "I"?---Should be "I". Yes, correct.

PN13393

And you also wish to make a change to page 7, subparagraph (e) to your affidavit?---Correct.

PN13394

That's right?---Yes.

PN13395

Sorry, paragraph 7, subparagraph (3). What do you wish to change there?---From "two part-time" to "three part-time". We actually have three.

PN13396

Subject to those changes, Mr On, do you wish to make any other changes to your affidavit?

PN13397

JUSTICE ROSS: Can you just go back to the first change. I (indistinct) to the second?---Paragraph 6, the last sentence, your Honour - - -

PN13398

"Only time"?---It should say "I" as opposed to "he".

PN13399

All right.

PN13400

MR SECK: Mr On, just so I can tidy up everything, paragraph 7 should now say 17 and not 16 staff. That's right, isn't it?---That's correct, yes.

*** QUINN ON

XN MR SECK

PN13401

Subject to the changes that we've just identified in paragraphs 6 and 7 of your affidavit, do you wish to make any further changes to your affidavit?---No.

PN13402

Are the contents of your affidavit true and correct to the best of your knowledge and belief?---Yes.

PN13403

I tender the affidavit.

PN13404

JUSTICE ROSS: We will mark the affidavit exhibit PG7, noting the deletion of the first two sentences of paragraph 22.

**EXHIBIT #PG7 AFFIDAVIT OF QUINN ON AS AMENDED DATED
06/08/2015**

PN13405

MR SECK: May it please your Honour.

CROSS-EXAMINATION BY MR MOORE

[4.48 PM]

PN13406

MR MOORE: Mr On, how long have you operated the - Menai, is it?---Menai, correct.

PN13407

The Menai Discount Drug Store?---Just over four years.

PN13408

It has been a profitable business over that time, has it?---Not for the first two years.

PN13409

And it has turned the corner, has it, since?---Yes.

PN13410

You've set out the opening hours of the Menai DDS in paragraph 5. Am I right in thinking that over the four years you've operated the store, that those hours have remained largely unchanged?---Actually, paragraph 5 where it says Monday to Friday 8.30 am to 7 pm, we're actually open to 8 pm on a Thursday night. We changed that a few years ago as a trial to see if we were busy enough to open later on a Thursday night.

PN13411

So do I understand what you're clarifying there is that in terms of what the store's trading hours are, they are as set out in paragraph 5 save that on Thursday nights - Thursdays you open from 8.30 am to 8 pm?---8.30 am to 8 pm on Thursdays, yes.

*** QUINN ON

XXN MR MOORE

PN13412

Thank you for that. Have those trading hours - I'll withdraw that. So other than the - you said the Thursday pushed back to 8 pm closing, that happened a couple of years ago, did it?---Yes.

PN13413

Is that pretty much the only change in the trading hours you've had in the four years?---From memory, yes.

PN13414

I take it that you formed the view - well you formed the view that it's a sustainable and commercially sensible thing for you to be trading until 8 pm on Thursday nights?---Actually I've been having that discussion with two of my pharmacists because they brought it up to me and they actually said to me that I should actually close at 7 pm on Thursday nights, because there's not enough customers, not enough traffic. So we are actually considering closing at 7 pm.

PN13415

Thank you. As I read your affidavit, in paragraph 6 you refer to public holidays and you set out at the end of that paragraph you say:

PN13416

The only time I will open is if full-time people will work on public holidays.

PN13417

In paragraph 19 you also say:

PN13418

Due to the cost of penalty rates on public holidays the Menai DDS does not open.

PN13419

As I read your affidavit my strong impression is that your main complaint that you make to this Commission, as it were, is that you won't - the public holiday penalty rates are prohibitive for you trading on public holidays?---That's correct, yes.

PN13420

Thank you. Now I take it though from paragraph 6 that you do open on some public holidays. You open on Easter Saturday and Easter Monday, that's correct?---Correct, yes.

PN13421

You also open on other, as I read the paragraph, tell me if I'm mistaken. You also open on other public holidays as required by your lease, is that right?---Correct, yes.

