



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

1052576

TRANSCRIPT IN CONFIDENCE

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

AM2014/305

s.156 - 4 yearly review of modern awards

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

Sydney

9.42 AM, TUESDAY, 27 OCTOBER 2015

Continued from 26/10/2015

PN18915

JUSTICE ROSS: Good morning. I understand there's a problem with the vision on the video link to Melbourne, that we can see you but you can't see us. Can you hear us?

PN18916

MR BREHAS: Yes. Yes, I can, your Honour.

PN18917

JUSTICE ROSS: Well, that's probably sufficient. We will endeavour to get it fixed shortly. Can I raise one or two other matters. The first is that Mr Parkes from Restaurant and Catering has advised that Mr [REDACTED] will be available to give evidence at 2 o'clock today or 2 o'clock tomorrow. It would probably suit our convenience if it was 2 o'clock today, unless anyone has a problem with that. Is Mr Parkes here? No. My associate will send him a response saying 2 o'clock today would be convenient. I think that witness is by video in any event.

PN18918

We've also received correspondence from Ai Group inquiring about the availability for the Full Bench on two sets of dates, which I assume are the dates that are being discussed by the parties for the hearing of the matter. The two sets of dates were Monday, 7 March to Wednesday, 9 March, with Thursday the 10th in reserve; and the week of the 11 to 15 April inclusive.

PN18919

We've sent a response indicating that yes, we're available on those dates and we're holding them for the next seven days. So we encourage you to - I'm in the process of setting appeal and arbitration rosters for next year, so the sooner we get these dates locked in, the better.

PN18920

The final matter is Ms Pezzullo's evidence. I had a brief report from Johns C, but only to indicate that the matter wasn't dealt with or resolved yesterday and it was listed for later this week. He foreshadowed that it may have implications for Ms Pezzullo's - the timing of her evidence. I'm assuming that you've had some discussions about this - that is, the SDA and the Pharmacy Guild.

PN18921

MR MOORE: Your Honour, I haven't had discussions with the Pharmacy Guild, who aren't here today, but we have received correspondence just before court which indicates the Meridian Lawyers' position. Can I just very briefly update the Bench as to where we see things arising from the hearing before Johns C yesterday afternoon.

PN18922

JUSTICE ROSS: Can I just - I'm not suggesting you traverse this, Mr Moore, but we don't want to know anything about the detail of the privilege claims or anything like that.

PN18923

MR MOORE: No. I fully understand that.

PN18924

JUSTICE ROSS: We understand the broad context from the letter.

PN18925

MR MOORE: Yes.

PN18926

JUSTICE ROSS: But beyond that, we don't want to - - -

PN18927

MR MOORE: I won't be going there, your Honour.

PN18928

JUSTICE ROSS: No.

PN18929

MR MOORE: The starting point it was identified Johns C yesterday is that given the controversy raised in the Deloittes correspondence, it's necessary to identify clearly what the scope of the production orders were. It would appear that no orders were actually published in relation to what I will call the Deloittes or the Pezzullo production.

PN18930

In order to ascertain the scope of production it's therefore necessary to look at the transcript. The transcript wasn't requested. It has now been requested, and Johns C indicated yesterday that he had hoped that it might be provided, I think at the earliest, by the end of today. That's the first thing. The second thing is that the Commissioner directed that Deloittes file and serve an application concerning the matters raised in their correspondence of 23 October and any materials in support thereto by 4 pm this Friday.

PN18931

As part of that direction the Commissioner indicated that Deloittes is to comprehensively identify all of the documents to which their application relates. An affidavit was filed yesterday by legal counsel for Deloittes which said that the review of all the documents produced was currently occurring and not yet complete. So the ambit or the extent of what is referred to as the inadvertent disclosure is not yet clear. And the Commissioner made it clear that those matters need to be resolved by Friday as well.

PN18932

The other matter to update the Bench about is that in the correspondence from Deloittes of the 23rd there were three categories of documents identified: what's referred to as draft reports; those referred to as commercially sensitive documents not within the scope of orders; and privileged documents.

PN18933

I can tell the Commission that overnight, subsequent to the hearing before Johns C, my instructors have corresponded with Deloittes and told them that my client

will not use, in this proceeding, those documents referred to in the letter under the heading "Commercially Sensitive Documents Not within the Scope of Orders". So that's one of the three categories in the letter.

PN18934

So we're attempting to respond constructively to the matters raised by Deloittes. However, the scope and extent of the inadvertent disclosure in relation to the two other categories remains unclear and is not finally determined this point in time, and won't be until Friday. And the position, as I - - -

PN18935

JUSTICE ROSS: Well, some time after Friday, yes.

PN18936

MR MOORE: I'm sorry.

PN18937

JUSTICE ROSS: Or some time after Friday, if they're simply filing the material.

PN18938

MR MOORE: Well, I understand that by Friday they need to make clear exhaustively what all the documents are.

PN18939

JUSTICE ROSS: And presumably there is some hearing or process after that.

PN18940

MR MOORE: No further directions have been made.

PN18941

JUSTICE ROSS: Okay. All right.

PN18942

MR MOORE: And I plainly indicated - I indicated, I think, to the Commissioner yesterday that once we receive that material on Friday we will engage with it in an effort to confine any controversy. The other point, of course, which I mentioned to the full bench yesterday is that the reality is that the SDA does intend at this time to rely on some of the specific documents referred to in the 23 October correspondence in the examination of Ms Pezzullo.

PN18943

As a consequence, it's not possible, in my respectful view, for Ms Pezzullo to be cross-examined until the controversy in respect of the inadvertent disclosure is resolved. And I don't want to go any further into that for obvious reasons.

PN18944

JUSTICE ROSS: That's fine. In your discussions with the Pharmacy Guild, do you have a different view?

PN18945

MR MOORE: No. The correspondence to my instructors of this morning says this - I quote in part:

PN18946

Having regard to the directions made by Johns C in relation to filing of an application dealing with the documents mistakenly produced by Deloitte in error, that application and list of documents is to be filed by Friday. It seems to us that Pezzullo cannot give her evidence tomorrow unless the SDA and other union parties agree not to use that material in cross-examination tomorrow.

PN18947

JUSTICE ROSS: And you've dealt with that latter point, and so in those circumstances Ms Pezzullo won't be required tomorrow. Is that the upshot of that?

PN18948

MR MOORE: That is the upshot. And to complete the circle, I've spoken to Mr Dowling this morning and he shares the view that I've now just expressed to the Bench.

PN18949

JUSTICE ROSS: All right. We've asked Ms Wellard to attend this morning as soon as possible and we will see what her position is in relation to all of that, but on the basis of her correspondence and your position, it would appear that Ms Pezzullo won't be required tomorrow. What I am determined to do, though, is to get a date for when she will be attending.

PN18950

MR MOORE: Yes.

PN18951

JUSTICE ROSS: And I will put that to Ms Wellard. From the Bench's perspective, that date would be 16 December, which is the day after the day on which we have the balance of the expert evidence, and that would be some time in advance. There shouldn't be a difficulty with Ms Pezzullo attending; if there is, I'm going to want to hear her give evidence about that difficulty.

PN18952

MR MOORE: Thank you, your Honour. I should - I don't want to, through any omissions, be said to have not correctly portrayed the position of Meridian Lawyers. The correspondence which I read from before goes on to say:

PN18953

One possibility is that we try to have a matter of Deloitte materials determined tomorrow so the application will be filed early, with the hearing tomorrow afternoon, and Lyn could give her evidence on Thursday, subject to the Commissioner's availability, as we understand their preference was not to sit on Thursday. We appreciate that a decision late Wednesday, if the Commission was minded to make one, but not provide your counsel with sufficient time to adjust the planned cross-examination if necessary.

PN18954

I just say - - -

PN18955

JUSTICE ROSS: I imagine that's right. But look, there are a number of issues involved in that.

PN18956

MR MOORE: Yes.

PN18957

JUSTICE ROSS: We have, for some time, indicated that we've got other matters on Thursdays. And, look, I think - - -

PN18958

MR MOORE: I just want to indicate, for completeness, the position conveyed by Meridian.

PN18959

JUSTICE ROSS: Well, we will wait until Ms Wellard gets here. But if they've not taken any steps to do any of that, they don't have the transcript to begin with, I'm not sure how any of that is going to work. And in any event, it's not a matter for us, it's a matter for Johns C. Unless she has made an application to Johns C along those lines and he has acceded to it - - -

PN18960

MR MOORE: Yes.

PN18961

JUSTICE ROSS: - - - I don't know where we can take any of that.

PN18962

MR MOORE: No. That's right.

PN18963

JUSTICE ROSS: All right. Mr Dixon, you're in the happy position this is washing over you, and I wish I was in the same spot.

PN18964

MR MOORE: There was one other preliminary matter, your Honour. I just draw this to the Bench's attention. I did note there was correspondence provided by FCB Lawyers to AMOD yesterday afternoon. I'm not sure if it has reached the Bench's attention.

PN18965

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

PN18966

MR MOORE: Well, I will tell you what it says, in substance.

PN18967

JUSTICE ROSS: Yes.

PN18968

MR MOORE: "FCB advise that they have requested Ms Pezzullo to prepare a report responding to Ms Serena Yu's report."

PN18969

JUSTICE ROSS: Yes.

PN18970

MR MOORE: And that the foreshadowed report by Ms Pezzullo won't be ready until 2 November, and once it's ready they will seek leave to file and serve it. I raise that to tell the Bench about it. There's no application yet before the Bench. My client's general position is to oppose the foreshadowed application, but it's only a foreshadowed application, and unless you want to hear from me at this point, I won't say anything further about it.

PN18971

JUSTICE ROSS: No, I don't. But I note that - just bear with me for a moment. I note that your instructors filed a further report of Ms Bartley.

PN18972

MR MOORE: Yes, they did. I think that was about - - -

PN18973

JUSTICE ROSS: What's the process that was followed in that?

PN18974

MR MOORE: There was a direction, as I recollect, for the filing of any responsive expert report to Dr Pratley's report, and a date was fixed for that; and I believe the further report filed yesterday by Ms Bartley was filed five to seven days after that due date. And I think - - -

PN18975

JUSTICE ROSS: And there is no - I mean, this isn't the first time your instructors have filed late and have not sought any variation to directions.

PN18976

MR MOORE: I see. Yes.

PN18977

JUSTICE ROSS: So if you can ask them to attend to that.

PN18978

MR MOORE: I will.

PN18979

JUSTICE ROSS: But just filing material in some sort of random whenever it suits you type of process - I'm not directing this criticism at you, Mr Moore - isn't going to assist the process, and it's not going to assist your cause when we come to deal with material filed in a similar fashion by your opponents. So if you can attend to that one, and we will hear from the FCB in due course when they want to do whatever they want to do.

PN18980

MR MOORE: Yes, your Honour.

PN18981

JUSTICE ROSS: Mr Seck.

PN18982

MR SECK: Yes, your Honour.

PN18983

JUSTICE ROSS: We've been having a discussion in relation to the timing of the resolution of the Deloitte matter, if I can refer to it that way.

PN18984

MR SECK: Yes, your Honour.

PN18985

JUSTICE ROSS: We've been advised that one of the issues is the scope of the orders, which is reflected in the transcript of the proceedings before Johns C; transcript unlikely to be available until sometime later today. The Commissioner has issued directions for the filing of certain material by Friday, and what - our immediate concern is Ms Pezzullo's evidence, which was scheduled for tomorrow.

PN18986

We, as previously advised, don't have Thursday available, certainly not for all of us; and in any event, on the Commissioner's current directions, you're to file your material on Friday by 4 pm and he would determine that matter sometime after that. Had he sought any variation to those directions?

PN18987

MR SECK: We haven't, your Honour. What we've done is written to the SDA's lawyers to ascertain their attitude - - -

PN18988

JUSTICE ROSS: Have you contacted the Commissioner and sought any variation to the directions that he has issued?

PN18989

MR SECK: No.

PN18990

JUSTICE ROSS: So as it presently stands, the matter before him would be determined some time after 4 pm on Friday. Is that where we are?

PN18991

MR SECK: Yes, your Honour.

PN18992

JUSTICE ROSS: All right. On that basis, what do you say about the utility of Ms Pezzullo being called to give evidence tomorrow?

PN18993

MR SECK: I suspect there would be limited utility, your Honour. I understand from Mr Moore yesterday that he will have great difficulty adjusting his cross-examination to deal with parts which are not the subject of dispute in terms of documents. I certainly appreciate - - -

PN18994

JUSTICE ROSS: Bearing in mind the scope of the dispute as to documents hasn't been determined yet, I imagine that's right.

PN18995

MR SECK: Indeed. Indeed, your Honour. My view is that it would be very limited utility. It would be better to get it over and done with. I've made inquiries of my instructing solicitor at Deloittes as to Ms Pezzullo's availability on other dates.

PN18996

JUSTICE ROSS: I don't think you need to trouble yourself about that. I'm going to let you know her availability in terms of when we want to have her in, and it will be 16 December. And if she's not available on that day, I would like her to come along and give evidence as to why.

PN18997

MR SECK: Your Honour, she will be made available on that day. And if not, we will do that.

PN18998

JUSTICE ROSS: I understand there's also a further - I understand there's a further report. Do you know anything about that?

PN18999

MR SECK: All I know, your Honour, is that I think the Retailers have approached Ms Pezzullo and Deloittes to produce a response to Ms Yu's report. That hasn't been initiated by the Guild as far as I'm aware.

PN19000

JUSTICE ROSS: And are the Retailers represented in Victoria - in Melbourne at the moment?

PN19001

MR DIXON: I don't think they were earlier, your Honour.

PN19002

JUSTICE ROSS: I'm sorry?

PN19003

MR DIXON: There was only a representative from the NRA there this morning.

PN19004

JUSTICE ROSS: I see. Thank you.

PN19005

MR DIXON: Mr Brehas.

PN19006

JUSTICE ROSS: Mr Seck, can you contact, through the Guild, given that it involves Ms Pezzullo, and ask your instructor to contact the Retailers. I think their instructors are FCB Lawyers.

PN19007

MR SECK: We'll do that straight away, your Honour.

PN19008

JUSTICE ROSS: They have forwarded correspondence indicating that Ms Pezzullo would be providing some report. My question is pursuant to what directions are they filing that material?

PN19009

MR SECK: I will make those inquiries and request that they inform the Commission of that issue immediately.

PN19010

JUSTICE ROSS: Thanks very much. Can you let us know through your instructors or otherwise tomorrow. We'll have, I think, Professor Markey in the morning. If you can have someone advise, you needn't attend yourself but perhaps to my Associate as to Ms Pezzullo's availability on 16 December, so that we can advise the other parties.

PN19011

MR SECK: Yes, your Honour.

PN19012

JUSTICE ROSS: Nothing further about that issue? Right. Let's proceed to the first witness.

PN19013

MR GOTTING: Your Honour, just before we proceed to the first witness.

PN19014

JUSTICE ROSS: Yes, Mr Gotting.

PN19015

MR GOTTING: Can I raise four matters. The first concerns tomorrow and the calling of Professor Markey.

PN19016

JUSTICE ROSS: Yes.

PN19017

MR GOTTING: At this stage, in light of the discussion that's just occurred, the only witness to be called tomorrow is Professor Markey.

PN19018

JUSTICE ROSS: That's right.

PN19019

MR GOTTING: I think the estimate is somewhere in the order of an hour and people are travelling from interstate. At this stage, there's one outstanding issue before Johns C relating to a notice to produce for documents that related to Professor Markey. Previously, the indication was that if necessary it would be appropriate to recall Professor Markey to address anything further - - -

PN19020

JUSTICE ROSS: Further on the document, yes.

PN19021

MR GOTTING: I just wanted to raise for the consideration of the Full Bench the appropriateness of continuing to proceed tomorrow if there was only going to be a short period of time.

PN19022

JUSTICE ROSS: When else were you to fit Professor Markey in, that's the problem. Then we'll run into counsel availability and a whole raft of other - - -

PN19023

MR GOTTING: I just thought - - -

PN19024

JUSTICE ROSS: Sorry, Mr Gotting. Unless the issue of notice to produce is sort of - is a fundamental question like instructions or something like that, the approach we've adopted - for example ABI had a similar issue. They were awaiting some material or they got it late and they were able to proceed with the vast bulk of the evidence, with liberty to call him back if it turned out they needed to put one or two questions. Bearing in mind we've got the Bench available, counsel have known about it for a while and it's the day before. We also had to shuffle Professor Markey, I think. He wasn't available today, otherwise that might have been the other option, I suppose, but - - -

PN19025

MR GOTTING: I just thought for completeness I should raise it.

PN19026

JUSTICE ROSS: No, no, I appreciate that.

PN19027

MR GOTTING: I'm not making an application, it's nothing that the Ai Group is directly interested in but I thought for candour I should do so.

PN19028

JUSTICE ROSS: No, no, thank you.

PN19029

MR GOTTING: The second issue that I wanted to raise was that in light of the filing of a Bartley further report, the Australian Industry Group seeks an opportunity to respond to that.

PN19030

JUSTICE ROSS: Yes.

PN19031

MR GOTTING: We will endeavour to do so as reasonably - - -

PN19032

JUSTICE ROSS: Well I want you to talk to Mr Moore and sort out directions. I don't want it to be left without dates or timeframe. Sort out consent directions for the filing of a response.

PN19033

MR GOTTING: Thank you. Those discussions will be held today. The third thing is there was some discussions about the preparation of a confidentiality order for some of the material that was filed by the Australian Industry Group.

PN19034

JUSTICE ROSS: Yes.

PN19035

MR GOTTING: A draft order has been prepared, it's underway. Hopefully we'll have that resolved by tomorrow.

PN19036

JUSTICE ROSS: Look, I think we've put in place the - I don't think we've changed this practice but the transcript isn't going on - it's only going to the advocates at the moment, until we complete the evidence to avoid any suggestion that the lay witnesses in particular I suppose reading what's been put to other lay witnesses and the like. When we complete the evidentiary case we'll put onto the website, the part that's available to the participants, all of the transcript, the redacted statement, links and those sorts of things. So I don't think there's any - I'll just - I'll make sure of that during the adjournment but there's no risk of that material being publically released by us until there is such an order in place.

PN19037

MR GOTTING: Thank you, your Honour.

PN19038

JUSTICE ROSS: It's not something that's particularly urgent.

PN19039

MR GOTTING: Thank you. The fourth matter was that there were two exhibits yesterday, SDA23 and 24 of which my instructors do not have copies, and I was just seeking leave to access that during the course of the day, so that copies might be made.