*** QUINN ON

XXN MR MOORE

PN13422

Which ones are they, do you know?---I haven't actually looked at the lease. The landlords are pretty easy. They have stipulated a few things but they said to me if you think it's not profitable then it's fine if you decide you don't want to open. So I decided to only open on those two public holidays out of - there's probably 10 in

a year. Reason being because during the Easter break there are four public holidays in a row and because we do provide the methadone program and the syringe exchange program and it can be very difficult for the patients to come and get their takeaways if we actually close for four days. So I try to at least open consecutive - two consecutive days - not - alternate days, in order for the patients to come and get their methadone.

PN13423

I'm right then - it sounds as if what you're saying is that if there's let us say 10 public holidays in a year, you open for two of them?---Correct, yes.

PN13424

So the heart of your complaint then is about the application of the penalty rates for public holidays and what's up for grabs, as it were, are those other let us say eight or so public holidays that you don't open on?---Sorry, I don't understand that question.

PN13425

Fair enough, I'll put it more clearly. What's in issue then in your mind in terms of public holidays, since you do already open on two public holidays is whether or not you can open on the remaining public holidays?---I've done - I would every now and then open on a public holiday based on what my manager pharmacist would tell me. If they say, you know, they might come up and tell me there's a few customers that said they wished we open on a certain public holiday, so actually we actually just opened one public holiday just last week on the 5th of this month, it was Labour Day. I thought - the manager pharmacist said why don't you just try opening for six hours and see if it's worth opening, you know, future public holidays apart from just opening on those two Easter holidays. So I said okay, let's do it. So I put on two 16 year olds and one 19 year old and also the pharmacist because it's quite a big store and I need a bit of coverage to prevent theft, because we have quite a bit of theft in that area. On analysing the results on that particular Monday on 5 October this year, I did a profit analysis and the profit on that day was \$920, around that, but the wages itself was \$980, so I came back to the pharmacists and I discussed it with them and they said well, okay, well maybe it's not worthwhile to actually open on a public day. I said that's the reason why I don't usually open on public holidays because the wages are just too high. Even though I put on two 16 year olds and a 19 year old to try and reduce the wages that way, it still exceeded the amount of profit that we made.

PN13426

So to be clear, on that profit analysis you did for 5 October, was that the date?---Correct.

PN13427

There was - when you said \$920 profit, what do you mean profit?---So when you do a printout at the end of the day it tells you what your turnover is.

*** QUINN ON

XXN MR MOORE

PN13428

Yes?---So your turnover minus your costs of goods that gives you your gross profit.

PN13429

I see. That's \$920 from which one needs to deduct wages?---Correct, and rent and it doesn't even cover wages so it doesn't - not covering rent either.

PN13430

This was a profit analysis you did - - -?---Just for that day, just to see if my pharmacists thought it would be a good idea to open a few more public holidays.

PN13431

That's a profit analysis that you did on a computer or on a piece of paper?---No, on a point of sale system, on our actual point of sale system.

PN13432

On your what system?---Point of sale system, yes.

PN13433

Is that able to be printed and generated?---Absolutely, yes. Yes, because I actually printed it out to show it to the pharmacists.

PN13434

I call for production of that document.

PN13435

JUSTICE ROSS: Are you able to obtain a copy of that document?---Yes, I actually have it but not here. It's in my bag.

PN13436

How do you want to deal with it?

PN13437

MR MOORE: Well perhaps if it - - -

PN13438

JUSTICE ROSS: Can be provided to the Pharmacy Guild representative and then provided to you, or do you want it done now?

PN13439

MR MOORE: I think that's the way to proceed and then we can deal with it from there.

PN13440

JUSTICE ROSS: All right.

PN13441

MR MOORE: Thank you. Have you done those sorts of analyses in relation to other public holidays?---In the past I have. Probably last year and the year before.

*** QUINN ON

XXN MR MOORE

PN13442

So there were other one off public holidays here and there that you decided to open?---Yes, just based on recommendations from my managers, based on their feedback from the customers and so I tried to open only six hours.

PN13443

Did you do a profit analysis on those days?---Yes, just basic printout, yes, the same way I did on 5 October last week.

PN13444

Do you still have those analyses from other dates?---No, I don't.

PN13445

You say though in paragraph 6 that:

PN13446

The only time I will open is if full-time people will work on public holidays.

PN13447

Do you understand that under the Pharmacy Industry Award the penalty rate to be paid to permanent employees is 250 per cent or double time and a half for working on a public holiday?---Correct.

PN13448

For casual employees the rate to be paid is in fact 275 per cent inclusive of the casual loading?---Correct.

PN13449

If your full-time workers will work on a public holiday, you'll open on a public holiday?---More likely, yes.

PN13450

So that suggests to me that it is the obligation to pay 275 per cent for the casual employees which is the real heart of your complaint, as it were. Is that right?---Can you rephrase that?

PN13451

Certainly. The impediment to you successfully trading on a public holiday relates in particular to the casual employee payments rather than the permanent employee payments for public holidays. Do you accept that?---The reason I would open on a public holiday if full-time people are willing to work is because they're very knowledgeable, and hence they can actually do better sales - better basket size, we call it. That would actually compensate for the penalty rates that we pay for full-time people. With casuals it's not just about the rate being too high; casuals are not very knowledgeable. And in the pharmacy when you're selling medicines, you need to know what you're talking about. So I would ask full-time staff if I decide to open on a public holiday, say, "Would you mind working a public holiday," you know, "You're going to get 250 per cent." But most of them prefer not to, and I don't want to make them do it if they don't want to. So - - -

*** QUINN ON

XXN MR MOORE

PN13452

Is that right? So when you speak to your permanents about working on the public holiday, most of them tell you prefer not to?---Even if I said, "Would you like to take another day off in lieu of," but they still like to have their public holidays. And if I would put on casuals, the rate is high, but I know it's not going to be compensated because they don't know very much about medicines and they can't really increase the basket size because they don't know how to give advice.

PN13453

I follow. Thank you. Before the Pharmacy Industry Award commenced in 2010 the minimum conditions that applied - I withdraw that. When you state that it's the - this is paragraph 19:

PN13454

Due to the cost of penalty rates on public holidays the Menai DDS does not open.

PN13455

Is that the result of any specific analysis or calculation that you've undertaken, or is that a matter of general impression?---No, it's based on an analysis, because like I said - I did another one on 5 October, only last week.

PN13456

Yes?---It's just not - - -

PN13457

All right. I understand about 5 October, and you're going to produce that analysis. Other than that analysis, is there any other analysis that you've undertaken on the question?---So your question is - sorry.

PN13458

My question is: your statement that due to the cost of penalty rates on public holidays, you don't open; is that the result of any analysis or calculation you've undertaken, or a matter of general impression that you have formed? That's my question?---Well, probably analysis, because I know that we don't - - -

PN13459

All right. So it's a result of an analysis?---Correct.

PN13460

And you've told us about an analysis you've done on 5 October. That was in relation to that particular day?---Yes.

PN13461

Is there any other analysis that you have undertaken more generally about public holidays or other particular public holidays?---Yes. I normally don't open on public holidays because of the penalty rates, because I know that it's not profitable day.

*** QUINN ON

XXN MR MOORE

PN13462

I'm asking you about the analysis. Have you undertaken a more general analysis in relation to public holidays generally, or in relation to other public holidays other than 5 October?---Yes, I have, but I just don't keep records of it.

PN13463

I see. And paragraph 20, you refer to not opening extended hours. But you're already open seven days, so I take it that when you say on the third line there, by not opening extended hours, what you're referring to is by not opening later on weekdays?---Correct.

PN13464

I see?---Because I could open to 9 pm.

PN13465

Yes. And you've had the - if I can call it an experiment - in relation to going to 8 pm for Thursdays?---Correct, yes.

PN13466

And the feedback from your pharmacy managers is that the demand really isn't there at that time?---That's correct.

PN13467

Do you understand that the Pharmacy Industry Award commenced operation in 2010?---Yes.

PN13468

And before that time the minimum conditions that applied to your pharmacist employees were covered by Community Pharmacy Award 1998?---Correct, yes.

PN13469

And there was a New South Wales award which applied to the pharmacy assistants?---I believe so.

PN13470

Yes. And you understand that since 2010 the Pharmacy Industry Award, as it has commenced operation, has not changed the penalty rates applicable to permanent pharmacy staff from what they were prior to 2010?---Sorry, can you say that again?