PN19040

JUSTICE ROSS: Certainly. I'll ask my Associate to make copies of those for you.

PN19041

MR GOTTING: Thank you.

PN19042

JUSTICE ROSS: Do you just require a copy?

PN19043

MR GOTTING: A single copy would suffice, thank you.

PN19044

JUSTICE ROSS: Do you have a copy of the matter that was marked for information? We might - - -

PN19045

MR GOTTING: Yes, we do, thank you.

PN19046

JUSTICE ROSS: Right. Yes, Mr Dixon.

PN19047

MR DIXON: May it please the Full Bench. Our next witness is Mr Nicola Agostino.

PN19048

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

PN19049

MR AGOSTINO: Nicola Agostino, (address supplied).

<NICOLA AGOSTINO, AFFIRMED

[10.06 AM]

EXAMINATION-IN-CHIEF BY MR DIXON

[10.06 AM]

PN19050

JUSTICE ROSS: There seems to be some issue with the link. What we might do is, if you can just bear with us for a moment, Mr Agostino, and just remain there, we'll stand down for a couple of minutes and see if we can re-establish it and - but this is Ai Group's witness in any event. So we won't delay you for too much longer, we'll just see if we can establish a link or at least a phone contact. We'll stand down, we'll be back in a moment.

SHORT ADJOURNMENT

[10.07 AM]

RESUMED

[10.14 AM]

PN19051

JUSTICE ROSS: Sorry, to have kept you, Mr Agostino. Mr Dixon.

PN19052

MR DIXON: Thank you, your Honour. Mr Agostino, your full name is Nicola Agostino?---Yes.

PN19053

Your address is (address supplied)?---Correct, yes.

*** NICOLA AGOSTINO

XN MR DIXON

PN19054

Are you a director of the company Agostino Group Holdings Pty Ltd?---Yes.

PN19055

Is your company a franchisee under the McDonald's franchise system operated by McDonald's Australia Ltd?---Yes.

PN19056

In your capacity as a director, have you prepared two affidavits for the purpose of these proceedings?---Yes.

PN19057

The first of those affidavits is one of 57 paragraphs with confidential exhibits NA1 and NA2 affirmed by you on 10 August 2015. Is that correct?---Yes.

PN19058

Do you have a copy of that with you?---Yes.

PN19059

May I hand up the confidential exhibits, if the Commission pleases. My learned friend has the confidential exhibits, if the Commission pleases. Mr Agostino, you've also affirmed an affidavit described as the second affidavit on 6 October 2015, consisting of some seven paragraphs. Is that correct?---Yes.

PN19060

Do you have a copy of that document with you?---Yes.

PN19061

If the Commission pleases, that's the evidence in-chief.

PN19062

JUSTICE ROSS: I'll mark the first affidavit as exhibit Ai Group 7 and the second affidavit as exhibit Ai Group 8.

EXHIBIT #Ai GROUP 7 FIRST AFFIDAVIT OF NICOLA AGOSTINO

EXHIBIT #Ai GROUP 8 SECOND AFFIDAVIT OF NICOLA AGOSTINO

PN19063

Mr Moore.

CROSS-EXAMINATION BY MR MOORE

[10.16 AM]

PN19064

MR MOORE: Thank you, your Honour. Good morning, Mr Agostino?---Good morning.

NICOLA AGOSTINO

XXN MR MOORE

PN19065

I just want to ask you some questions about your affidavits. Now in paragraph 50(a) of your affidavit, your first affidavit, which is on page 12, you'll see in about the middle of the paragraph you say that;

PN19066

An applicant's availability to work is a significant determining factor as to whether or not the company will decide to engage the particular applicant.

PN19067

Another witness in this proceeding who's a McDonald's licensee, Mr Dando, has given evidence that managers are trained when conducting job interviews to tell applicants that they're expected to be available to work during peak times. Does that practice occur with your restaurants?---Yes.

PN19068

Your busiest times are Saturdays and Sundays, I think you say in your affidavit?---Yes, correct.

PN19069

So applicants are told that they're expected to be available then?---For at least one of those days, yes.

PN19070

If they're not available at least for one of those days they're less likely to get a job?---Yes, yes.

PN19071

Now if a person is employed their availabilities are entered into the system?---Correct.

PN19072

There are processes within the business for staff to change their permanent availabilities?---Yes.

PN19073

An employee will be rostered within the range of their availabilities that are recorded on the system?---Correct.

PN19074

Within the times and says that employees identify as being times and days that they're available, there's no processes in place for employees to identify their preferred times. That's right?---Um - - -

PN19075

Just their available times?---Correct, yes.

PN19076

Not their preferred times?---Yes, that's right, yes.

*** NICOLA AGOSTINO

XXN MR MOORE

PN19077

Thank you. So in paragraph 50 of your affidavit, have you got that open?---Yes.

PN19078

Where you say before paragraph (a);

PN19079

The company uses a number of systems for employees to express their preferred working hours.

PN19080

You mean the hours for which employees are available?---Correct.

PN19081

Another licensee Mr Marcus Dunn has given evidence in this proceeding that on Fridays, Saturdays and Sundays more people call in sick or have other commitments that affect their temporary availability. That's the evidence he's given to this Commission. Is that consistent with the experience in your restaurants?---Yes, yes.

PN19082

Of those days would it be right that the day upon which people most call in sick or have other commitments that affect their temporary availabilities would be Sundays?---Can you repeat the question. Sorry.

PN19083

Certainly. Within the day that people are most likely to call in sick or have other commitments that affect their temporary availabilities is Sunday. Do you accept that's right?---No.

PN19084

No. All right. Now, you've referred, I think, in your statement to the NA book?---Yes.

PN19085

I think you actually refer to it in paragraph 50(b) as the time out book?---Yes.

PN19086

That's what it's called in your premises?---Yes.

PN19087

And that's a book which is a [REDACTED]

[REDACTED] ---Correct.

PN19088

All right. Can the witness please be shown this folder of documents, and that's one for the Bench.

NICOLA AGOSTINO

XXN MR MOORE

PN19089

Mr Agostino, do you recall that in the lead-up to this hearing you were required to produce to the Commission copies of the time out book for the period of [REDACTED] to [REDACTED]?---Yes.

PN19090

What I've handed to you is a copy of what has been produced by you or your company?---Yes.

PN19091

Can you just look at the folder, and I will ask you to confirm whether that is indeed a copy of the time out book for your restaurants - the three restaurants - for the period of [REDACTED] to [REDACTED]?---Yes, this is correct.

PN19092

All right. Thank you. I tender that bundle, if the Commission pleases.

PN19093

JUSTICE ROSS: Mark that exhibit SDA27.

**EXHIBIT #SDA27 COPY OF TIME OUT BOOKS FROM [REDACTED]
TO [REDACTED]**

PN19094

JUSTICE ROSS: Do you have a copy of that, Mr Dixon?

PN19095

MR DIXON: We've got a form of the documents so we can go along with the intended line of cross-examination - - -

PN19096

JUSTICE ROSS: All right. But we might add that to the list of - - -

PN19097

MR DIXON: - - - but I might need to seek leave to access SDA25 in due course.

PN19098

JUSTICE ROSS: No, that's fine. We will - yes. No, that's fine, we will endeavour to get you a copy of this as well.

PN19099

MR DIXON: As the Commission pleases.

*** NICOLA AGOSTINO

XXN MR MOORE

PN19100

MR MOORE: Can I hand you another document. Mr Agostino, let me explain this document. It's a document that has been prepared by my solicitors, and by reference to the time out book documents that you have in front of you. And what occurred is that on each day the number of names on each date in that time period was identified - the number of names listed on any particular date; those number of names were added up; and the average number of names for each day of the week was determined; and that average is set out in the column at the top left of

the page. So on our examination of those records it shows, for example, that on average in that time period of [REDACTED], [REDACTED] names appeared on a [REDACTED] in the time out book. Do you follow me so far?---Yes.

PN19101

And the graph records or represents those averages pictorially. Do you see that?---Yes.

PN19102

Do you see that the graph records that the highest average number of entries in the book by day occurred on [REDACTED] in that time period; then [REDACTED], and then [REDACTED]. See that?---Yes.

PN19103

Does that accord with your experience in your restaurants?---Yes.

PN19104

All right. Thank you. I tender that document.

PN19105

JUSTICE ROSS: Mark that exhibit in MFI - are we - - -

PN19106

MR MOORE: Well, that - - -

PN19107

JUSTICE ROSS: Yes. No, I see, we're back to the issue. Yes. No, that's fine. SDA28.

EXHIBIT #SDA28 GRAPH DEPICTING TIME OUT BOOK ENTRIES

PN19108

MR DIXON: We've just assumed it's tendered on the same basis as before.

PN19109

MR MOORE: Yes, it is.

PN19110

JUSTICE ROSS: Yes. Yes, indeed.

RE-EXAMINATION BY MR DIXON

[10.26 AM]

PN19111

MR DIXON: Mr Agostino, perhaps I can ask you to turn to the volume of material you have, which would be your NA book - or time out book, as you've described it?---Yes.

PN19112

And would you turn to, for example, Forest Lakes?---Yes.

PN19113

And by way of example, turn to [REDACTED], which is a [REDACTED]?---Yes.

PN19114

Do you have that? There are a number of entries there. Can you describe to the Commission what the entries mean? Does that mean, for example, there's someone called [REDACTED], "[REDACTED]." What message did that convey, as you understood the position?---[REDACTED].

PN19115

On [REDACTED] the - - - ?---[REDACTED], [REDACTED], yes.

PN19116

And the next entry would simply be [REDACTED]?---Correct.

PN19117

Not available - - - ?---Not available between [REDACTED], yes.

PN19118

Now, if you then go to the next page, it's [REDACTED] the [REDACTED]?---Yes.

PN19119

[REDACTED], I think. What did you take from that? Does it mean that all [REDACTED] of those - - -

PN19120

MR MOORE: I object to the question.

PN19121

JUSTICE ROSS: Yes. You can ask him what it means.

PN19122

MR DIXON: I will.

PN19123

In relation to the [REDACTED] there, would they be the - - -

PN19124

MR MOORE: I object to the question.

PN19125

MR DIXON: It's not a leading question, if I - - -

PN19126

JUSTICE ROSS: Well, it's starting - - -

PN19127

MR DIXON: Let me finish the question and you can ask the question.

*** NICOLA AGOSTINO

RXN MR DIXON

PN19128

PN19129

MR MOORE: Well, I think that does lead the witness, even though it elicits a yes or a no answer. In my respectful submission my learned friend should approach the matter in an open-ended basis.

PN19130

MR DIXON: Can you tell us what the [REDACTED] indicate to you?---That [REDACTED] or [REDACTED].

PN19131

And would those [REDACTED] the book, as you understood it, [REDACTED]?

PN19132

MR MOORE: Well, I object to that question.

PN19133

JUSTICE ROSS: Why?

PN19134

MR MOORE: I'm not sure how the witness can answer when the - - -

PN19135

MR DIXON: I will rephrase the question.

PN19136

Do the employees have the ability to put their names on that list before or after the roster has been set?---Before the roster.

PN19137

Before it has been set. And typically on Wednesdays do you roster the same number of people on Wednesdays as you do on every other day of the week?---No.

PN19138

On which day of the week do you roster most people at your restaurants?---The weekends, Saturday and Sunday.

PN19139

Right. And are you aware of whether the employees who put their names on the list as unavailable have to provide specific reasons for doing so?---In the time out book? No.

PN19140

No?---Yes.

PN19141

So they can choose whatever reason, can they?---Yes.

PN19142

And are there any consequences for them putting their names in the book other than not being available to work?---No.

PN19143

And if you then go to [REDACTED], as an example, there are a whole - it appears - and I don't think my learned friend will object to this - it appears that there are a much [REDACTED] [REDACTED]?---Yes.

PN19144

What is your practice at Forest Lakes, for example; do you roster more or fewer people than you think you may need for the weekends?---No, we roster what's needed. We don't roster more.

PN19145

Do you have available, people who can fill in when employees indicate that they are not available on those particular days?---Yes.

PN19146

What is the process? What is the process that the managers adopt when a range of employees say they're not available on that day? What happens with a view to getting other people to come to work?---Okay. So this is before the rosters are done.

PN19147

Yes?---This will get entered into the restaurant - the rosters database.

PN19148

Yes?---So none of these crew are working that day or rostered that day, and everyone else available will be rostered that day.

PN19149

Right. And in your experience, when you say "everyone else is available", how does their availability get communicated to the manager?---It's in the availability report.

PN19150

I see. And in the - you were asked some questions about temporary unavailability of employees. What are the reasons that you get communicated to the managers, to your knowledge for temporary unavailability?---Yes, a host of reasons: exams, holidays, social events that happen on those particular days, birthdays; there are a range of reasons.

PN19151

And are you able to say whether any - sorry, I withdraw that. If the Commission pleases, that's the evidence.

*** NICOLA AGOSTINO

RXN MR DIXON

PN19152

JUSTICE ROSS: Nothing further? Thank you for your evidence, Mr Agostino. You're excused?---Thank you.

<THE WITNESS WITHDREW

[10.32 AM]

PN19153

JUSTICE ROSS: The Bench has a short farewell ceremony to attend, a long-standing member. We will only detain you for 15 minutes or so. So if we adjourn until 10.50, and then we will deal with Mr Eagles.

SHORT ADJOURNMENT

[10.33 AM]

RESUMED

[10.53 AM]

PN19154

JUSTICE ROSS: Yes, Mr Dixon.

PN19155

MR DIXON: May it please the Commission. Our next witness is Mr David Eagles.

PN19156

THE ASSOCIATE: Could you please state your full name and work address for the Commission.

PN19157

MR EAGLES: David Ronald Eagles, [REDACTED]
[REDACTED].

<DAVID RONALD EAGLES, SWORN

[10.54 AM]

EXAMINATION-IN-CHIEF BY MR DIXON

[10.54 AM]

PN19158

JUSTICE ROSS: Mr Dixon.

PN19159

MR DIXON: Thank you, your Honour. Mr Eagles, your full name is David Ronald Eagles?---Yes, they are.

PN19160

Your address is [REDACTED] ?---Yes, it is.

PN19161

You are a director and company secretary of a company Eyrie, that's E-y-r-i-e - Holdings Pty Ltd?---Yes, I am.

*** DAVID RONALD EAGLES

XN MR DIXON

PN19162

Your company is a franchisee under the McDonald's franchise system, operated by McDonald's Australia Ltd?---Yes, it is.

PN19163

In your capacity as a director and company secretary, you have sworn two affidavits for the purpose of these proceedings?---Yes, I have.

PN19164

May I draw your attention to the first one which was some 54 paragraphs, sworn on 10 August 2015, which contains confidential exhibits DE1, DE2, DE3 and DE4, is that correct?---Correct.

PN19165

You wanted to correct something in relation to paragraph 16, as I understand it, in the second sentence?---Yes.

PN19166

Would you go to that paragraph in your first affidavit?---Yes.

PN19167

The sentence reads;

PN19168

For the purposes of this statement I used the MeTime system -

PN19169

You want to correct that, in that sentence you meant by "myRestaurant system"?---Correct.

PN19170

If the Commission would please make that amendment. May I hand up the confidential exhibits that are referred to, if the Commission pleases. Mr Eagles, you also swore a second affidavit on 6 October 2015 consisting of some three paragraphs. Do you have that with you?---Yes, I do, yes.

PN19171

If the Commission pleases, that's the evidence in-chief.

PN19172

JUSTICE ROSS: I'll mark Mr Eagles' first affidavit as exhibit Ai Group 9 and the second affidavit as exhibit Ai Group 10.

**EXHIBIT #Ai GROUP 9 FIRST AFFIDAVIT OF DAVID EAGLES
DATED 10/08/2015, CONTAINING CONFIDENTIAL EXHIBITS**

**EXHIBIT #Ai GROUP 10 SECOND AFFIDAVIT OF DAVID
EAGLES DATED 06/10/2015**

PN19173

Mr Moore.

*** DAVID RONALD EAGLES

XN MR DIXON

CROSS-EXAMINATION BY MR MOORE

[10.57 AM]

PN19174

MR MOORE: Thank you, your Honour. Good morning, Mr Eagles?---Good morning.

PN19175

I just want to ask you some questions about your affidavits. Mr Eagles, a number of witnesses who are licensees with McDonald's like you are have given evidence that candidates for jobs with McDonald's, their availability to work is a significant determining factor as to whether they would be employed. Is that so in relation to your restaurants?---Yes, it is.

PN19176

Other licensees have also given evidence to the Commission that managers are trained for when conducting job interviews to tell applicants that they're expected to be available to work in peak times. Does that practice occur with applicants for jobs in your restaurants?---Yes, it does.

PN19177

As I understand it from your affidavits, your busiest times for your restaurants are Saturdays and Sundays?---They are.

PN19178

I take it applicants for jobs in your restaurants are told that they're expected to be available then?---Yes.

PN19179

Speaking generally, if an applicant is not available on those days, they're unlikely to get a job with one of your restaurants?---No, they can apply for a job and work only Monday to Friday if they require that, due to their personal circumstances.

PN19180

Now if a person is employed their availability is entered into the system?---Mm-hm.

PN19181

There are processes for employees to make changes to their permanent availability?---There are.

PN19182

Employees or an employee will be rostered within the range of their availabilities recorded on the system?---Correct.

PN19183

Within the times and days identified as when an employee is available, there are no processes in place for employees to identify their preferred times or days?---Sorry, can you say that again?

*** DAVID RONALD EAGLES

XXN MR MOORE

PN19184

Certainly. Within the times and days identified in the system as an employee's available times and days, there's no system or processes in place which allow an employee to identify their preferred times or days?---No, it will fall within that range.

PN19185

So if you could look at paragraph 44 of your affidavit, and you deal with there some of the matters I've just been asking you about?---Mm-hm.

PN19186

But the heading before paragraph 44 reads:

PN19187

Systems for employees to express preferred working hours.

PN19188

What you mean to say there is these are the systems which allow employees to express their available working hours?---Correct, yes.

PN19189

Evidence has been given by a number of licensee witnesses in this proceeding that on Fridays, Saturdays and Sundays more people call in sick or have other commitments that affect their temporary availability. Does that reflect the experience in your restaurants?---At times it does, yes.

PN19190

Thank you. Of those three days, generally speaking, would you accept that the day upon which most people call in sick or are otherwise unavailable temporarily is Sunday?---No, it could vary over those three days.

PN19191

Would it be Saturday?---It could be Saturday, yes.