PN13471

With the commencement of the pharmacy industry award in 2010, it brought about no change in the weekday penalty rates to be applied in the evening, as compared to what previously applied in relation to pharmacists. Do you understand that?---I think from memory the 7.00 to 9.00 pm shift was the same - -

PN13472

Penalty?---Yes. There wasn't a penalty from 7.00 to 9.00 for 2010 - or maybe there was. Yes, there is a penalty between 7.00 and 9.00 pm - 7 pm to 9 pm - so there are no changes, you're saying.

*** QUINN ON

XXN MR MOORE

PN13473

Yes?---Yes, that's correct.

PN13474

That's correct, thank you. So this issue you raise in paragraph 20 about the impact of penalty rates on opening extended hours, which you identify as being opening later on weeknights - - -?---Correct, yes.

PN13475

- - - it has really got nothing to do with penalty rates, is it, because they've remained unchanged. Do you accept that?---For pharmacists.

PN13476

Yes?---It's not so much the pharmacist, but it's more the pharmacy assistants.

PN13477

I see. But for pharmacists you accept my analysis?---Yes.

PN13478

All right?---Yes. Pharmacists, yes.

PN13479

Thank you. Now, in this paragraph you're saying that there's an increase - this is paragraph 20 - I withdraw that. I want to ask you something is before I ask you about that. You're not suggesting that the penalty rates on weekday evenings between 7.00 and 9.00 are an impediment to you opening in those hours - that is, past 7 o'clock?---For pharmacy assistants, yes, because I would need to put a few more on, due to the theft problem. So you can't have skeleton staff on between 7.00 and 9.00 because of the theft. Because of the penalty rates it was actually better off for me to just close at 7.00, as opposed to open till 9.00.

PN13480

You also operate the Priceline Pharmacy in Menai, don't you?---Correct.

PN13481

You don't refer to that in your statement, do you?---No, I didn't refer to it, no.

PN13482

No. You're a proprietor of the Priceline Pharmacy?---Correct. I am.

PN13483

Proprietor of any other pharmacies?---Yes.

PN13484

How many others?---There's one at Illawong.

PN13485

Pardon?---Illawong Pharmacy, that's with a business partner. So she runs that one and I have one at On's Pharmacy at Cabramatta and my wife's a pharmacist and she runs that one.

*** QUINN ON

XXN MR MOORE

PN13486

So four pharmacies all up?---Correct. But I look after two, in Menai.

PN13487

Including the Priceline Pharmacy?---Yes.

PN13488

And the picture I have of your front door at the Menai Pharmacy records your – that you're open 7 days, including on Monday to Friday 8.30 am to 9 pm, that's right?---That's the Priceline's, that's correct, yes.

PN13489

Yes. So I suggest to you again that the penalty rates for late trade on week days are not an impediment to trading at that time?---Yes, that's because the Priceline is on an SDA Award that we signed up 5 years ago. It's not on the PIA.

PN13490

Excuse me a moment. The agreement to which you refer does not operate though in relation to Priceline Pharmacy businesses, that's right?---The SDA Award?

PN13491

Yes, the agreement with the SDA to which you refer only operates, doesn't it, in relation to non-pharmacy Priceline stores?---No.

PN13492

That's not your understanding?---No.

PN13493

All right.

PN13494

JUSTICE ROSS: Can someone produce a copy of the agreement?

PN13495

MR MOORE: Yes, well I'm just asking that question, your Honour. We will produce a copy of the agreement to the Commission.

PN13496

JUSTICE ROSS: All right, thanks.

PN13497

MR MOORE: How many people do you employ at the Priceline store?---There's 35 there.

PN13498

And it operates 8.30 am to 9 pm Monday to Friday?---Correct.

PN13499

And 8.30 am to 5.30 pm on Saturdays?---Correct.

*** QUINN ON

XXN MR MOORE

PN13500

And 8.30 am to 5.30 pm on Sundays?---Correct.

PN13501

Now, going back to paragraph 20 of your statement, you're saying there, as I read that paragraph, that there is an increased chance of needles being shared and accordingly the spread of HIV and hepatitis, that's what you're saying? You're saying that that risk increases when pharmacies aren't open?---Only if – the reasons being because the discount drug store actually has the Syringe Exchange Program. The Priceline pharmacy does not have the Syringe Exchange Program.

PN13502

My question, I'm sorry, was not about the Priceline. I'm sorry if that confused you, because I was asking you about that a moment ago?---Yes.

PN13503

In paragraph 20, you're just dealing with the DDS shop?---Yes, that's right.

PN13504

And my question is about that and I just want to understand what you're saying here. You're saying that there's an increased chance of the spread of disease if a pharmacy which provides a needle sharing program, isn't open on a particular day?---That's correct.

PN13505

All right. So that risk has logically got nothing to do with whether or not a pharmacy with a needle exchange program is or is not operating extended hours on a particular day. It's whether or not it's open at all, that right?---Well, if the pharmacy is open longer hours, it will give people who are dependent on drugs, on the listed drug basically, more access, more time to get to the – to get the needles.

PN13506

But it's a qualitatively different risk, is it not, between - you're not going to equate the risk for the spread of disease between whether or not a pharmacy is open between 8 and 6 pm or between 8 and 9 pm. That difference of risk of spread of disease is very different, you're surely going to accept, as whether or not a pharmacy is open at all on a particular day?---Well, I believe if the pharmacy's opening hours are longer, then it just gives more access to patients who need new syringes.

PN13507

You see, I suggest to you this paragraph 20 is highly exaggerated and quite alarmist, to link the notion of extended trading hours to the risk of the spread of HIV and hepatitis is, I'd suggest to you, an unduly alarmist and exaggerated claim?---Not really, because if the pharmacy is closed and you have a patient who's desperate to shoot up basically and they need clean syringes and they can't get access to it, they'll just re-use whatever old ones they have.

*** QUINN ON

XXN MR MOORE

PN13508

You haven't got any evidence or research that you point to or that you're aware of which supports this claim that there's some association between trading hours on a particular day and the risk of spread of disease, or if there is, could you please point the Commission to it?---No, I don't. No, I don't have any evidence.

PN13509

So this is just your ponderings as to how you see the risks?---Correct, yes.

PN13510

There are pharmacies nearby that offer Methadone?---Not – not within 5 k that I know of.

PN13511

Well, within 5 ks? Sorry, in 5 or 10 kilometres?---Not that I'm aware of, or the syringe exchange.

PN13512

Well, I think you say in your statement that there is a way in which you manage the Methadone program on days that the pharmacy is closed. There is a take away program for Methadone?---Correct.

PN13513

So users or persons, patients who are participating in the Methadone program are not left high and dry completely, as it were, they can obtain a dose to manage the day that they're not there?---Correct.

PN13514

And we're here only talking about, aren't we, eight or so days a year?---Yes.

PN13515

Yes. Now, you refer in your statement to a whole lot of services, in paragraph 10, additional services that the Menai DDS provides. Can you tell the Commission – I'll withdraw that. Without perhaps taking you through each one, is it fair to say that many of the services that you there list are funded by the Community Pharmacy Program, or by State Government funding?---Probably half of them are funded.

PN13516

Yes. And is it also the case that about half of them you would charge a fee to patients?---Actually, no, we don't charge a fee for quite a few.

PN13517

Well, which ones would you charge a fee for?---Which ones would we charge a fee for?

*** QUINN ON

XXN MR MOORE

PN13518

Yes?---Let's start from the top, medication management program. We don't charge for that. Keeping your scripts on file, we don't charge for that. Dose administration aids, we charge a small fee for that, about \$5 per week. NDSS point, we don't charge a fee for that. Heart age assessment, we don't. Asthma

inhaler technique, we don't charge a fee. Diabetes 2 we get funding for that. BMI assessment, we don't charge. Bowel cancer, we don't charge. INSOL medication reviews, we get paid 10 of those a month, the rest we don't charge. Patient medication profiles, we don't charge. Blood pressure, we don't charge. Blood glucose testing, we don't charge. Home health aids, we charge a small fee. Weight management, we don't charge. Compounding, we do. Opioid, we get a fee from the government. The stage supply medicines, we get a fee from the government. The syringe exchange, we get a very small fee, like \$30 a month. Return of unwanted, we don't charge a fee either.

PN13519

Thank you. In paragraph 17 you refer to one of the services you say is popular and that's keeping their script on file?---Yes.

PN13520

As I read the paragraph there, what I understand this service to be is in short, it's a filing and notification service. Is that right?---Correct.