PN19192

We'll just show you some documents. Mr Eagles, in the lead-up to your giving evidence you were required to produce to this Commission the books that your restaurants have, where employees can record changes in their temporary availability?---That's right.

PN19193

You refer to those books in paragraph 45 of your affidavit. The books that you produced were those for the period from [REDACTED], in relation to your restaurants?---Yes.

PN19194

Could you please confirm that the folder of documents that's been placed in front of you are indeed those copies of those books for that period for those restaurants?---Yes, they are.

*** DAVID RONALD EAGLES

XXN MR MOORE

PN19195

Thank you. I tender those if the Commission please.

PN19196

JUSTICE ROSS: Mark that exhibit SDA29.

**EXHIBIT #SDA29 BOOK WHERE EMPLOYEES RECORD
TEMPORARY AVAILABILITY FROM MR EAGLES' BUSINESS**

PN19197

MR MOORE: Thank you. Now I'll hand you another document. Let me tell you, Mr Eagles, what this document is. It's a document prepared by my instructing solicitors and it's been prepared by reference to the copies of the book that you have in front of you, for that period in respect of your restaurants?---Mm-hm.

PN19198

It's the case that in the copies of the book that are before you, what appears are [REDACTED]. That's right?---That's right.

PN19199

What my instructors have done is to calculate the numbers of names that appear on each day of the week and determine the average number of names that appear on each day of the week, over that time period across your stores?---Yes.

PN19200

Follow me?---Yes, I am.

PN19201

The average which was calculated is what's set out in the top left of this document. So [REDACTED] it records that the average number of names appearing in the book is [REDACTED]?---Mm-hm.

PN19202

This book is a book in which employees can record their temporary unavailability on a particular date?---Correct.

PN19203

Yes. So what has been represented in the graph below are those averages set out above, see that?---Yes.

PN19204

The graph shows that the average number of entries in the book, by day, is highest for [REDACTED]. See that?---Yes, I do.

PN19205

Second highest for [REDACTED], the third highest for [REDACTED] and so forth. See that?---Yes, I do.

*** DAVID RONALD EAGLES

XXN MR MOORE

PN19206

Does that graph and do those averages that you have in front of you, does that accord with your experience as to the average number of temporary absences by day?---Yes, it does. It doesn't surprise me at all.

PN19207

Thank you. I tender that on the same basis as before.

PN19208

JUSTICE ROSS: I'll mark that exhibit SDA30.

**EXHIBIT #SDA30 GRAPHS AND AVERAGES DRAWN FROM THE
BOOK WHERE EMPLOYEES RECORD TEMPORARY
AVAILABILITY FROM MR EAGLES' BUSINESS**

PN19209

MR MOORE: Thank you. If the Commission pleases, no further questions.

PN19210

COMMISSIONER HAMPTON: Mr Eagles, are you aware, is that child employment or child labour laws operating in Western Australia?---We don't employ anyone under the age of 14 years old.

PN19211

Are there other restrictions that are either applied externally or internally in relation to school-aged children?---We don't roster school-aged children past a certain time at night.

PN19212

Do you know why that practice is adopted?---Because we have a responsible student policy which we adhere to.

PN19213

Is that a national policy?---It is, yes.

PN19214

Thank you.

PN19215

JUSTICE ROSS: Mr Dixon.

RE-EXAMINATION BY MR DIXON

[11.06 AM]

PN19216

MR DIXON: Mr Eagles, you were asked some questions in relation to the temporary unavailability of employees who have indicated an availability. What are the reasons that you're aware of for employees indicating their temporary absences?---So my experience is they generally request temporary time off work for things like study leave to prepare for exams, they also require time off for certain sporting events that they need to attend to, and it could be just the fact that they're going on holidays.

DAVID RONALD EAGLES

RXN MR DIXON

PN19217

Are such indications accommodated by your restaurants?---Yes, they are.

PN19218

What day or days of the week do you roster most number of employees?---Saturdays.

PN19219

Least number?---Would be probably Mondays.

PN19220

Do you roster the same, typically the same number on Saturdays or do they differ from time of year or business?---So typically a Saturday roster would be the same except for during peak holiday seasons and, you know, around Christmas, New Year, that sort of period.

PN19221

The indications you get from employees' unavailability, for the reasons you've expressed, in your experience do the numbers differ from one Saturday to the next, for example, or one Sunday to the next?---They can vary. It depends once again on what local events are actually happening.

PN19222

Would you please turn to the materials that were provided to you, which come from your Not Available Book, and turn to the Bunbury South section. Do you have that?---I do, yes.

PN19223

If you turn to page - to the page for [REDACTED], [REDACTED] as an example. Do you have that?---I do, yes.

PN19224

Would you just explain to the Commission how that book operates, in relation to that day and employees' unavailability?---So the employees that have put their names down here have done so generally in advance time before the schedules have been completed. They write their name in the book and then when the scheduling manager comes to do the rosters, they exclude these people from being rostered on that day.

PN19225

Is there any consequences for employees other than they're not being able to work by reason of them putting their unavailability forward?---Absolutely not.

PN19226

If you go back to [REDACTED], [REDACTED]?---Mm-hm.

*** DAVID RONALD EAGLES

RXN MR DIXON

PN19227

You find as appears on that page [REDACTED]. Can you explain why you think that is the case?---So this is on a [REDACTED], so typically

there may not be that many sporting events or any other reason why people might need to be not available for that day.

PN19228

By way of the number that you roster, would you be rostering fewer people on a Thursday as opposed to a Saturday, for example?---We would roster fewer people on a Thursday than a Saturday, yes.

PN19229

If the Commission pleases, that is the evidence. May Mr Eagles be excused.

PN19230

JUSTICE ROSS: Thank you for your evidence, Mr Eagles. You're excused?---Thank you.

<THE WITNESS WITHDREW

[11.10 AM]

PN19231

JUSTICE ROSS: Next witness?

PN19232

MR DIXON: If it pleases the Commission, our next witness is Patricia Deasy. I'm instructed she's on her way, if the Commission pleases. She has two affidavits that are presently being - events overtook me somewhat. I apologise.

PN19233

JUSTICE ROSS: That's all right.

PN19234

MR DIXON: The two affidavits are now included into one amended first affidavit. And if I may hand up a copy.

PN19235

THE ASSOCIATE: Please state your full name and work address for the Commission.

PN19236

MS DEASY: Patricia Ann Deasy, [REDACTED].

<PATRICIA ANN DEASY, AFFIRMED

[11.12 AM]

EXAMINATION-IN-CHIEF BY MR DIXON

[11.13 AM]

PN19237

MR DIXON: Ms Deasy, are your full names Patricia Ann Deasy?---Correct.

PN19238

And your address is [REDACTED] ?---Correct.

*** PATRICIA ANN DEASY

XN MR DIXON

PN19239

And you are employed as a principal consultant with Australian Survey Research Group, Pty Ltd. Is that correct?---Correct.

PN19240

And in that capacity, having received a request, you have made and affirmed an affidavit described as the amended first affidavit consisting of 21 paragraphs, with three annexures to that affidavit. Is that correct?---Correct.

PN19241

That is the evidence-in-chief, if the Commission pleases.

PN19242

JUSTICE ROSS: I will mark the amended - - -

PN19243

MR MOORE: Your Honour, can I just clarify for the record I haven't seen that amended first affidavit before. Your Honour, as I understand it, it's a consolidated version of Ms Deasy's affidavit of 10 August, which we have seen, reflecting amendments made as set out in an affidavit sworn 29 September 2015. If that's so

- - -

PN19244

JUSTICE ROSS: We can confirm that and - - -

PN19245

MR MOORE: - - - I don't have any difficulty.

PN19246

JUSTICE ROSS: It appears it might be slightly more complex. What we might do is we will stand down for five minutes. You can confirm that you're satisfied with where you're up to.

PN19247

MR DIXON: I apologise for that inconvenience. We will clarify it immediately, your Honour.

PN19248

JUSTICE ROSS: All right. Thanks.

<THE WITNESS WITHDREW [11.15 AM]

SHORT ADJOURNMENT [11.15 AM]

RESUMED [11.18 AM]

<PATRICIA ANN DEASY, RECALLED ON FORMER AFFIRMATION [11.18 AM]

EXAMINATION-IN-CHIEF BY MR DIXON, CONTINUING [11.18 AM]

*** PATRICIA ANN DEASY XN MR DIXON

PN19249

MR DIXON: We appreciate that opportunity. The matter is resolved, and that's the evidence-in-chief, if the Commission pleases. I don't know if your Honour has marked the - - -

PN19250

JUSTICE ROSS: I have. I marked it exhibit Ai Group 11.

PN19251

MR DIXON: Thank you, your Honour.

PN19252

JUSTICE ROSS: That's the amended first affidavit of Ms Deasy.

**EXHIBIT #Ai GROUP 11 AMENDED FIRST AFFIDAVIT OF
PATRICIA DEASY**

CROSS-EXAMINATION BY MR MOORE

[11.18 AM]

PN19253

MR MOORE: Good morning, Ms Deasy?---Good morning.

PN19254

You're a qualified practising market researcher?---Correct.

PN19255

And you've got substantial experience in drafting survey questions?---Yes.

PN19256

And arranging for data in surveys to be collected?---Yes.

PN19257

And analysing survey data?---Yes.

PN19258

Do you accept that in order for reliable and valid conclusions to be able to be drawn about a population, the subject of a survey, that it's essential that questions in the survey and available responses be drafted without bias?---As much as possible, yes.

PN19259

Yes. And as much as possible, in terms which allow for respondents to the survey to have their views accurately expressed in relation to the survey questions?---To be given - for them to be given a full range of options to answer. Whether it's expressed accurately or not is another - - -

PN19260

I see?---The respondent may not be able to express accurately.

*** PATRICIA ANN DEASY

XXN MR MOORE

PN19261

Yes. But what you say is that it's important that the survey questions - and in particular, the available answers - be sufficiently wide - - - ?---Yes.

PN19262

- - - to embrace the full range of options?---A range of - yes.

PN19263

All right. Thank you. Now, I just want to ask you about some questions in the survey that you designed for McDonald's and fast food - I'm sorry - Hungry Jack's employees. And it's attached as PAD2 to your affidavit?---Mm-hm.

PN19264

Which is page 9, I believe?---Yes.

PN19265

Do you have annexure PAD2, "Questionnaire Used in Online Survey"?---Yes, I do. I do.

PN19266

Go to page 60, as numbered in the bottom right, and there's a - the question third from the bottom which reads:

PN19267

Right now, how are you employed with McDonald's (or Hungry Jack's)?

PN19268

And the available options are: permanent full-time, 35 hours or more per week; permanent part-time; and casual; and don't know?---Mm-hm.

PN19269

Do you see that?---Yes.

PN19270

Why did you include "don't know" in that option as an option there?---So that if people couldn't answer the first three, they had a way of providing an answer.

PN19271

And that's an important element in good survey design, is it?---Yes. Because it was a forced choice question - you know, there was a single answer - it's often important to - especially with terms and conditions of employment - that people are given a choice to not have a view.

PN19272

Yes?---My experience in human resource consulting, which is probably as extensive as the market research, is that a lot of people don't know about how they're employed.

PN19273

Yes?---Or where they're employed.

PN19274

All right. Thank you. And if you could go over the page to page 61. And there's a question under the heading "Working on Saturday", the second one below that, which reads:

PN19275

What impact does working on a Saturday have on spending time with your family or friends?

PN19276

?---Mm-hm.

PN19277

And there are five options identified?---Mm-hm.

PN19278

A lot of - positive impact; some positive impact; no impact; some negative impact; a lot of negative impact. And the same question appears over the page, but in relation to Sundays, the second from the top. Do you see that?---Mm-hm.

PN19279

With the same suite of alternative answers?---Yes.

PN19280

Yes?---Yes.

PN19281

There was no option provided for a respondent to say "I don't know" in answer to that question, was there?---Correct.

PN19282

And so by posing the question in the terms it was and in the face of the alternatives identified, the respondents were constrained, in the answers they were given, to identify either no impact or a positive impact or a negative impact, or variations between those two?---Or they could have chosen not to answer the question.

PN19283

Yes. But they weren't given the full range of - - - ?---No, because - - -

PN19284

Can you just listen to the question for a moment?---Okay.

PN19285

They weren't given the full range of options, as you say, in answer to that question, were they? Because on valid answer would have been, "I don't know"?---It's possible a valid answer would have been; but one was a fact and the other one was an opinion. And so the factual question, "How are you employed," some of them may not have known that; whereas my belief is that they would have had an opinion.

PATRICIA ANN DEASY

XXN MR MOORE

PN19286

Yes. And so what you've assumed is that the survey respondents had already thought about and had an opinion on the question of impact. That's so?---Not necessarily. If they didn't have an opinion, they could have not answered the question.

PN19287

That was their only available option?---Correct.

PN19288

And that would have been a less than ideal option because it wouldn't have captured a valid response?---You're putting words in my mouth, saying it's a valid response. I don't know whether it was a valid response or not.

PN19289

Well, in answer to a question which asks the someone's opinion, a valid response could include the fact that they don't know?---It could.

PN19290

Right?---It's possible.

PN19291

And so the way - - -?---But the way we addressed it - - -

PN19292

I'm sorry. Please go on?---Was to allow them not to answer. So the response counts for these questions are only based on those that offer valid answer.

PN19293

Another possibility, of course, is that a person who hadn't thought about the impact on them of working a Saturday or Sunday might have just said, "No impact." That's possible, isn't it?---If they hadn't thought about it? Say the question again.

PN19294

Well, the question presupposed that the respondent had given consideration to, and had an opinion about the impact of working on Saturdays or Sundays on them. That's right?---It was asking them to think about that.

PN19295

Yes?---It didn't presuppose that they had a view; it was asking them what was their view at the time of reading the question. I'm just looking at the number of people that - yes, go on.

PN19296

What I'm suggesting to you is because the available answers did not include and "I don't know" response, the responses to those questions are not reliable because you've not captured all of the potentially valid responses?---You can't - no, I disagree with that statement.

PN19297

Now - - -?---Especially about reliability.

PN19298

Now, are you familiar with what a response rate is to a survey?---I am.

PN19299

And it is the percentage of the selected sample that responded to a survey?---Yes.
Percentage of people who - yes, who - yes, who respondent to a survey. Yes.

PN19300

And the response rate to a survey is an indicator of the extent to which a survey result may be unbiased. Do you agree with that?---No.

PN19301

Well, you understand there is a thing called non-response bias?---Correct.

PN19302

And non-response bias is where the characteristics of those who were selected to participate in the survey but did not respond differ in any way to the survey participants?---Correct, but that's not anything to do with the response rate.

PN19303

But if the response rate is low there is a greater scope for non-response bias?---Incorrect. Disagree.

PN19304

All right?---It all has to do with the composition of the sample. So I will give you an example of the national opinion poll - any national opinion poll has 1800 respondents represent the whole population of Australia in voting. That's way less than 1 per cent, but because it's a very, very carefully construct sample that has no non-response bias, it is representative. So the response rate in its own is not an indicator of response bias or non-response bias.

PN19305

All right. It's good practice in a report - I withdraw that. As a qualified practising market researcher, in reporting upon the conduct of a survey, it's good on standard practice to record the response rate achieved in a survey. Is that so?---Possible. I was not asked to do that.

PN19306

No. You didn't record the response rate to these surveys?---No, because I didn't know the population.

PN19307

All right?---And so you can't do a response rate if you don't have a population.

PN19308

You weren't told what the population was?---Correct.

PN19309

I see. Mr Kopias is an employee of McDonald's who has sworn an affidavit which is to be received in evidence in this proceeding, and his evidence is that 101,201 McDonald's employees had access to the survey. Paragraph 16 of your statement, at the last line - I'm sorry, I will allow you to turn that up - you see in the last line of paragraph 16 that you say that there were 20,635 valid records from the response sample from McDonald's?---Yes, I can see that.

PN19310

So the response rate is the number of valid records divided by the number of employees who had access to the survey?---Yes.

PN19311

That's right?---Yes.

PN19312

And you don't have your calculator in front of you, but when I undertake that calculation of dividing 20,635 by 101,201, I obtain a response rate of 20.4 per cent. Do you accept that that's a low response rate?---No, it's a very high response rate.

PN19313

Can I suggest to you that it is a low response rate and it may affect the validity of the conclusions which can be drawn about the population of McDonald's employees?---I totally disagree.

PN19314

Can I ask you about the response rate with Hungry Jacks, the Hungry Jacks employees survey. Another witness has sworn an affidavit and their evidence will be received in the - by the Commission, a Ms Feast. She records that 13,564 Hungry Jacks employees had access to the survey and you say in paragraph - excuse me a moment - - -?---The same one, 16.

PN19315

Thank you, that there were 944 valid records in relation to that survey. So again to obtain the response rate one divides 944 by 13,564. Agree with that?---(No audible reply)

PN19316

Having undertaken that calculation, that is a percentage of 7 per cent?---Mm-hm.

PN19317

Do you accept that that is indeed a very low response rate?---No.

PN19318

Do you accept it is a low response rate?---It's lower than the McDonald's one, but it's about the quantum, the number, the sample size required to achieve the confidence interval under which this survey was conducted or aimed for, and it's about sample composition. So no, I don't accept that.

PATRICIA ANN DEASY

XXN MR MOORE

PN19319

Can I suggest to you that by reason of a response rate alone of 7 per cent, that that is of such a low number as to render the results of the Hungry Jacks' surveys as being unreliable?---No, I disagree.

PN19320

Now the results of the McDonald's survey and the Hungry Jacks' survey were pooled for the purposes of reporting?---Correct. For analysis and reporting.

PN19321

Yes, thank you. You analysed it, including through frequency distributions?---I did.

PN19322

You report, you note in your report that the statistical analysis you undertook, the results as between McDonald's and Hungry Jacks' survey, the results were not weighted?---Correct. That's what I said, yes.

PN19323

Do you accept that because the response rate to the McDonald's survey at 20 per cent was substantially than the response rate to the Hungry Jacks' survey, the survey results pooled together are necessarily biased in favour of McDonald's respondents?---No, I don't agree with that statement, that they were biased. McDonald's results made a greater contribution to the frequency distribution but in my scanning of the separate results, where there were questions around behaviours or opinions, the results were similar to within .1 in some cases, of a per cent, or 1 per cent. So I saw no difference in the proportional answers to questions with the different samples. So while McDonald's would have a greater contribution in some answers, the answers proportionally between the two samples were so similar that there was no need to weight.