PN13521

The provision of that filing, the undertaking of that service, the filing and the notifying to the patient isn't affected in any way by whether or not you work extended hours beyond what you already do. Do you accept that?---Could you rephrase that?

PN13522

Certainly. The undertaking of those services, the filing of scripts, the notifying to patients, the provision of those services is unaffected by whether or not you traded beyond the extent of the trading hours that you already trade?---I guess not.

PN13523

The provision of that service isn't affected by you being closed on public holidays, that's right?---Well yes, it would be affected because if someone's repeat is due on a certain day and it falls on a public holiday well then they can't really pick it up on that day.

PN13524

I see, the notification on that particular day?---That's right.

PN13525

But the notification is if the public holiday is on a Monday the notification might be given in the previous week when they come into get it. If you're not open on the Monday it doesn't actually affect the notifying does it?---No, but because the system is set on a certain interval and that day might fall on a public holiday.

*** QUINN ON

XXN MR MOORE

PN13526

Can I ask you about paragraph 21. You talk about penalty rates on weekends and you say it compromises the service and I think you were saying that the junior pharmacy assistants simply work the registers rather than also being able to assist with patient queries. But there's still a pharmacist on at those times?---Yes, there is.

PN13527

So a patient who needs to speak to a pharmacist can at those times, it may be that they have to wait a bit longer. Is that a fair summary?---Correct, yes.

PN13528

Now you say at paragraph 24 that if the Pharmacy Guild proposal was accepted you would be able to immediately extend the trading hours and you would consider opening on all public holidays except two. So in relation to the public holidays situation, given that you currently open I think you said on two, what this amounts to is that if the Guild proposal was accepted there might be another six or eight public holidays you say you would open on?---That's correct.

PN13529

In saying that you would be able to immediately extend the trading hours, I take it what you're saying that that's something you would think about, not necessarily something that you would likely do?---Yes, yes.

PN13530

Thank you. You say that it would mean - in paragraph 24, this would mean that you could hire new staff. I assume though that if the proposal put forward by the Guild was accepted that what you would do - what you would envisage is that any additional hours of work would be first filled by offering additional hours to your existing employees?---That's correct, yes.

PN13531

Paragraph 27, you refer to something called spirometry services?---Correct.

PN13532

You say you don't offer that service now because of time constraints. Are you saying that if the Guild proposal was accepted it may mean that the reduced cost on weekends and public holidays might affect your total weekly costs and therefore affect your weekly rostering. Is that what you're saying?---Well if the penalty rates were lower, then that means I can actually put on more pharmacists - an extra pharmacist on the weekend to help put that service together because it's actually quite time consuming.

PN13533

So the spirometry service is currently offered - well I'm sorry, I don't quite understand this. Do you or do you not currently offer the spirometry service?---We just took it off. We did offer it but because we didn't have enough pharmacists on to spend enough time with each of the patients so it wasn't viable to do it because the fee for it was too low, it didn't cover the costs of the extra pharmacist.

*** QUINN ON

XXN MR MOORE

PN13534

The additional services - sorry, the other services that you refer to in paragraph 28, am I right in thinking that they are all services that you currently offer?---We already started doing the medical certificates, yes. The flu vaccination that will happen next year, the MedsChecks we already offer. Sleep apnoea we're talking

about doing it, we started it but we didn't have enough time so we took it out again. We don't really have a baby nurse to cater for our mums and bubs that come in on a regular basis, so we don't have that yet and the weight loss, nutrition advice, we actually don't have enough time to do that either.

PN13535

Thank you, Mr On, nothing further.

PN13536

COMMISSIONER HAMPTON: Mr On, can I just explore just one issue about the practical setting or the location of Menai DDS. Is it in a street shop or is in a shopping complex?---Menai DDS is - it's a very funny place. It's got like six buildings and they're all separated by small roads. So it's not really a shopping centre, it's not really a strip either. So yes, I don't know how to really define it. It's a very unusual place.

PN13537

It's an unusual address you've given?---Yes.

PN13538

Shop C, 1.04?---Yes.

PN13539

So are the premises in that complex, are they shops?---So we have a Dan Murphy and a Dick Smith and us and Auto Cheap and a Pet Farm.

PN13540

I think I understand. So taking 5 October, the last public holiday, were those other - those shops, were they open?---Yes, they were and that's why the pharmacists said these shops are open, why don't we try opening and see how we go.