PN19324

You haven't in your report computed the results or set out the results of the Hungry Jacks and McDonald's surveys separately?---Correct.

PN19325

Without that, without that consideration of the separate results, one is unable to determine the extent to which the responses from the two surveys were the same or different?---Correct.

PN19326

You accept that if the results between the two surveys were notably different that this would accept - affect, I'm sorry, the validity of the conclusions sought to be drawn from the respondents, as reported in your report?---No, it will - we would say that these are reflecting more of McDonald's but it wouldn't affect the validity of the McDonald's results. I believe it doesn't affect the validity of the Hungry Jacks results either.

*** PATRICIA ANN DEASY

XXN MR MOORE

PN19327

Nothing further.

PN19328

COMMISSIONER LEE: Ms Deasy, you talked about the structure of the sample and its composition being important to determine reliability and that's - - -?---Or to determine representativeness.

PN19329

Determine representativeness. That was part of your answer to the questioning about whether you were concerned about the response rate. Can you tell me some more about how you went about controlling for that sample composition?---I didn't. I believe that's the - another witness has provided that information.

RE-EXAMINATION BY MR DIXON

[11.36 AM]

PN19330

MR DIXON: Ms Deasy, on the last topic that you were asked questions about from my learned friend, it covered the question of your pooling your analysis. You were asked about frequency distributions and you said they were not weighted and you rejected the proposition that it was biased towards McDonald's responses. You went onto say that you did some scanning?---Mm-hm.

PN19331

Can you just explain what you mean by that?---The software - this analysis was conducted by extracting data and using a third party statistical analysis package called SPSS, and then put into Excel. In addition to that, I had the ability to take an analysis of all the data from the survey software that we use and it took all the answers, all the complete answers of both surveys, and I was able to pool a report from the software that showed some of these tables and charts. I looked at the two of them and I was actually stunned at how similar they were. It was like I'd done the survey the same - used the same people to answer both of them for nearly all the questions.

PN19332

So when you say for the two surveys you're referring - - -?---I mean Hungry Jacks and McDonald's.

PN19333

You indicated, I think, that in response to behaviours or opinions you had such a view. Can you give an example of what you had in mind?---I think one of them was screen time, how much screen time do you spend, and it was exactly the same graphs both times. Another one was religious activity. When did you last - whatever the question was, when did you last attend a religious event or service I think it was. So that one almost had exactly the same percentage results. They were just two examples.

PN19334

When you said within .1 per cent, I think, in response to one answer, what did that relate to?---I don't remember which cell, which count but I'll just find a question. For example, it's the third last question on page 14 on the affidavit, also numbered 64 in the bottom right-hand corner;

PATRICIA ANN DEASY

RXN MR DIXON

PN19335

How often do you attend a religious service?

PN19336

Let's say, look at the third answer from the bottom or the third answer - option;

PN19337

Once every few months.

PN19338

Some people - I don't remember the numbers but it was like 16.1 per cent said every few months, in one and 16.0 per cent said every few months, in another.

PN19339

When you say on the one, do you mean - - -?---McDonald's versus Hungry Jacks.

PN19340

It was lastly on that same topic put to you that the way in which you went about analysing the material would affect the validity of the McDonald's survey or affect the validity of the Hungry Jacks' results. You rejected that proposition?---Mm-hm.

PN19341

Can you tell us why?---The sample sizes in both of them are far larger than needed for a representative sample at the 95 per cent confidence interval, plus or minus 5 per cent. Both of them are much larger than required. Obviously the McDonald's one is a very large sample. A normal sample size for these populations is around 380 people to be representative at the 95 per cent confidence level. That's about representativeness and to some degree about the reliability of the data. It in no way affects the validity of the data which is a totally different concept. In other words, are these valid answers? These are valid answers. Irrespective of the numbers involved, particularly as they were both more than 380 in size, so they're very valid - if you can use that. It's sort of like being very pregnant, I think, but anyhow very valid answers and in terms of quantum, they are representative.

PN19342

In relation to the percentages that were given, the 20.4 per cent, you said in response to that proposition that it was a very high response rate?---Mm-hm.

PN19343

Why do you say that?---Because in doing these types of surveys, with this type of population, in general market research practice if you have a population of 100,000 or plus, a 1 or 2 per cent response rate is a good response rate. And it's a good response rate but that doesn't mean it's a good sample, so you need to understand the sample composition. But it's very common to use a 1 or 2 per cent response rate, as long as the sample has a good composition. That is reflects the population.

In response to questions about the Hungry Jacks response rate of 7 per cent, you said it's not very low and you said it's lower than the - obviously lower than the McDonald's response rate?---Mm-hm.

PN19345

You gave on - you went onto say that it was the quantum of the numbers that were relevant. Can you explain why you said that?---That's - the 380 was the magic number. We had to get more than that to be representative of the total population at the 95 per cent level, as long as the sample population, the sample had a similar composition as that of the population.

PN19346

How did that affect your confidence level at all, if at all? The responses that you got, were you satisfied about the confidence - - -?---I was satisfied because of the answers to the first two questions. I used that as a guide about the sample composition and the first two questions and their answers are on page 24 of the affidavit, and they show a very broad range of years - age years and a very broad range of places of work or states of work in this case. So that told me that the sample was widely distributed. It wasn't just very young people, 14 to 15 year olds and it wasn't just New South Wales employees. So using those two as an indicator, only as an indicator, I said that the sample was very broad and I was prepared to work with those samples to do this analysis. My understanding is that someone else has provided the breakdown of the sample with the population.

PN19347

Again, in relation to the Hungry Jacks' response rate, it was suggested to you that such a low number would render the survey unreliable, and you disagreed with that proposition?---Yes.

PN19348

Can you tell us why you formed that view?---Because you need 380 respondents to be representative of the total population of the 95 per cent confidence level, plus or minus 5 per cent confidence interval, and there was almost triple that number in the valid response sample. It was about having a broad breakdown of - having a sample that had a similar composition to the population.

PN19349

Just going back to one of the first questions you were asked about the impact for Saturdays and Sundays, and you were asked that there was no "don't know" answer. You rejected the proposition that that affected the survey and you said, as I understood it, especially about reliability. Do you recall that?---Yes.

*** PATRICIA ANN DEASY

RXN MR DIXON

PN19350

Can you tell us why you say that?---Whether people answer a question or not is not an issue of the reliability of the data. It's the number of people that answered the question. So if only 10 out of the 20,000 answered that question you would have a problem with the reliability. I just want to see - I just want to look something up in the answers that's important and I'm just trying to find - it's the

question, "What impact your colleague offered, what impact does working a Saturday" - - -

PN19351

There is something - - -?---And it's table - I was just trying to find it before. It's table 20(c), I think.

PN19352

Table 20 starts at page 44 and following?---Yes. So this was only asked of people that worked on Saturday and so 13,700 plus answered the question.

PN19353

That's on page 44, is it?---Yes. But I'm just trying to find the previous question that asked them what days did they work.

PN19354

Page 40?---Days worked, 13,878. I'm looking at table 13 on page 31. 13,878 said that they worked and 13,714 in table 20 on page 44 offered an opinion about that. So very few people didn't answer that question that were presented it.

PN19355

What do you draw from that?---That that's a result you could rely on. It's a reliable result.

PN19356

If the Commission pleases, that's the re-examination and if Ms Deasy could be excused.

PN19357

JUSTICE ROSS: Thank you for your evidence, Ms Deasy. You're excused?---Thank you.

<THE WITNESS WITHDREW

[11.49 AM]

PN19358

Mr Moore.

PN19359

MR MOORE: The next witness, I'll call Morris Altman. I think he's just nearby. I don't want to make an error like I did the other day and start asking the witness questions before they were sworn in.

PN19360

THE ASSOCIATE: Please state your full name and address for the Bench.

PN19361

MR ALTMAN: My name is Morris Altman, (address supplied).

<MORRIS ALTMAN, AFFIRMED

[11.50 AM]

*** PATRICIA ANN DEASY

RXN MR DIXON

EXAMINATION-IN-CHIEF BY MR MOORE

[11.50 AM]

PN19362

MR MOORE: Professor Altman, could you please restate your full name and work address?---My name is Morris Altman. My work address is Newcastle Business School, University of Newcastle, Callaghan, New South Wales, Australia.

PN19363

Could you tell the Commission your occupation, please?---Sure. I'm a professor of behavioural and institutional economics, and I'm the Dean of the Newcastle Business School.

PN19364

Thank you. Have you prepared a report for this proceeding entitled "Response to the Rose Report Value of Time and Value of Work Time During Public Holidays Prepared by Professor John Rose"?---Yes, I did.

PN19365

Yes. And have you got a copy of that with you in the witness box? You have?---Yes, I do.

PN19366

Thank you. That report, Professor Altman, can you confirm for the Commission, is comprised of 58 pages numbered at the bottom right. Is that correct?---It is, yes.

PN19367

And the date of the report appears on the final page, 1 September 2015?---Yes.

PN19368

Thank you. Does that report accurately set out the opinions formed by you on the basis of your specialised knowledge?---Yes, it does.

PN19369

Thank you. I tender the report.

PN19370

JUSTICE ROSS: Mark the report exhibit SDA31.

EXHIBIT #SDA31 REPORT OF PROFESSOR MORRIS ALTMAN DATED 01/09/2015

PN19371

MR MOORE: If the Commission pleases, I seek leave to ask Professor Altman five questions in relation to matters raised in the reply provided by Professor Rose. This is intended to complete the circle, as it were, of the exchange between the two of them.

*** MORRIS ALTMAN

XN MR MOORE

PN19372

MR IZZO: No objection, your Honour.

PN19373

MR MOORE: Now, can I have shown to you a copy of - can I please have shown to you exhibit ABI2. Professor Altman, I've had handed to you a document, "Comment on Response to the Rose Report Value of Time and Value of Work Time During Public Holidays prepared by Professor Altman", and this is a document prepared by Professor Rose, which is in evidence in this proceeding. Have you read this before?---Yes, I have.

PN19374

All right. I want to ask you some questions about. If you can go to page 2, and just to - I'm sorry, if you can go back to page 1, to provide you some context. Halfway down the page there's a heading "Referencing and Anchoring" and in paragraph 6 Professor Rose states:

PN19375

The two reference points were present within the survey itself.

PN19376

And he sets out paragraphs (a) and (b). Can I ask you to turn the page to the first paragraph at the top, before paragraph number 7, and about halfway through the first paragraph Professor Rose states:

PN19377

Professor Altman has completely misunderstood the experimental design used within the survey, having assumed that respondents were only shown hourly pay rates less than the current rate and failed to comprehend that the actual current hourly rates, including penalty rates where appropriate, were used as part of the experiment, acting as a reference point for those falling under the two awards.

PN19378

Can you tell the Commission what you say in response to that statement by Professor Rose?---Well, that statement by Professor Rose is incorrect. I completely understood that in the survey experiment which he designed, and others helped execute, incorporated different rates of pay, including rates of pay above and below the penalty rates. That's really not the point. The point is whether or not individuals subject to that survey experiment were aware, in terms of referencing and anchoring, whether or not their - let's say - Sunday pay rates were to be cut and reduced, because that's what critical. When you examine or ask people questions with regard to how they value time, you have to pinpoint exactly what the reference point is. So it's not a matter of having data above or below the normal rate of pay, it's how you frame the question to individuals who are part of the survey experiment.

*** MORRIS ALTMAN

XN MR MOORE

PN19379

Thank you, professor. Could I ask you to - on the same page there's a heading halfway down "Loss Aversion", and if you can go to paragraph 11 at the bottom of the page, Professor Rose says this:

PN19380

Given that the survey choice tasks respondents were asked to complete involved offers that were both plus and minus the actual current pay rate, including some offers that are the current award rate, the survey task directly allows for loss aversion.

PN19381

Could you please tell the Commission your response to that subpoena by Professor Rose?---My response to that statement is that Professor Rose happens to be, in my opinion, incorrect, because what he does is he allows for substitution within a day, and sometimes across days. What loss aversion refers to, it's a person's opinion of a loss of income - what in this case would be a loss of income. And in the survey experiment Professor Rose doesn't in any way ask the subjects of the experiment how they would evaluate a particular loss from a given wage. So if we think about Sunday time, so people are paid normal rate plus penalty rate; if the pay is going to be cut by 1 per cent, 2 per cent, 50 per cent, whatever, loss aversion refers to how a person would feel in terms of loss of utility or gain of utility if her or his rate of pay was to be cut or is to be cut. Yes, to his methodology doesn't incorporate loss aversion.

PN19382

Thank you?---To my mind, at least.

PN19383

All right. Thank you. If you could turn a couple - to the next page, page 3, the heading halfway down, "Welfare Effects". In paragraph 16 in the first sentence, just to provide you with some context here, Professor Rose states:

PN19384

Professor Altman states that the experiment conducted in the Rose report fails to account for welfare effects of respondents given a loss of wages.

PN19385

And if I could ask you to then go down to paragraph 19, he says:

PN19386

It is my opinion, therefore, that the issue of welfare effects on respondents undertaking the study is not an issue, as the respondents were able to account for these impacts when making the choices they did.

*** MORRIS ALTMAN

XN MR MOORE

PN19387

Could you please tell the Commission your response to that statement?---Well, the Rose survey experiment does not at all account for welfare losses because in his experiment, as he well admits, individuals are engaged in voluntary choice. They're stating certain preferences based on choices afforded to them and they choose choice X or choice Y and they make some substitutions, but this is all

voluntary. What we're looking at, a potential situation, is where people - most people have no choice in terms of days and times during which they work, and if a person is - called the *caeteris paribus*, all other things remaining the same - if your wage is cut by 10 per cent or 20 per cent, all other things remaining the same, then conventional economic theory would predict that your welfare would fall; your level of utility or happiness would fall because your income has fallen, and that is not accounted for in the Rose survey experiment because he's assuming voluntary choice, which is not - that's not - that experiment does not reflect well the reality of real world labour markets, at least in this particular instance.

PN19388

Thank you. Now, if you could go to paragraph 30. And to provide you some context, on page 4 there'd a heading "Distributional Effects"?---You said paragraph 40?

PN19389

Yes, I'm sorry. If you go on page 4?---Okay.

PN19390

Page 4, there's a heading "Distributional Effects"?---Right.

PN19391

And under that heading it goes over to the next page. And if you go to paragraph 30, in the first couple of sentences there Professor Rose states as follows:

PN19392

It is possible, though unclear, that Professor Altman is attempting to argue that rather than work with the average WTA, one should instead work with the marginal WTA. Such an argument would suggest that in order to entice all potential workers into the labour market, one should offer the WTA value required to entice the last worker into the labour, not the average WTA value.

PN19393

Can you please tell the Commission your response to that statement by Professor Rose?---Well, the statement by Professor Rose is a bit - I guess I find it a bit convoluted. It's convoluted because this is not my opinion, this is economic theory, whether - this is the conventional economic theory suggests to us that if you - to attract an additional hour of work or an additional worker, depending on how you want to model things, the worker is paid his or her reservation wage. It's the marginal wage. It's the additional wage. It's not the average. So the focus of the Rose report is on the average. But in terms of actually modelling the wage required to attract that additional worker or that additional hour of work, one has to use the marginal wage rate - you have to use the wage rate, and the wage rate is the marginal willingness to accept. That's what the wage rate is, that's what conventional theory says. So it's nothing to do with my opinion, that's what economic theory says.

MORRIS ALTMAN

XN MR MOORE

PN19394

Thank you. And if you can go to page 7, and there's a heading three quarters of the way down the page "Biases and Stated Preference of Experiments", and over the page at paragraph 46 Professor Rose says:

PN19395

The evidence, whilst mixed, suggests that any bias in stated choice experiments is for the WTP/WTA to be biased upwards.

PN19396

And he refers to two articles and papers:

PN19397

In the current context where the hourly pay rates respondents were presented with were varied both plus and minus around the current award rate, any bias is likely to be for respondents to choose shifts with higher hourly pay rates than less, which would be more aligned with their strategic interests. As such, if the WTA values do suffer from any hypothetical bias, the bias is most likely to be such that the values reported are higher than the true WTA values in the population at large, not lower.

PN19398

Could you please respond to that statement by Professor Rose?---I think that's - I think his argument is wrong. Sure, there is variation in wage rate above and below the normal wage, but the respondents are responding to how questions are framed. So even in his own experiment when they look at holiday pay - so you frame things in terms of holiday pay or holidays being special, then your willingness to accept would be relatively much higher. If - which he doesn't do - if he had framed Sunday as being a - the normal pay plus penalty rates being normal, which it has been, then one would expect with that type of framing or anchoring or reference point, the respondents would have valued Sunday pay even higher than they did, probably more akin to the recognised holiday days. So it's all about how one frames things, and in my view Professor Rose framed questions in such a way that really paid little attention to Sunday day as it's actually currently articulated in Australia's labour market for the subset of workers. So to my mind it's all about framing of reference points, and the framing was wrong and reference points were wrong.

PN19399

Thank you, Professor Altman. If you just wait there. If Commission pleases.

CROSS-EXAMINATION BY MR IZZO

[12.06 PM]

PN19400

MR IZZO: Professor, you're an expert specialising in behavioural economics. Is that right?---Yes, it is.

*** MORRIS ALTMAN

XXN MR IZZO

PN19401

And my understanding is that behavioural economics integrates the formal study of psychology into economics and looks at how participants in the economy react

to policy interventions and general incentives in the market. Is that, broadly speaking, a summary of behavioural economics?---I would say no.

PN19402

I would then - - -?---Okay.

PN19403

You can perhaps summarise it better than I could?---Sure. Well, I would just say, well, psychology is important, but that's only a subset of how one models individual behaviour. You also have to look at sociological factors and institutional factors. By sociological, I mean how people relate to one another, to the family, to society; institutional, political, equal factors; all those parameters have to be integrated into building models that have more realistic assumptions, so as to better model human behaviour. So psychology, yes, that's one part of the story, but it's only one part of the story.

PN19404

And you're not an expert in econometrics, though?---I'm not an econometrician, but I've done methodological work in econometrics and have organised - have published and organise papers dealing with issues such as statistical significance, along with Deirdre McCloskey and Steve Ziliak, and I've organised panels with Kenneth Arrow, who won a Nobel Prize in economics for the American Economic Association. So I'm not an econometrician, but as a journal editor with Elsevier Science and other journals, I've dealt with significant econometric issues, but I'm not an econometrician.

PN19405

And so you wouldn't call yourself an expert in econometrics?---No. No, I'm not in econometrics, no.

PN19406

And econometrics, do you broadly understand is the application of mathematics and statistical methods to economic theories and data?---It is, yes.

PN19407

Do you have a copy of your report that you prepared in these proceedings with you? You do? Okay. Can I ask you to turn to paragraph 14 of that report, which is on page 9. And this is where you say, primarily in the second sentence, that the wage required that one should be looking at to employ someone is not the reservation wage, but the marginal WTA. So that's what you talk about there in the second sentence. I take it your position is that if the rates in the award were lower than the marginal WTA, you say that employers would struggle to find people to employ on the award rates. Is that right?---What I'm saying is that in terms of the economic theory that all other things remaining the same, if you cut - if one would cut the award rate, you would expect that you're going to, on the margin, lose some hours of work and some employees.

MORRIS ALTMAN

XXN MR IZZO

PN19408

If the Commission did set the award wages at a rate below the marginal WTA and there was a problem employing people at this wage, am I correct in assuming that standard economic theory says that the market would respond by increasing the rates of paid office employees?---It depends and it also depends on the timeframe. So initially at the bottom of the market, if the wage rate is dropped then you're going to have a subset of workers - well I think there's more than one issue here. There is a person's valuation of time and then there is the lowest wage a person would accept reservation wage to take employment. So some people - and there is evidence of this, will quit their job or reduce hours employed. Other people will accept the job even though their valuation of time is way higher than the reservation wage, because they need a job to survive.

PN19409

But if for those people that quit or those people that won't accept the lower rate, do you accept that if there is a difficulty in attracting people at that lower rate, then the market would itself offer the rate required to attract the required number of employees?---The market will probably overtime respond and the wage rate might increase but the issue there has to do also with its impact on the effort supplied of workers at the lower wage rate, which could be quite important. You might end up with a somewhat higher wage rate adjusted by the market but at the end of the day, a cut in pay will have the predicted effect I would submit of cutting also effort supplies. You may have the same number of workers or somewhat lower number of workers but effort would be reduced, productivity would be reduced.

PN19410

Do you accept that Professor Rose's report does not analyse demand for labour at all. It simply focuses of factors driving the supply of labour?---That's largely what his reports focuses on.

PN19411

Do you accept that when it comes to determining the wage required to ensure total employment or substantial employment of a group of persons, a vital factor that's required is an understanding of the demand?---Well you need both blades of the scissors to figure out what the equilibrium level of employment will be.

PN19412

When you refer to equilibrium levels, it's that equilibrium point between supply and demand that will give us the greatest employment outcome for a particular group, isn't it?---Given the wage rate, yes.

PN19413

If I can give you a simple example. I'm just going to hand you a report prepared by another expert in these proceedings but simply because it's got a hypothetical example in it. It's the report of Professor Borland and paragraph 52. I apologise, your Honour, I haven't bought copies for the Borland report for the Bench but simply to refer to one of the examples that he did so it should become quite apparent. You'll see in paragraph 52, Professor Borland says halfway down;

PN19414

For example, suppose there are five potential workers to earn the minimum wage, of which they are willing to supply their labour is respectively \$1, \$2, \$3, \$4 and \$5 per hour.

PN19415

Do you see that?---Yes, I see it.

PN19416

The professor says that;

PN19417

For this group of potential workers the average wage might be \$3 per hour but suppose the employer offers this average wage of \$3 per hour, only three workers will be willing to accept the work.

PN19418

The professor goes onto say that;

PN19419

It's then accordingly necessary to pay the marginal wage of \$5 per hour to ensure that all five can be employed.

PN19420

Do you see that?---I see that.

PN19421

I'm just providing it to you because it gives a simple example that we can we work with?---Correct, yes.

PN19422

Do you accept that if there's only demand for three workers then the wage rate that is required to be paid to employ all three would be \$3. That's correct?---Yes.

PN19423

Now if we can take the case of Professor Rose's survey, if we were looking to employ every single employee who did the survey tomorrow, we would need to pay the marginal WTA, that would be your position, yes?---It's not if you wanted to pay every single worker, it's what determines on the supply side, the supply curve of labour is the marginal rate of pay. The Rose report focuses simply on the average.

MORRIS ALTMAN

XXN MR IZZO

PN19424

I'm not sure that precisely answered my question. My question is if we wanted to employ all the workers who did the survey tomorrow - - -?---You have to look at the supply curve of labour, right, and you have to look at the demand curve of labour and then you would find an equilibrium. So you have to look at the marginal effect, not the average effect. You also have to look at the interaction between what's happening on the supply side with the demand curve, because the demand curve itself is effected by the wage rate. The demand curve can shift up

and down depending on the wage. If you cut the wage according to a lot of research in behavioural economics, such as work by George Akerlof and David Card and others, myself, that if you cut the wage the demand curve will be shifted in, you increase the wage the demand curve will shift it out, but you need both the supply curve and the demand curve and the marginal effect is what's important.

PN19425

But as a simple matter, if one wanted to employ - 500 people did the survey, if one wanted to employ all 500 tomorrow, wouldn't the point of - wouldn't the pay that needs to be paid to attract all of the 500 people that Professor Rose surveyed be the marginal WTA, that would be your position wouldn't it?---Well, to employ all those workers you would have to pay those workers what would happen to be amongst that group the marginal - the wage rate or the reservation wage on the margin.

PN19426

When you talk about reservation wage, for some of these workers, they will accept less than the marginal WTA though. You accept that?---Well that's what a supply group tells us.

PN19427

That the employer could individually bargain with some of these employees, so that some of them will be paid less than marginal WTA because they will accept less, whereas those that require higher rates closer to the marginal WTA the employer might need to pay at that higher level?---Well, if you look back in history of labour markets going to past, even the past 400 years, that hasn't happened. It hasn't happened because the costs involved in trying to bargain down each individual worker is so high, that it doesn't pay - it typically does not pay employers to engage in such a bargaining game. So it's the same thing if you look at the market for apples. You pay a low price for apples because that's the marginal price, somebody else might be willing to pay \$30 for apples but I don't see - but Woolworths doesn't go around and bargain with every customer and saying well, can I get you to pay \$10 and you I'll get you to pay \$1. It's the same thing in the labour market. Hypothetically - - -

MORRIS ALTMAN

XXN MR IZZO

PN19428

You accept that the consumer examples in relation to selling products is somewhat different though to the example of finding employees to perform particular work?---Sure, because it is different and one big difference - this falls, for example, on the argument of Robert Solo, that workers are not the same thing as carrots or broccoli. If you play that type of bargaining game, the impact of that might very well be, depending on the type of labour market, to increase job turnover, for workers to retaliate because they feel they're being treated unfairly, reducing effort, generating costs to the firms and to society at large. So the thing is what you're saying hypothetically that that's possible but it doesn't happen, it doesn't happen for very good rational efficiency reasons. That's why the workers are paid, that's why you have this notion of workers equilibrium are paid the wage rate which happens to be the marginal rate. What that marginal rate, by the way,

depends on the market. It could be - you could have a supply curve that's sort of really flat and goes up like this. It could be like this, it really depends on - - -

PN19429

When you talk about the marginal rate, my understanding would be the marginal rate for the 500 employees who performed the survey is the highest rate of pay identified by those employees. Of the highest rate of pay identified by - - -?---The Rose report doesn't specify anything in the marginal, it looks only at the average. What the rose report does do, well in that report what he specifies is a range of averages - - -

PN19430

Sorry, I'm just asking you what you mean by the marginal rate?---What I mean by the marginal rate is for any - if you assume you have 200 workers or 300 workers. Let's say you assume five workers, so going from your example you have five workers, the marginal rate would here be \$5.

PN19431

So in the Rose report if we have 500 workers, the marginal rate is the rate that the - the highest rate identified by each of those 500 workers to work. The 500th rate, if you rank them in order of height from lowest to highest, the marginal rate is the top one, yes?---Well that's honestly not quite true because you have to look at every firm specifically. So if you take one firm that has six workers, you have to look at the sixth worker. If you have another firm that employs 300 workers or 200 workers, so it's firm specific and economic theory text book economics. You assume one firm, you assume one labour market and you have one marginal rate of pay.

PN19432

So the marginal rate depends on the size of the demand?---The marginal - well, it depends on two things. It depends on the labour market, it depends on the specificity and preferences of workers, it depends on their social context, it depends on alternative sources of income that generates the supply curve and then you have a demand curve.

PN19433

So I understood from your response when you said if you've got 200 workers then the marginal rate will be the 201st, if you've got 300, it's 301st?---In terms of the - in terms of the economic conventional economic theory, it will be that rate which will attract the last hour of work to be employed.

PN19434

Now at paragraph 19 - - -?---You're looking at mine?

*** MORRIS ALTMAN

XXN MR IZZO

PN19435

Yes, sorry, you can hand back that report. At paragraph 19 of your report, you talk about cuts to penalty rates that are deemed to be unfair and that they would be reciprocated by reductions in effort input. That's in the first sentence. You then go onto refer to some literature starting from Akerlof and a number of reports

down to, I presume it's Slichta in 1920. The literature you refer to there, that doesn't actually study cuts to penalty rates though does it?---No, they don't.

PN19436

Nor do they say the cuts to penalty rates are unfair do they?---No, they don't.

PN19437

The phenomenon you discuss at paragraph 19, that is about reductions in efforts arising from cuts that are unfair. That only - sorry, I'll withdraw that, I'll rephrase the question. The phenomenon you discuss about reductions to effort occurring, that will only occur if the cut is unfair. Do you accept that?---Well one has to specify to sample subject a particular scenario and determine from those - from questions put to those subjects of a particular survey experiment whether or not they deem arbitrary cuts to their pay to be fair or unfair.

PN19438

It will only be if they're unfair that you then see that flow on effect of effort reduction, yes?---Sure, people have to - yes, people have to view those type of cuts as being unfair.

PN19439

Now you refer in that first sentence to cuts from above, imposed from above being unfair. By that do I take it you're referring to a cut that's made by an employer?---It doesn't have to only be made by an employer. It can be made through government. It could be made through the employer. It could be made by government induced by actions taken by the employer.

PN19440

So does that mean your position is that cuts will only be deemed as fair if they're negotiated by employees to the point of agreement?---I'm saying that one has to - if you're thinking about doing empirical analysis one has to construct a survey instrument which would allow the subjects of that experiment to give their determination of whether a particular action is fair and unfair, and you have for example in literature an experimental behavioural economics instruments called - something called an ultimatum and dictator game where you can actually instrument particular types of cuts and behaviours and determine and survey subjects that will give you their opinion. You can draw an index in terms of the loss (indistinct) and how they would respond to something which they deemed to be unfair.

PN19441

If I can take you to the first sentence of that paragraph?---Yes.

PN19442

You say:

PN19443

Cuts to penalty rates which are deemed to be unfair -

And you then say;

PN19445

Imposed from above, not negotiated.

PN19446

?---So where are you right now?

PN19447

The first sentence, the third line of paragraph 19;

PN19448

Cuts to penalty rates -

PN19449

You say;

PN19450

Which are deemed to be unfair would be reciprocated by reductions in effort input.

PN19451

But after the reference to "which are deemed to be unfair", you say;

PN19452

Imposed from above, not negotiated.

PN19453

?---Paragraph 19?

PN19454

I think so, page 12?---Yes.

PN19455

Is well established in the literature - - -?---Yes;

PN19456

The effort related to economic theory would (indistinct) cuts to penalty rates.

PN19457

Yes, okay.

PN19458

Continuing:

PN19459

Which are deemed to be unfair, imposed from above, not negotiated.

PN19460

?---Yes.

PN19461

So I take it from that that you're saying that a cut which is imposed from above is likely to be deemed by employees to be unfair?---It's likely to be deemed, yes.

PN19462

It won't be deemed to be unfair - sorry, let me withdraw that. What I asked you is that, is it your position then that cuts will only be deemed by employees as fair if they're negotiated with the employees to the point of agreement?---There are other instruments which make one arrive at a fair solution but negotiated settlements, something that's negotiated with two parties, or two parties and an arbitrator is often deemed to be fairer than something which is arbitrarily imposed.

PN19463

So something that's arbitrated might be fair?---It might be, yes. If arbitration is accepted by all parties.

PN19464

What about - sorry, so I take it then from your evidence that it doesn't just need to be negotiated to be seen as fair. There's other ways in which - factors at play?---There might be - - -

PN19465

If I could just finish the question?---Sure.

PN19466

It doesn't need to just be negotiated. There are other factors at play that might also make it fair other than negotiation, yes?---Possible, yes.

PN19467

Now some of the things that might impact upon whether it's considered as unfair or fair by employees, I'm just going to name a range, include the size of the cut, the merit for the cut to the rate, the identity of the person implementing the cut, the subjective perspective of the employee and how the cut is communicated to the employees. Do you accept that all of those are factors that might influence upon whether it's fair or unfair?---They all make an influence, yes.

PN19468

If a cut is made by the Fair Work Commission, after consideration of all the relevant facts in evidence, as part of proceedings ranging over multiple years, then there might not be a perception of unfairness in relation to the cut?---I think you would have to ask employees how would they respond to that.

PN19469

Now if I can take you to paragraph 22 of your report.

PN19470

JUSTICE ROSS: Multiple years, Mr Izzo?

PN19471

MR IZZO: Sorry, your Honour?

PN19472

JUSTICE ROSS: Multiple years?

PN19473

MR IZZO: Well I believe we started last year, your Honour, and I think we're finishing next year.

PN19474

JUSTICE ROSS: Time flies.

PN19475

MR IZZO: Now if I can take you to paragraph 22, you talk about the importance of context and referencing in conducting surveys, starting at paragraph 22 on page 13. When one considers this survey about what employees wish to be paid on weekends and public holidays, part of the context would include ensuring employees consider what they'd be doing at the time they're being asked to work. Would you agree with that?---It would affect the outcome.

PN19476

But that that's part of an appropriate context to put to the employees, you'd accept that?---Yes.

PN19477

Equally, the employees' own personal financial situation is part of the context which should appropriately be considered by employees?---In terms of what?

PN19478

Well, if we're trying to find out - so the overarching question is we're trying to find out what employees wish to be paid to work on weekends and public holidays. Part of the context, it would be helpful for the purposes of that survey, to have the employees consider, part of that is their own personal financial situation?---The literature of that plays a part as well as the target income of that population.

PN19479

The employee's needs, such as their domestic needs and family obligations, would be a relevant part of the context?---Yes.

PN19480

Their other hours of work surrounding the weekend and public holiday shifts we're talking about would be part of the context?---Sure.

PN19481

And the employee's social commitments?---Sure.

PN19482

What I would like to do is give you a copy of the Professor Rose report, which have seen before, and just take you to a section. Does the Bench have copies of the Professor Rose report?

MORRIS ALTMAN

XXN MR IZZO

PN19483

JUSTICE ROSS: We do. Whether we've got them here or not is a separate question. Let's see how we go.

PN19484

MR IZZO: If you can hand that to the witness. Can I take you to page 50 of that report?---Yes.

PN19485

You will see here a screen shot of a calendar and I will just explain the process here for your benefit. What is depicted here is what the employees were required to fill out when they did the survey. So they were asked to keep notes or a diary or some kind of record of what they had done in - - -?---Employers or employees?

PN19486

The employees?---Right.

PN19487

Of what they had done in the week preceding completing the survey. They were then asked to fill out a calendar and you will see the types of things that they could enter are things like coffee, snack, travel, household obligations, banking services, all the types of things they may have done in that week. Do you see that there? If I can then take you overleaf to page 52, you will then see the rates of pay that were offered to the employees to either accept or reject as hours of work and beneath the rates of pay is the calendar?---Yes.

PN19488

Now, it's not populated there - - -?---Right.

PN19489

- - - but it was when they completed that. Can I ask you to assume that as well?---Yes.

PN19490

So when the employees were accepting or rejecting shifts that were offered to them, they would have been conscious of the types of thing that they do on a Saturday or Sunday when filling out the survey, wouldn't they?---They would.

PN19491

They'd be conscious of things like when they might do their shopping when they were filling out the survey, or they'd also be conscious of the types of things they do when - sorry, I withdraw that. They would also be conscious of when they might visit their family when filling out the survey?---Yes, I presume so.

PN19492

And visiting their friends?---Yes.

*** MORRIS ALTMAN

XXN MR IZZO

PN19493

So that means they had as a reference point when filling out the survey the types of activities they actually performed on these days when they considered whether to accept or reject a shift, do you accept that?---Yes.

PN19494

If a person is a recipient of penalty rates, there's a good chance they already know they are receiving penalty rates, do you accept that?---They probably are, yes.

PN19495

You accept, don't you, that the Rose survey did not tell employees what they were being paid at all?---They were given options.

PN19496

They were given options to choose to accept or reject shifts, yes?---They were given options in a role where choice is completely voluntary.

PN19497

But my question is do you accept that the Rose survey didn't tell them what they were being paid?---That's what I believe, yes.

PN19498

They weren't told that they - - -?---Wait one sec. They were just - let me just make one point. They were given options. Options are reference points. So they weren't being told how much - they were given choices but those choices were - they're written down and they represent types of defaults. So they're not told "thou shalt be paid this much". They have choices and they can make trade-offs.

PN19499

My question to you is a far simpler one. They weren't told what rate of pay they currently receive for doing their work, were they?---No. They would know that themselves.

PN19500

They weren't told that they currently receive an ordinary rate of pay on Sundays, were they?---No.

PN19501

They just answered the questions based on their own existing knowledge of their personal circumstances, yes?

PN19502

MR MOORE: Your Honour, I object to the question. The question invites the witness to comment on the basis upon which the survey respondents answered the question. It is a bridge too far for the witness to get into the mind of the basis and reasons upon which the respondents answered the questions.

PN19503

MR IZZO: I will withdraw the question, Your Honour. Now, you accept, don't you, that all these people that completed the survey aren't all earning the actual award rate? Do you accept that?---Want to rephrase that? Or repeat it?

MORRIS ALTMAN

XXN MR IZZO

PN19504

Yes. Happy to. Do you accept that not all of the people who completed the survey are receiving the actual award rates? Do you accept that?---That appears to be the case.

PN19505

If I can take you - you've still got that Professor Rose report in front of you?---Me?

PN19506

Yes?---Yes, right.

PN19507

If I can take you to page 20, table 6, you will see there that the employees recorded earning wages as low as what looks to be about \$11 an hour and as high as \$30 an hour, and that is for both the retail award and the restaurant award. Do you accept that?---Yes. This is what is reported.

PN19508

Yes?---Yes. Self-reported.

PN19509

If I can take you to paragraph 26 of your own report?---Okay.