PN13541

Thank you.

PN13542

JUSTICE ROSS: Re-examination?

PN13543

MR SECK: No re-examination, your Honour.

PN13544

JUSTICE ROSS: Thank you for your evidence, Mr On. You're excused.

<THE WITNESS WITHDREW

[5.29 PM]

PN13545

Is that the last witness for today?

*** QUINN ON

XXN MR MOORE

PN13546

MR SECK: That's our last witness for today, your Honour.

PN13547

JUSTICE ROSS: So 9.30 tomorrow morning.

PN13548

MR SECK: Yes, your Honour.

PN13549

JUSTICE ROSS: Thanks, we'll adjourn.

ADJOURNED UNTIL TUESDAY, 13 OCTOBER 2015

[5.29 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

ANTHONY VINCENT TASSONE, SWORN.....	PN12140
EXAMINATION-IN-CHIEF BY MR SECK.....	PN12140
EXHIBIT #PG2 WITNESS STATEMENT OF ANTHONY TASSONE AS AMENDED DATED 10 AUGUST.	PN12161
CROSS-EXAMINATION BY MR MOORE	PN12161
EXHIBIT #SDA 8 COPY OF SIXTH COMMUNITY PHARMACY AGREEMENT	PN12327
THE WITNESS WITHDREW	PN12348
ANTHONY VINCENT TASSONE, RECALLED.....	PN12348
CROSS-EXAMINATION BY MR MOORE, CONTINUING.....	PN12348
EXHIBIT #SDA9 BUNDLE OF DOCUMENTS SIXTH CPA FACT SHEETS.....	PN12357
EXHIBIT #SDA10 SET OF SLIDES FROM PHARMACY GUILD OF AUSTRALIA WEB SITE	PN12366
RE-EXAMINATION BY MR SECK.....	PN12450
THE WITNESS WITHDREW	PN12464
PAUL THOMAS KEANE, SWORN	PN12484
EXAMINATION-IN-CHIEF BY MR SECK.....	PN12484
EXHIBIT #PG3 AFFIDAVIT OF P.T. KEANE DATED 15/08/2015 NOTING THAT PARAGRAPH 13 IS STRUCK OUT	PN12496
CROSS-EXAMINATION BY MR MOORE	PN12498
RE-EXAMINATION BY MR SECK.....	PN12634
THE WITNESS WITHDREW	PN12640
ANGELO PRICOLO, SWORN	PN12834
EXAMINATION-IN-CHIEF BY MR SECK.....	PN12834
EXHIBIT #PG4 AFFIDAVIT OF A PRICOLO	PN12854
CROSS-EXAMINATION BY MR MOORE	PN12855

THE WITNESS WITHDREW	PN12987
GREGORY DA RUI, SWORN.....	PN13003
EXAMINATION-IN-CHIEF BY MR MOORE	PN13003
EXHIBIT #PG5 WITNESS STATEMENT OF GREGORY DA RUI	PN13020
THE WITNESS WITHDREW	PN13174
GREG DA RUI, RECALLED	PN13193
CROSS-EXAMINATION BY MR MOORE	PN13193
EXHIBIT #SDA11 WAGES AND PENALTIES PHARMACY INDUSTRY AWARD 2010 TABLE	PN13206
THE WITNESS WITHDREW	PN13207
GREGORY DA RUI, RECALLED	PN13219
CROSS-EXAMINATION BY MR MOORE	PN13219
THE WITNESS WITHDREW	PN13265
DAVID MARTIN HEFFERNAN, SWORN.....	PN13282
EXAMINATION-IN-CHIEF BY MR SECK.....	PN13282
EXHIBIT #PG6 AFFIDAVIT OF DAVID MARTIN HEFFERNAN SWORN 11/08/2015	PN13296
CROSS-EXAMINATION BY MR MOORE	PN13298
THE WITNESS WITHDREW	PN13366
QUINN ON, SWORN	PN13384
EXAMINATION-IN-CHIEF BY MR SECK.....	PN13384
EXHIBIT #PG7 AFFIDAVIT OF QUINN ON AS AMENDED DATED 06/08/2015	PN13404
CROSS-EXAMINATION BY MR MOORE	PN13405
THE WITNESS WITHDREW	PN13544