PN19510

You mention there that once someone gets used to a state of affairs, that will affect their reservation wage. You say that. Now, you're aware that all of the participants in the Rose survey were recipient - sorry, I'll rephrase that. Are you aware that all of the participants in the Rose survey were recipients of penalty rates?---It wasn't - well, it wasn't - they're part of that bargaining unit that receives - that can receive penalty rates if the individual he or she works on Saturday or Sunday.

PN19511

So their reservation wage would likely be influenced by the fact that they currently form part of a group that receives penalty rates?---Not necessarily. It depends on how the question is framed.

PN19512

If I can take you to paragraph 30, you have - - -?---This is my - my report?

*** MORRIS ALTMAN

XXN MR IZZO

PN19513

Yes, of yours. Apologies. When it comes to how the question is framed, you say at paragraph 30 how you said the question should have been worded. Now, do I take it then that the question - you have got your proposed wording broadly outlined in paragraph 30. Are you able to provide us with the actual wording that you say should have been used in asking the employees about their Sunday rate?---Well, I won't give you an exact wording because I - if I was going to design an experiment I would have to think through very carefully but all I'm saying here is that if the issue in hand is how people will evaluate time with

regards to Sunday work, with regards to having a prior penalty rate, then the reference point - if that is the question to be addressed, then you - the reference point needs to be the pay that an individual, he or she, would get if this individual worked on Sunday, which is the normal rate of pay plus the penalty rate.

PN19514

So is it your position they should be told "This is what you are entitled to get on a Sunday, a rate of X," and then asking them, "What would you wish to accept to work on a Sunday?" That is your position?---Well, that's - that's not - that's not the issue. One of the - if the question is the value of time, how a person - one of the major questions is how would a person value time in the context of having a penalty rate and having a cut in a penalty rate, so that gives you two points of reference. Another question could be, as you indicated, "What would your reservation wage be for Sunday?" given the person's knowledge, the foreknowledge of what that reference point wage rate on Sunday would be.

PN19515

Isn't that what you've suggested here in paragraph 30, that they should be told, "This is your rate of Sunday pay rate," and then ask, "What would be the rate you would accept to work a Sunday?" That is what you're proposing in paragraph 30, yes?---I am saying if the question is with regards to determining a person's reservation wage, you have to - you need to inform - a person has to be placed in the context of that particular day, which would include a penalty rate. The other issue which I - let me just raise this really briefly, is whether or not a person - if a survey question is framed whether or not the penalty - a cut in penalty rate is arbitrarily determined and whether a person has options or trade-offs with regards to the penalty rate, that would - in terms of days of work and other types of options, that could influence a person's reservation wage.

PN19516

So is it your position that they should have been told the award rate plus the penalty rate before being asked what they would be willing to accept? Is that your position?---I think that's an additional question that should have been asked if the point of the exercise is to look at the impact, the possible impact, of cutting penalty rates for Sunday. That's not the focal point. It's - - -

PN19517

You accept that part of the purpose of the survey was to understand what rate of pay employees require to actually work, yes?---That is one of the - that is one of the side issues in the Rose report.

PN19518

You accept that in answering this question - you have accepted earlier - that part of what they might want to have regard to, one of the relevant factors as a part of context, is their own personal financial situation, yes?---Yes.

PN19519

That might include your current mortgage repayments, school fees, child maintenance, social expenses - - -?---Right.

MORRIS ALTMAN

XXN MR IZZO

PN19520

All those types of things, yes?---Yes.

PN19521

One of the other things that is going to be relevant to working out what an employee actually needs to be paid to work will be how they meet their current expenses with their current income. Do you accept that?---That's part - part of the story.

PN19522

They might also consider how much breathing room they have, and by that I mean how much their income exceeds their expenses. That might be something else?---Well, one can say that if a person has three kids and a husband who can't work and has to support her - her uncle and her mother and her father, that person might agree to accept 10 cents an hour because it's better than nothing. But that's

PN19523

But all of these things feed into the decision about what they'd be willing to accept to work, yes?---It's part of it. Certainly part of it.

PN19524

If we were to tell the employees their award rate, they would likely compare the shifts being offered in the survey against the award rate, would they not?---What do you mean by that? Whether - well, clarify for me what you mean by that.

PN19525

If we were to provide employees their award rate plus penalty as a reference point before then asking them how much they'd be willing to pay, their response would be biased in the direction of the award rate. Do you accept that?---Sure. Yeah. Yes, it would.

PN19526

It would?---Yes. That's why you have to have different sets of questions, because there will be biases no matter what question you ask.

PN19527

In fact, it might even mislead them into thinking they are earning a sum different to what they actually earn. That's a possibility, isn't it?---It's highly unlikely unless you framed the question very poorly.

MORRIS ALTMAN

XXN MR IZZO

PN19528

Because you accept that they don't all earn the award rate?---But if you're running a survey experiment - if you look at experimental economics, you would be plastering economics. You have students who never worked and they're asked to imagine themselves working in a factory. They don't - they don't work in a factory, they never have, but you run experiments based on this classroom population. If you have - if you're talking about actual workers in a survey experiment, they know about penalty rates. They may not all be getting penalty rates but they can imagine in a very concrete way what a penalty rate would be.

They're not - so I don't see how they would be confused if they are provided with options and are told very explicitly what they would earn and under what circumstances they would earn whatever they're earning.

PN19529

Yes, but if we're asking them what they need to be paid to be willing to work, or to accept a particular shift, their current expenses and their current income are far more influential factors as opposed to what might be contained in an award, aren't they?---It really depends on whether or not - whether the survey - this is all hypothetical in many ways, the survey experiments, so it really depends on what you're hypothesising in terms of the question for such an experiment what he or she would be earning.

PN19530

Well, we've said that part of the purpose that we're interested in, and assume this to be the case, is to understand what rate of pay employees require to actually work, that is one of the goals here. Isn't the better reference point what they are actually earning presently for working on a weekend or public holiday as opposed to what the award might state?---If you want to determine - that I didn't see actually as the complete objective of the Rose exercise. The Rose exercise was looking at, trying to investigate, the value that people have with regards to time. The other side issue was the lowest wage a firm could, in a way, get away paying workers or employees. They're two different issues. They are not exactly the same thing. If you want - sorry, go on.

PN19531

So the question was assume that part of what we're interested in in these proceedings is finding out the amount that employees wish - or that they require to actually work - sorry, I'll rephrase that. The wording wasn't ideal. Part of the purpose that we're - sorry, I'll rephrase - withdraw that. One of the things that we're interested in understanding as part of these proceedings is the rate of pay employees actually require to work and that the better reference point to use for that is their actual current expenses and actual current income as opposed to what might be contained in an award?---No, because it's subjective. It's like I said, if you come from Uganda, if somebody from Uganda comes here to Australia, they might be - they might accept, given their former context, getting paid one cent an hour. If your context is being paid a penalty rate for Sunday, and so the particular level, then that would affect your reservation wage. It's not simply about how many dependants you have. There's actually been a study in Australia that the people who retaliate most harshly against hypothetical cuts to penalty rates are the people who are the most advantaged and the most disadvantaged.

MORRIS ALTMAN

XXN MR IZZO

PN19532

If the Ugandan in the example you give, if we ask the Ugandan what they would require to work, they will naturally have - your view is that they will naturally nominate an amount lower due to the state of affairs that – the current environment that they're in. Does that not provide us with an accurate indication of what, that Ugandan in that example, would be willing to accept to work?---Only if you take the Ugandan, for example, and do not place that

Ugandan in an Australian context. If you take this Ugandan individual and you say "Well, you know, in Australia, if you work on Sunday or Saturday or whatever day, this is the rate of pay that one typically gets for say a certain category of work". And then ask that person "What is your reservation wage?" It's highly likely that that person would change her or his tune, which is what typically happens with an immigrant population. So it's context dependent.

PN19533

In this case, all the survey respondents we know, work in either the retail or restaurant industry in Australia?---Yes, that's right.

PN19534

Yes?---Yes.

PN19535

So they are all working in the Australian Regulatory environment, yes?---Yes.

PN19536

And so, when we're trying to determine what it is that they would accept to work, the better reference point is what they currently receive because it may be higher than the award, or – sorry, I withdraw that. The better reference point is what they currently receive as opposed to what might be, in an industrial instrument, that does not correlate to what they currently earn?---I think that's (indistinct), you say that people will always accept the wage rate which they get. Once again, that's not context dependent, so if a person – so once again, if a person is given information in terms of the rate of pay that he or she would get, let's say on Sunday or Saturday, then that would impact that person's reservation wage. That is their reveal preference reservation wage. Now in a certain environment, one can get away paying people less than minimum wage, if that was possible. It doesn't mean that's the reveal preference reservation wage. And it doesn't mean that workers under the industrial environment that you have here in Australia, would not have other consequences such as higher turnover, reduction in effort, a shift inward of the demand curve, things like that.

PN19537

If an employee is receiving a greater amount than what's contained in the award, the relevant context for that person is what they actually receive when they make this decision about what they'd be willing to accept, not what might be in the award. Do you accept that?

PN19538

MR MOORE: Your Honour, I object to the question. My friend's asked this question about five times.

PN19539

MR IZZO: He hasn't answered.

PN19540

MR MOORE: One way or another. And we've been over this terrain repeatedly.

PN19541

JUSTICE ROSS: That's all right, ask your question, Mr Izzo.

PN19542

MR IZZO: If the employee is earning a rate of pay above the award rate and then we're trying to determine the best we can, the actual amount they require to be willing to work, then in those circumstances, it's better for them to have a consideration of what they're currently receiving as opposed to what might be the award?---If you're talking about a survey experiment, you're always giving a person a context, so that context – in a survey experiment, you ask – you should be asking an array of questions to get a sense of what that actual reservation wage would be and what that reveal preference reservation wage would be. So what I'm saying is, that you have to provide that context and you need a wide array of questions to determine an accurate sense- - -

PN19543

And what I'm asking- - -?---Yes.

PN19544

- - -you about is, as part of that context, we could use two reference points. One is the actual rate they receive and one is the award rate. And what I'm putting to you is when we formulate that context, in this example, someone earning above the award, the better reference point to use is what they actually receive?---No, I don't agree with that.

PN19545

So your position is that the award rate is better of those two alternatives?---Given – given the question at hand, given that labour markets, work schedules are not typically voluntarily chosen but rather imposed in one way or another, I disagree with your particular formulation.

PN19546

Now, the question you propose in paragraph 30, or the type of question you propose, which refers to – which informs the employee of their current award Sunday pay rate and then ask them what rate of pay they'd be willing to accept, that's what's described in applied economic literature, as a stated preference question. Do you accept that?---There is different – it's different ways of referring to it. It's also as an anchor as a reference point.

PN19547

Do you accept that it's a type of stated preference question which is referred to as contingent valuation in the literature?---It's in some sense, in some cases, yes.

PN19548

And I take it you're not an expert in contingent valuation, is that right?---I've read on it, but no, I haven't executed contingent evaluation analysis.

MORRIS ALTMAN

XXN MR IZZO

PN19549

Do you accept that if the participants are told that their existing penalty rate – sorry, I withdraw that. If the participants are told their existing penalty rate and

then asked to accept a rate of pay lower than that, the question is likely to lead the employees to refuse the lower rate of pay. Do you accept that?---They may not refuse it, but they might react to it. That's my- - -

PN19550

It might influence them against the lower rate, is that right?---It would put – in terms of the question asked, it would lean people towards the current scenario.

PN19551

Now, are you aware of the concept of incentive compatibility in survey questioning?---Yes.

PN19552

Now, my understanding, correct me if I'm wrong, is that something which is incentive compatible is where the question is likely to reveal a person's true preferences as there is some incentive to do so. Is that a fair summary?---Yes.

PN19553

And if something is incentive incompatible, that's where the question is not likely to reveal a person's true preference as there is no incentive to do so or there might be an incentive the other way?---One has to be careful, because a lot depends on what one refers to as a true preference of the individual. The true preference of an individual is also context dependent. So you have to provide an environment where a person will reveal her true preferences in different environments.

PN19554

So is my summary of incentive – the literature, when it talks about something being incentive incompatible, are you saying that my summary isn't an accurate reflection of what the literature discusses as being incentive incompatible?---I'm saying that the literature on contingent evaluation studies and the incentives used in the experiment is subject to a lot of debate. And the one has to be very careful how one frames one's incentive, and for example, the work by – I refer to it in my report, (indistinct).

PN19555

Now, if we tell the employees their existing penalty rate and then ask them to accept a rate of pay that's lower, you've already given evidence about what effect that might have, that is likely to be incentive incompatible, is it not, because there will be no incentive for them to reveal their true preference as to whether they wish to work or not but instead, they will be incentivised to give an answer that maintains the existing rate. Do you accept that?---It's not incentive incompatible. It depends on the type of information you're looking for. You could set – in a survey experiment you could set up a number of questions to reveal how a person would respond to a cut in penalty rates and you could set the question as to whether or not a person is willing or not willing to work, depending on the wage rate inclusive or exclusive of penalty rates - on a voluntary basis, of course.

PN19556

If I can take you to page 52 of the Rose report.

PN19557

JUSTICE ROSS: Do you know how much longer you're likely to be, Mr Izzo?
We just may need to readjust some things, that's all.

PN19558

MR IZZO: I imagine, your Honour, something in the order of half an hour.

PN19559

JUSTICE ROSS: All right.

PN19560

MR IZZO: I've just noticed the time, your Honour.

PN19561

JUSTICE ROSS: Well, we don't have the alternative of adjourning. We've all got matters this afternoon, so we'll keep going.

PN19562

MR IZZO: Okay. Now, in the Rose report, you'll see at page 52 there's a series of shifts that are offered to the employee and you'll see that there's, for instance, Friday \$16 an hour at a particular time, Saturday \$22 an hour – there's a couple of Saturday offers, Sunday, see all of that?---Yes.

PN19563

And on the next page, equally it's the same. There's a variety of different rates of pay offered for some overlapping shifts, a whole range of different shifts. The employees were then asked to pick particular shifts. They could pick the shifts that they would like to work. And if I take you to page 53, you will see the employee is asked to choose between two Sunday shifts. There's one at \$25.94 an hour for 3 hours and one at \$48.17 an hour for 3 hours as well. There's also a number of other varying shifts around those times. The choices, if you look at those two shifts offered, do you accept that the employee is likely, everything else being equal about the times that the shifts are on, the employee is likely to choose the \$48 shift as opposed to the \$25 shift because it's higher?---It depends on the circumstances. So people behave "economically, rationally, strategically". They might accept the higher offer and they could do so, all other things remain the same, it depends on the options that people have and other considerations.

PN19564

But for instance, if there was some family obligation that they regularly do at that time, the 48, they might choose the lower rate?---Yes, they're free to choose. That's what critical, is that they have to be free to choose, which they are in the survey experiment.

PN19565

You accept the – sorry I withdraw that. Now, there is accordingly, is there not, a bias towards the employees accepting the higher rate of pay?---No.

*** MORRIS ALTMAN

XXN MR IZZO

PN19566

So if there were two – sorry?---I don't agree.

PN19567

If the two shifts are offered and everything else being equal, you've agreed that the employees are more likely to take the \$48 shift---All other things remaining the same.

PN19568

And then things that might not remain the same are things that they might otherwise be doing at that time, yes?---Well, you have to – if individuals don't choose the higher offer, you have to look at the details and take other options and choices that they would make to that. I mean, you would have to debrief them to see why they were making the choices they were making.

PN19569

Well, you accept that the only other thing they were looking at when they did this decision was the calendar beneath?---Yes. Well, I guess so, I won't say I know. That's part of the story, people look at the calendar and they think things through.

PN19570

Do you accept that having seen the higher paying shifts available, the employees are likely to find the lower paying shifts less attractive?---All other things remaining the same, that we know from the economic literature, money isn't everything. People make sacrifices.

PN19571

Sorry, I don't understand, is your answer to that yes or no?---Well, I'm saying not necessarily. If a person – if an individual was a pure wealth maximiser, that person, all other things remaining the same, which is not typically always the case, would accept the higher offer.

PN19572

Now, at paragraph 27 of your report, you discuss loss aversion. And loss aversion, at a basic level I understand, is that if someone has something, they're going to value it more highly if they're asked to give it up than if they never had it in the first place. That's quite a basic summary, but is that an accurate summary, or do you agree with that summary of loss aversion?---Well basically, the definition of loss aversion is that you value any given loss more than any given gain.

PN19573

Thank you. In this context, what employees are giving up, as I understand it, is their actual higher Sunday and public holiday rates of pay in this experiment?---Well, the experiment actually doesn't really make explicit the notion of Sunday pay or Saturday pay. That's not the focal point of the survey experiment, but if you can go back – going back to your question, if somebody is being asked to – if people are told that you're going to get your pay cut, that's a loss in pay.

MORRIS ALTMAN

XXN MR IZZO

PN19574

And the employees know what their current rates of pay are. You previously accepted that, yes?---In the survey experiments, there will be a stipulation of alternative rates of pay.

PN19575

But my question is, sorry- - -?---Yes.

PN19576

My question is, they know what their current rates of pay are, yes?---Well, they would know yes, what their current rates of pay are.

PN19577

And so, when they're offered rates that are lower than their current rates of pay, then there will be a loss aversion effect, will there not?---There would be, all other things remaining the same, and that's what's critical.

PN19578

We spoke earlier about using the reference point as the existing award wage or the actual rate of pay that employees receive?---That's one of the reference points, yes.

PN19579

If the reference point used is the award rate, there might not be loss aversion because the employees are not actually – if they're not actually receiving – sorry, I withdraw that. If the employee is not actually receiving the award rate, then giving the employee the award rate as a reference point will not have a loss aversion effect?---That's not true because this is an experiment. It's a survey experiment. You're asking people hypotheticals. This whole thing is hypothetical. So you say hypothetically, in any experiment – first of all, in any experiment, according to experimental economics at least, in that literature you're supposed to be completely forthright and honest with members of the survey experiment. You're supposed to tell them the context and the conditions within which they're making a decision. So in the hypothetical, you're saying well, if you're getting – let's say the normal rate plus penalty rate, how might you react to a reduction in your penalty rate. But it's a hypothetical.

PN19580

If an employee's not receiving the award rate, they're not losing the award rate, are they?---Well, of course not, but this is a survey experiment. It's about hypotheticals. If you're asking me a question – if you asked somebody who's not earning a penalty rate, because he or she, I don't know, for whatever reason, if you're not earning a penalty rate because you're not in a position to earn a penalty rate and you're told that a penalty rate is being cut, then you yourself will not suffer loss aversion. However, one has to be careful about that because if you're in a group of individuals who are your friends and your neighbours, whatever, earn penalty rates and if you have a sense of empathy and sympathy, you might react to how your colleagues are treated. So it's not as clear cut as that.

*** MORRIS ALTMAN

XXN MR IZZO

PN19581

Again, an employee who's participated in this survey might be earning a penalty rate. They might just not be earning exactly what the award stipulates?---True.

PN19582

For that person to – for us to appropriately factor in loss aversion for that person, a better reference point to use is that person looking at the potentially lower rate offered in the survey compared to what they presently earned. That will give a loss aversion effect, yes?---It depends on the questions that one's asking. So if you're looking at every single individual and you want to calculate loss aversion, assume that everyone is behaving as if he or she is in a sealed room, not affected by other persons' behaviour, you would have to ask that person how he or she would respond to a cut in pay, whatever that cut in pay might be.

PN19583

If I can take you to page 30 of your report - sorry, paragraph 30 on page 18, you said that the Rose report - the reference point appears to be the normal wage during the regular weekday. That's on the top of page 18, halfway through the paragraph?---Yes.

PN19584

Now if I can then take you to page 53 of the Rose report, you'll see that the wage rates offered are scattered?---Yes.

PN19585

Some are \$20, some are 30, some are 48?---Right.

PN19586

There is no reference point given to the employee which is their regular weekday wage when answering this question, is there?---Not explicitly.

PN19587

In fact, sorry, I'll withdraw that. You've accepted that if employees receive penalty rates that they would know about that. You've said that already today. You recall that?---If he or she is actually receiving a penalty rate, yes, he or she would know that.

PN19588

So they would inherently bring that knowledge with them when answering the survey, yes?---It depends on how the survey's constructed. That's not how experiments are done. It's all about hypotheticals and you could bring a multi billionaire into the survey and ask that person how - if you hypothesise that you're working at McDonald's or you're working as a cleaner, how would you feel if your penalty rates were cut. So it really depends on how the survey is constructed, this is all about hypotheticals.

PN19589

If I can take you to page 7 of your report?---Seven.

*** MORRIS ALTMAN

XXN MR IZZO

PN19590

There's a bullet point, the last bullet point on the document, page 7. It says;

PN19591

If Sunday as a preferred day is treated by survey respondents like a public holiday upper bound values for the WTA just as the range of averages would be expected to exceed the Sunday penalty rate.

PN19592

Are you saying that employees should have been told that Sunday is the same as a public holiday?---What I'm saying is that that should be - that should have been part of the survey because all the Rose report does it identifies certain days of the week as potentially special as public holidays. They ask people what's your really cool or really preferred public holiday, and then they ask questions using those days as anchors or reference points. Now the same - if the objective of the report is to examine the importance, the significance of Sunday, then people should have been provided with questions which would allow such a determination. Instead as Professor Rose admits they're making the assumption that Sunday should not even be on the radar as a potential special day.

PN19593

So is it your position then that what should have been done, because the way the public holidays were treated in the second aspect of the games that they played was that the public holiday was named in red and it said Easter Sunday?---Yes.

PN19594

So your position is employees were to be told that this is a Sunday when they answered it. Is that right?---It's not the only - well they know it's a Sunday.

PN19595

Well that's how the public holidays were treated, isn't it?---Well, they're - people are asked to identify which holidays, which are the special holidays. Then they're asked to evaluate the value of time with regards to these various special holidays, and those special holidays are given a higher rate in terms of value of time and a willingness to accept. For those people - so the question is for those people who value Sunday as a special day, how would they value Sunday time. There has to be symmetry. I mean if the objective is about Sunday, there should have been a question there about Sunday because Sunday is still in Australia treated by a lot of people as a family day or a friendship day.

PN19596

But you accept that when they answered the questions about the Sunday work, they had the calendar in front of them, which told them their own personal activities that they were doing on that Sunday, yes?---Yes.

PN19597

So - - -?---Although that's also a little - one has to be careful about that in experiments because what you put down on a calendar is also informed by the constraints you face on the labour market.

MORRIS ALTMAN

XXN MR IZZO

PN19598

But by using the calendar, we have a better reference point because we have the employees' own actual activities that they conduct on these days, as opposed to general notions of value that someone might hypothesise, attach to a Sunday?---Well the same is true of holiday days, but the Rose report identifies, it explicitly identifies holiday days as special days. They didn't have to do that but they did that.

PN19599

When you say it specifically identifies holiday days as special days, you're saying that's the questions that asked the employees to name the public holidays and then attribute certain points to the public holidays?---Basically, yes.

PN19600

There's nothing in those that says this is a special day though?---But there - it's identified in the report as a holiday and it's become - by being a holiday it's different from the other days of the week, and then they ask people to attribute value of time to those particular days. There's a big difference between the average willingness to accept for a public holiday so identified and a normal day.

PN19601

When you say it's identified as a holiday, that's merely because the call it a public holiday. There's no other reference to it being a holiday in this survey is there?---Well it's a public holiday, yes.

PN19602

The survey says we'd like you to tell us what the public holidays are, that's page 56?---Yes.

PN19603

Then page 57 asks people to appoint points of importance to the public holidays. Nothing in it tells them it's a special day or has special significance?---They self-identify certain days as being special.

PN19604

Thereby create - withdraw that. At paragraph 34 of your report, you refer to the fact that utility or wellbeing will be reduced - sorry, benefits of action need to be weighed up against utility or wellbeing being reduced. When you talk about utility here, am I correct in assuming you're talking about levels of happiness, and that is then utility in the economic sense?---It's - well, economists define in different ways; wellbeing doesn't have to be the same as happiness.

PN19605

Well it's not the layman's utility that is usefulness?---It is - well, it's not usefulness. It's usefulness if it makes you happy, makes you feel better, but - - -

PN19606

But utility - sorry, just so I understand - - -?---It's an economics definition.

*** MORRIS ALTMAN

XXN MR IZZO

PN19607

Which means wellbeing, happiness, something to that effect?---Yes, yes.

PN19608

Now can I ask, professor, have you ever worked in a restaurant?---Actually, I did.

PN19609

When was that?---A long time ago.

PN19610

How long?---Well, a restaurant in the late 19- - well late 1960s. I also worked in factories and watermelon packaging plants, banana plantations, all sorts of - - -

PN19611

Did you work in a retail shop?---In a retail shop? Yes, I did. I used to sell magazines.

PN19612

When was that?---Let me see, 19- - -

PN19613

You can give me a rough decade?---1974, 1975, 1976, while I was going to McGill University in a nightshift.

PN19614

Have you studied staffing levels in restaurants compared to consumer demand in restaurants?---Not myself, but I did the economics academic studies on that.

PN19615

Have you studied staffing levels in retail shops compared to consumer demand in retail shops?

PN19616

JUSTICE ROSS: Is he giving evidence about any of these matters?

PN19617

MR IZZO: There is a proposition I wish to put to the professor which relates.

PN19618

JUSTICE ROSS: Move on, yes.

PN19619

MR IZZO: Have you studied how much downtime employees have in restaurants and retail businesses?---Not myself, no.

PN19620

Have you studied or looked into the overflow the restaurant businesses might have in terms of staffing on a day to day basis?---Not myself, no.

PN19621

Have you studied or looked into the overflow that retail businesses might have in terms of staffing on a day to day basis?---No, I haven't.

PN19622

If you haven't studied the staffing levels and demands for servicing a retail or restaurant business, you can't really offer any credible view about the impact that wage changes might have on employee effort levels in these industries, can you?---You're incorrect, because I teach in those subjects and I was a journal editor for 10 years, journal social economics, I published people in this area, I teach labour ec, I taught in past lives labour economics so I'm familiar with the literature. You don't have to do the empirical studies necessarily to be familiar with different types of real worlds scenarios.

PN19623

At paragraph 36 of your report, at page 21 - - -?---36 or - - -

PN19624

Sorry paragraph 36 but I think there's actually two paragraph 36s. There's one on page 20 and one on page 21?---Yes, there is a mistake here, right.

PN19625

So I am referring to the one on page 21?---Okay.

PN19626

You say that the Rose report assumes that Sundays are not the preferred day for family and friendship. Do you see that?---Yes, I do.

PN19627

It's your understanding that employees weren't told it's not the preferred day for family and friendship. They weren't told about Sunday at all in that sense. That's right, yes?---Yes.

PN19628

Now you accept that for some employees it might not be the preferred day for family and friendship?---Of course.

PN19629

But for some it will?---Of course.

PN19630

For some it will be about a day of domestic chores, for some - - -?---Yes.

PN19631

Sorry. For some it'll be a working day perhaps. By giving the employees the calendar, instead of telling employees that it's the preferred day of family and friendships, the Rose report allows employees to place - to take into account how Sunday is relevant to them when answering the survey, yes?---In part. The choices are voluntary, that's the whole idea. In the Rose experiment all choices are voluntary and people can make voluntarily trade-offs between shift times and days.

*** MORRIS ALTMAN

XXN MR IZZO

PN19632

Now the last matter I want to take you to, professor, relates to - sorry, just bear with me one moment. I apologise, your Honour, I have one more question but it is the last question so I won't keep everyone too much longer. You talk about in your report the fact that employees - that the survey is voluntary and employees won't have a choice in real life, and that's at paragraph 36 on page 20. Now that's - in the case of casual employees that's not the case because casual employees do have an ability to refuse to accept shifts. That's right, isn't it?---Casual employees in part have that right but if they want particular jobs they have to accept what's offered to them.

PN19633

I have no further questions.

PN19634

JUSTICE ROSS: Any further cross-examination of Professor Altman?

CROSS-EXAMINATION BY MR WHEELAHAN

[1.25 PM]

PN19635

MR WHEELAHAN: Professor Altman, could you please turn to paragraph 38 of your report at page 22?---Sorry, I didn't catch that.

PN19636

Paragraph 38, sorry, I'll move closer to the microphone. Paragraph 38 of your report?---Yes.

PN19637

The last two sentences there, if you can just read those to yourself?---Yes.

PN19638

Those opinions that you've expressed there or assertions, they depend of course upon the demand for labour in a particular labour market or firm, don't they?---Actually no, this is looking at the supply side. So the equilibrium, yes, not the supply curve.

PN19639

You can't make that assertion without taking into account a demand for labour because you won't have an equilibrium unless there's a demand and supply, that's right isn't it?---Well I'm just following through the methodology of the Rose report.

PN19640

Your assumption here, the marginal WTA, where in this paragraph do you take into account the demand for labour in a particular labour market or firm, in order to make that conclusion?---I don't have to take into account the demand curve to make that conclusion. I don't have to take into account the demand curve to make

- - -

*** MORRIS ALTMAN

XXN MR WHEELAHAN

PN19641

That's not the question, Professor Altman, sorry. The question's not whether you have to or not, do I take it by that answer, I'm putting to you that you have not taken into account the demand for labour in a particular labour market or firm in order to make that conclusion in your report?---I do not take into account the demand side to make that particular statement.

PN19642

Yes. Now earlier in the cross-examination of you, you referred to the demand curve shifting in when you were asked questions about what might happen with a drop in the cost of labour. Now the usual terminology of course is for a demand curve to shift right or shift left. Do you accept that?---There are different terminologies. Shifting in is an acceptable terminology.

PN19643

Yes, is the usual terminology to shift right and shift left?---As I said, one can use both terminologies and they're used at different times, different occasions.

PN19644

But by shifting in, do you mean shift right or to shift left?---Shifting in is shifting left.

PN19645

Left. So is it your position that a decrease in the cost of labour will in fact decrease the demand for labour?---It's not decreasing the costs of labour, it's decreasing the wage rate. The decrease in the wage rate does not necessarily decrease the costs of labour if the - if labour productivity falls. The wage rate can fall by 10 per cent, the productivity falls by 10 per cent, there's no fall in cost.

PN19646

I think you've over-complicated by question with your answer. Let me put another question to you. Is it your position when you say the demand curve shifts in it says a decrease in the cost of labour?---Yes.

PN19647

Is your evidence to the Commission that a decrease in the cost of labour means there will be a reduction in the demand for labour?---What I'm saying is that one has to take into consideration when modelling labour markets that a reduction in the rate of pay or the wage rate might have the impact of reducing effort inputs and increasing labour turnover, if that takes place then the demand curve which is built upon the marginal product of labour data or thinking will shift the demand curve to the left or inward.

PN19648

If you ignore the mights in your answer to that question, do you accept that the orthodox view - I'm asking the witness to make some assumptions.

PN19649

MR MOORE: I'm sorry, Mr Wheelahan, I'm just voicing an objection to the use of the word might.

MORRIS ALTMAN

XXN MR WHEELAHAN

PN19650

JUSTICE ROSS: That's fine, just rephrase the question Mr Wheelahan.

PN19651

MR WHEELAHAN: Yes, well in his answer you put might and preface some assumptions - - -

PN19652

JUSTICE ROSS: Let's move onto the question, yes.

PN19653

MR WHEELAHAN: Yes. Do you accept that a decrease in the cost of labour, the orthodox view is that that will result in an increase in the demand for labour?---Actually, that's not the case. First of all I want to - I would disagree with how - your term "decreasing the cost of labour", I don't think that's - that's not an appropriate term. In terms of the orthodox view, the orthodox view stipulates that the demand curve will not change - the position of the demand curve will not change as the wage rate moves up or down. What will happen, according to the orthodox view, is that the way - the demand curve stays constant. As the wage rate falls, more workers or more hours of labour will be employed.

PN19654

Yes. I was not asking you a question about whether the demand curves shifts or not. My question is the orthodox view is that a reduction in the price or the cost of labour will mean an increase - a higher level of demand for that labour. Do you accept that?---That's what the orthodox view has tended to argue.

PN19655

Yes. Thank you. No further questions.

PN19656

JUSTICE ROSS: Any further cross-examination? Any re-examination? There's one more.

CROSS-EXAMINATION BY MR BREHAS

[1.31 PM]

PN19657

MR BREHAS: Professor Altman, my name is Costa Brehas, and I represent that National Retail Association. I won't keep you for too much longer. I just have a couple of questions regarding your report. In your report in page 7 you state:

PN19658

There are some core problems and issues to be addressed, including -

PN19659

and then the second dot point you refer to how the questions are structured and contextualised. Now, would it be correct to say - and I expect your answer would be yes - that the context of the report is a key issue to the present proceedings?---Yes.

PN19660

And in the same light, so would the context of your report be a key issue?---Yes.

PN19661

Okay. You go on in the next dot point to refer to the Rose report having made unsubstantiated assumptions that Sunday is not the preferred day of family and friendship meetings and gathering. But, professor, that doesn't seem to be correct. If you actually look at Professor Rose's report in paragraph 2, page 2 of his report in fact states the opposite?---What page are you referring to?

PN19662

So in page 2 of Professor Rose's report.

PN19663

COUNSEL: Two, or the exhibit summary?

PN19664

MR BREHAS: Of the summary, sorry. It has got the - - - ?---I'm quoting the Rose report.

PN19665

Yes, under "Project Background". There's a paragraph that starts off with:

PN19666

This report seeks to answer several research questions.

PN19667

Do you see that?---Sorry, where are you?

PN19668

Page 2 of the Rose report?---Page 2.

PN19669

It's headed "Project Background"?---Yes.

PN19670

Second paragraph?---Yes.

PN19671

Starts off:

PN19672

This report seeks to answer several research questions.

PN19673

And it says:

PN19674

First, the research seeks to determine what hours and what days are deemed socially more or less important.

PN19675

And then the next sentence after that, it says:

PN19676

Rather than assume that weekends are deemed less desirable days to work, the study allows for an examination of which days and times different employees either prefer to work, or feel more flexible to working during.

PN19677

And then goes on:

PN19678

Understanding the desirability of various times and days to engage in employment activities is important, given changes to societal expectations as to the value of certain activities.

PN19679

And then it says:

PN19680

For example, one can no longer assume that Sunday is a day for family gatherings and deemed the least desirable day to work, particularly amongst certain segments of society.

PN19681

So my reading of that is completely contrary to your understanding of that having been an unsubstantiated assumption that Sunday is not the preferred day. Rather, it effectively indicates that one can't make any assumptions one way or the other. Would you agree with that?---Well, that's what they're saying, which is contrary to the evidence.

PN19682

Excuse me?---That's what the Rose report stipulates, but that's contrary to the evidence.

PN19683

I'm just responding to your statement in the third dot point of paragraph 7 of your report?---Right.

PN19684

In which you say that:

PN19685

The Rose report makes an unsubstantiated assumption that Sunday is not the preferred day of family and friendship meetings and gatherings.

PN19686

?---Yes.

That's not an assumption that's made there, professor. Is that not the case?---To quote Rose:

PN19688

One can no longer assume that Sunday is a day for family gatherings and deemed the least desirable day to work.

PN19689

But again, if you look at it in context, professor, which as you've indicated initially is a key issue to understanding this report, his previous sentence is:

PN19690

Rather than assume that weekends are deemed less desirable days to work, the study allows for an examination of which days and times different employees either prefer to work,

PN19691

et cetera. So it's not making an assumption one way or the other?---In the - - -

PN19692

Do you agree with that?

PN19693

JUSTICE ROSS: Are you putting a question to the witness, or are you arguing with him?

PN19694

MR BREHAS: No, I'm asking the witness if he agrees with it?---Well, I said I don't.

PN19695

Okay. In page 12 of your report in paragraph 19 - sorry, just bear with me - you refer to well established literature that would predict that cuts to penalty rates which are deemed to be unfair would be reciprocated by reductions in effort and input. I just wanted you to clarify, professor, is this in the context of existing employees only, as opposed to prospective or new employees?---This refers to the modelling of how one goes about modelling labour markets. And what's being argued is that there is an abundance of evidence that under reasonable circumstances arbitrary cuts to pay - or pay cuts that are deemed to be arbitrary - has the effect of reducing the quantity and quality of effort inputted by workers or employees per unit of time and increasing turnover. So it's the modelling that needs - and one has to be open to that possibility if one is thinking about what might be deemed to be - might be deemed to be unfair cuts to pay.

MORRIS ALTMAN

XXN MR BREHAS

PN19696

I understand. But is it in the context - again, the issue of context that you've indicated right at the outset when I started this cross-examination, which is crucial - is that context in the context of existing employees?---It's a model. Economic models, econometrically applied, deals - it applies to any workers in any context. It's something one has to take into consideration, as opposed to the traditional

model, which makes the prior assumption that effort will be constant and turnover will not be affected by changes to wage rates or to compensation to workers.

PN19697

But, professor, wouldn't it be a case that a reciprocated reduction in effort input could only arise in relation to existing employees, not prospective or new employees that have not yet joined the workforce?---If you have - if you're talking about how - first of all, yes. In the first instance you're looking at current employees. If you have new employees it really depends on the information that they have with regards to the wage structure and the wage set-up and how they respond to that structure and the history that has built up towards the particular wage structure.

PN19698

Professor, if we go on to page 17 of your report, the point that you made in paragraph 29 about:

PN19699

Overall, a person's WTA being willingness to accept and willingness to pay is context dependent.

PN19700

Again, that's a key element:

PN19701

Change the context and you will tend to change your valuation of the product. The same can be said of a person's valuation of work time.

PN19702

You then go on in paragraph 30 to address a new issue, and in that you come up with a hypothetical alternative, being:

PN19703

What would be the WTA if employees, being the survey subjects, are told that their Sunday pay equals a higher than normal wage rate? And as a result then that becomes the new normal; penalty rates then become the new normal.

PN19704

Would it be correct, professor, that if you change that hypothetical to refer to the job being dependent on reduced penalty rates, that the job then becomes the new reference point in that scenario?---I'm not exactly sure what you're getting at.

PN19705

So you've come up with an alternative scenario, though. You said that if employees are told that their Sunday pay equals a higher than normal wage rate, you've come up with a more specific question that could be constructed around survey participants being told that the Sunday wage rate is being cut through a 50 per cent reduction, and then they can be asked:

*** MORRIS ALTMAN

XXN MR BREHAS

PN19706

By how much is their level of utility wellbeing affected by this cut, and how would this wage rate be increased -

PN19707

et cetera. And then you say:

PN19708

The wage rate plus penalty rate becomes the new reference point.

PN19709

Equally, based on that argument, could you not say that the employee's job is dependent on a reduction to an employee's penalty rate, in which event that then becomes the new reference point?---Well, one could make that argument, but it would be a false argument.

PN19710

Why would it be a false argument?---Why would it be a false argument? Because you're making the assumption that workers under the current penalty rate should lose their jobs or will lose their jobs.

PN19711

No, I'm not making that assumption?---No?

PN19712

I'm saying that if an employer tells workers, "Look, unfortunately I cannot afford you because the penalty rates are much too high. You are employed specifically to work on days that attract penalty rates, therefore I can no longer continue employing you." That's not an assumption, that's something that exists and arises in day to day life, professor?---Well, actually, the argument here that's being made in the Rose report and my response to the Rose report is that one assumption is that if you - well, you're actually making a few assumptions. One assumption is that if you cut penalty rates, firms will be able to employ - will be employing more and more workers. Based on economic theory and empirical evidence there is really very - there's nothing strong - there's no strong evidence to back up that type of argument. If you're making a statement like that as a credible threat to people, "If you don't accept a fall in penalty rates you'll lose your job," except employers don't make that determination; the determination is made here by the honourable panel.

PN19713

I think you're going on to other issues which I haven't asked, professor.

Ultimately the point of the question is that it's possible for us to include a number of variables as to what ultimately becomes a reference point which you refer to in that paragraph. Is that not correct, professor?---There could be different reference points, but it has to pertain to the willingness to accept to loss aversion and the value of time.

MORRIS ALTMAN

XXN MR BREHAS

PN19714

I put it to you, professor, that the Rose report and the response by Professor Rose to your comments are acceptable and are the correct ways of framing the relevant

anchor points, as opposed to the hypothetical alternatives that you've proposed, given that there are so many other alternative variables that can be presented?---No. His arguments are hypothetical too. He's assuming - for example, he assumes in his model that people are subject, in the world of work, to free choice.

PN19715

That's an interesting issue, professor, because you later on refer to coercion, which I will get onto. But leaving that aside, if we can move on to page 18 of your report, paragraph 32. You refer to the Rose report estimates not being contextualised in terms of the literature, and related evidence on loss aversion, and higher reductions in penalty rates would impact on the level of well-being of employees. Again, could you clarify that you're referring to the level of wellbeing of existing employees?---I am referring to the wellbeing of existing employees and how one's model could predict the wellbeing of future employees in terms of economic theory.

PN19716

I find that difficult to understand, professor, given the evidence that you gave earlier about how a person is impacted once they are in possession of a thing?---Yes.

PN19717

And given that future employees are not in possession of that theoretical thing. It doesn't make much sense to me. Could you clarify your answer?---Well, overall, to quote economic theory, the lower one's income, the lower one's level of utility or wellbeing. People who possess that thing - let's say that higher wage - will be directly affected, according to the theory, by a cut in penalty rates. If people are - let's say the next group of people are all employed only - there's a new group of people, a new batch of people are employed under a new type of regime, that might have a different effect on their level of wellbeing, but that only depends on whether or not these people have any relationship, any context, any understanding of what existed prior to that.

PN19718

Okay. If we go on to page - sorry, give me a second, professor - paragraph 36 of your report, when you state, "By assuming that work" - this is on page 20:

PN19719

By assuming that work scheduling is voluntary when it's not, the WTA is also based downward. When individuals are forced to work on Sunday -

*** MORRIS ALTMAN

XXN MR BREHAS

PN19720

et cetera. Can you please clarify what you mean by individuals being forced to work on Sunday, professor?---If people have no choice or have little choice as to work scheduling; if one of the days that they have to work to keep their job is Sunday, that implies that they're not being afforded the opportunity to choose between, let's say, you want to work on Monday as opposed to Sunday; if you work on Monday as opposed to Sunday, are there different type of options that

will afford to you? So there can be a voluntary trade-off between working on Sunday and some other day, or a public holiday and some other day.

PN19721

So are you saying, professor, that employees who work on Sundays or Saturdays, et cetera, and do so because they are forced to do so, not because they have willingly entered into an agreement ---?---I think you have to - one has to survey individuals. In this particular survey experiment one has to determine - one could design questions just asking people, in terms of getting the basic data, what options do they have with regards to working on Sunday, Saturday, holidays?

PN19722

I put it to you, professor, that employees in Australia in the normal course of events are not ever forced to work or coerced to work, and if they are, that that is illegal, and it's not - we're talking about is just purely legal circumstances, whereas the reference to an employee being forced to work on a Sunday is a very exceptional, rare situation, someone being forced to do something illegal?---People's options in the labour market in Australia are - there are constraints faced by - legal constraints faced by employees. People are put in situations where they have little choice - as compared to the experiment , relative to the experiment - as to whether or not they work on Sunday and Saturday - - -

PN19723

On what basis do you make those comments, Professor?---Sorry?

PN19724

On what basis do you make those comments?---I will put it to you in a different way: the survey experiment assumes complete free choice. In the real world labour markets, in Australia and elsewhere, workers are not subject to complete free choice in terms of their work scheduling.

PN19725

So are you saying that they are not students who would prefer to work on Sundays or Saturdays or people with carers commitments or even people that want to supplement their income with a second job, that would prefer to do that?---That's - that's not the point. You have people – you have some people who want to work Sunday under certain conditions. You have some people don't want to work Sunday under certain conditions.

PN19726

When you're talking about "some people" can you quantify that, Professor? Do you have any critical data to support your views that people are being forced to work on Sundays?---Well, I think actually, if one runs an experiment based on the assumption of free choice, that designing that experiment, one has to provide evidence that in a labour market in Australia, there is complete free choice in the work scheduling. There is no such evidence.

MORRIS ALTMAN

XXN MR BREHAS

PN19727

But you're making statements of the effect of employees having to be compensated for the displeasure of working during a non-preferred day. Now, isn't that an assumption, Professor, as opposed to evidence that it could actually---?---What I've said is you need an experimental design to allow people – to allow us to determine the extent to which Sunday work is freely chosen. Under what circumstances would people work on Sunday or on a public holiday? That's not done in this experiment.

PN19728

Thank you, Professor, but I believe your answers are a bit evasive. You're not directly responding to the questions.

PN19729

MR MOORE: Well, I object to that remark by my learned friend.

PN19730

JUSTICE ROSS: If you've got another question to put, put another question.

PN19731

MR BREHAS: Yes. Just in relation to that same paragraph, Professor, paragraph 36, you also refer to the scheduling of work which is arbitrarily determined by the employer. Again, Professor, do you have any empirical data to support that statement because it could just as easily be argued that that scheduling is actually determined by society and the demands of the community as opposed to the employer?---It's determined by a variety of factors. The point is, it's not freely chosen. Whoever determines – it's exogenously given, it's not determined by the employee. And that has an impact.

PN19732

Well, I put it to you that those statements are based on assumptions, Professor, and that you have no empirical data to support those statements in that paragraph 36?---Well, there is evidence. I can get it for you, if you would like.

PN19733

But you haven't referred to that in this report, have you?---No, I haven't. My objective – my task was to look and to interrogate the Rose report which makes – which generates conclusions based on the assumption of voluntary choice, complete voluntary choice on the labour market. Such complete voluntary choice does not exist.

PN19734

Professor, in page 24 of your report, the last sentence you state:

PN19735

Only if the benefits allow our society to compensate the losers for the loss in utility or well-being if cuts to penalty rates proceed without generating a net utility loss to society.

*** MORRIS ALTMAN

XXN MR BREHAS

PN19736

Again, Professor, the reference there to "the losers" as you described them, would those be existing employees?---In standard economic analysis, when you make a change in society to determine the welfare benefits of its change, would you look at current individuals affected by those changes.

PN19737

Thank you?---So you're looking at current employees who have a change. What's the net benefit to society, given point in time of making that change? And to do that, you actually have to – if you want to design a survey experiment, you have to determine empirically what those losses and gains might be. And I have no idea what they might be because I haven't – there is no – this particular scenario, there's been no evidence provided.

PN19738

Thank you, Professor, no further questions from me.

PN19739

JUSTICE ROSS: Any further cross-examination of this witness? Any re-examination?

PN19740

MR MOORE: Just briefly, your Honour.

RE-EXAMINATION BY MR MOORE

[1.54 PM]

PN19741

MR MOORE: Professor Altman, you agreed to a proposition that if, in the survey, if the survey participants were told what the award rate plus penalty rate it was, that their – the responses of the survey would be biased in favour of the award rate and you agreed to that proposition?---Because a person's evaluation of time is always impacted by the default or the reference point people are provided with, whatever that reference point may be. So if you choose a lower reference point, on average, people will move to that lower reference point or default, or higher reference point, you'll move to that higher point in reference.

PN19742

And just one other matter, you agreed to a proposition that because employees know their current rate of pay, the loss aversion effect would be accounted for in the survey experiment, but you said all other things remaining the same and that's what's critical. Can you explain why you put that emphasis upon "all other things remaining the same"?---If a person's – well, I'm not sure I agree to that first point that you mentioned. But in terms of all other things remaining the same, because if you're assuming that no other circumstances are changing, then you could come to a certain conclusion. But if other events change as a consequence of a change in a particular variable, then a person's preference and valuations might change, as a consequence.

MORRIS ALTMAN

RXN MR MOORE

PN19743

Thank you. Nothing further.

PN19744

JUSTICE ROSS: Thank you very much for your evidence?---Thank you.

<THE WITNESS WITHDREW

[1.56 PM]

PN19745

JUSTICE ROSS: Just bear with us for a moment. We will adjourn for two minutes while we reconstitute, because I've got three other matters to deal with. Mr Izzo, you might want to confer with your colleagues about the estimates in relation to cross-examination. Professor Altman was supposed to take 45 minutes. I'm getting a little anxious about next week. And I don't understand, are there two representatives now for the Retail Employers?

PN19746

MR BORGEEST: No, your Honour, I've actually specifically been requested to attend, given that decision context of the Transport Industry Award.

PN19747

JUSTICE ROSS: I see. All right. Anyway, Mr Izzo, if you just check with them and I know these things are difficult, but three times might be making me a bit anxious about next week, that's all.

PN19748

MR IZZO: (Indistinct.)

PN19749

MR BORGEEST: Thank you, your Honour, and may I be excused, I will not be attending the rest of these proceedings today.

PN19750

JUSTICE ROSS: Yes, certainly.

PN19751

MR BORGEEST: Thank you.

PN19752

JUSTICE ROSS: We'll adjourn.

SHORT ADJOURNMENT

[1.58 PM]

RESUMED

[2.07 PM]

PN19753

VICE PRESIDENT CATANZARITI: Thank you, we have on the phone the APESMA witness, I believe.

*** MORRIS ALTMAN

RXN MR MOORE

PN19754

MR BORGEEST: Your Honours and Commissioners, I just announce a change in appearance. In addition to my other capacity, I'm appearing for APESMA today for the purpose of calling this witness.

PN19755

VICE PRESIDENT CATANZARITI: You'll call your witness on the phone and we'll have him sworn in.

<APESMA WITNESS, SWORN

[2.08 PM]

EXAMINATION-IN-CHIEF BY MR BORGEEST

[2.08 PM]

PN19756

MR BORGEEST: Mr Witness, this is Tony Borgeest speaking, I'm the lawyer for APESMA today. Mr Witness, just for the transcript, can you please repeat your full name and your address?---Yes, (name supplied) of (address supplied).

PN19757

And what's our occupation?---A pharmacist.

PN19758

Mr Witness, have you prepared a statement in connection with these proceedings?---Yes.

PN19759

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

PN19760

Are you looking at a statement of about one and a half pages long with 12 numbered paragraphs and dated- - -?---Yes, that's correct.

PN19761

And dated 5 October?---Yes.

PN19762

Your Honours, I tender that statement. I do have copies.

PN19763

VICE PRESIDENT CATANZARITI: I think that's APESMA 1, isn't it?

**EXHIBIT #APESMA1 STATEMENT OF APESMA WITNESS
DATED 5 OCTOBER 2015**

PN19764

MR BORGEEST: Mr Witness, just stay on the line, there's another gentleman to ask you some questions.

PN19765

VICE PRESIDENT CATANZARITI: Mr Seck.

*** APESMA WITNESS

XN MR BORGEEST

CROSS-EXAMINATION BY MR SECK

[2.09 PM]

PN19766

MR SECK: Mr Witness, my name is Michael Seck, I'm the barrister representing the Pharmacy Guild. Can you hear me?---Yes.

PN19767

Mr Witness, I'm just going to ask you some questions about matters contained in your statement. You say in paragraph 4 of your statement that you completed your internship at [REDACTED] and you worked there on a part-time basis for a period of time?---Yeah.

PN19768

Can you tell the Commission the opening hours of [REDACTED] during your employment there?---Sure. They were open 9.00 until 5.30 Monday to Thursday; 9.00 until 6.00 on Fridays; and 9.00 until 2.30 on a Saturday.

PN19769

I gather from your answer it did not open on Sundays?---Not open on Sundays.

PN19770

Did it open on public holidays?---Only on Easter Saturday.

PN19771

Mr Witness, I gather [REDACTED] is an outer suburb of [REDACTED], is that so?---That's correct.

PN19772

When you worked at [REDACTED], did you during that time wish to work full-time?---I did.

PN19773

But that employment was not available to you, that's correct?---Yes, that's - that's correct.

PN19774

During the time that you were employed at [REDACTED], were you seeking full-time work outside of the pharmacy, elsewhere?---Yeah.

PN19775

You were unable to find it for the duration of your employment at [REDACTED], that is so until your recent job?---I sought it for a short period and then my boss was able to give me more hours.

PN19776

But obviously it was desirable for you to be fully occupied as a full-time employee?---Yes.

APESMA WITNESS

XN MR BORGEEST

APESMA WITNESS

XXN MR SECK

PN19777

You found full-time work in your current role at [REDACTED] in [REDACTED], that is so?---That's correct.

PN19778

The proprietor of [REDACTED] is [REDACTED], that's correct?---Correct.

PN19779

[REDACTED] surname is spelt, for the record, [REDACTED]? That is right?---[REDACTED].

PN19780

Pardon me?---Yeah.

PN19781

Mr Witness, you spoke to [REDACTED] about seeking full-time work, that is right?---Correct.

PN19782

She initially said to you that she wanted someone to work part-time, that's correct?---She said that's what she was initially looking for but she was happy to consider putting somebody on full-time because her business had grown.

PN19783

After your first conversation with you about possible employment with [REDACTED], she told you she'd try to find someone part-time first, that's correct?---That's correct, although she had trouble finding a pharmacist so she was really looking for anyone who would accept employment there.

PN19784

After a period of time from that initial discussion that you had with [REDACTED], she approached you and offered you full-time employment, that's correct?---Yes, the following day.

PN19785

Can you tell the Commission the opening hours or the trading hours for [REDACTED]?---The current pharmacy is open 8.30 until 8.00 Monday to Friday, and open 8.30 until 5.00 on Saturdays and not open Sundays.

PN19786

Do you know the opening hours for public holidays?---It's variable. The public holidays that I have been there for, the boss has worked them. Just a half day, 8.30 until 1.00 I believe.

PN19787

Mr Witness, I understand that the [REDACTED] is next to a [REDACTED], that's correct?---Correct.

PN19788

[REDACTED] opens at the same times as the [REDACTED], that's correct?---That's correct, and some extra hours, like on public holidays.

PN19789

Is it correct that you've never worked on a Sunday as a pharmacist?---That's correct.

PN19790

Would it be correct that what you've done is sought to find employment where you're not required to work on a Sunday?---Yes. Yeah.

PN19791

Have you been aware of jobs where you would be required to work on a Sunday and you've just declined to pursue those opportunities?---Correct.

PN19792

That was whilst you were working part-time at your previous job at [REDACTED] [REDACTED], that's right?---Yes. The - there was a situation where the boss floated the idea of working on a Sunday but he didn't want to go ahead with that.

PN19793

That was a pharmacy in the [REDACTED] area, that's right?---Correct.

PN19794

Did that involve working full-time or part-time?---Sorry. That was the [REDACTED] [REDACTED] that I was mentioning.

PN19795

I understand. [REDACTED], however, never during your employment opened on a Sunday, did it?---No, it never did.

PN19796

Did you ever seek employment outside of [REDACTED] where it involved working on a Sunday?---No.

PN19797

Did you ever see jobs available which would involve working more time or more hours than you were working at [REDACTED] but it involved working on a Sunday?---I have seen several - several jobs. In fact the majority of jobs seem to include work on a Sunday and that's, yeah, both part-time and full-time work.

PN19798

Even though you were seeking full-time work, you decided to not pursue those opportunities because it involved working on a Sunday, that's correct?---Correct. It was not - not worth the difference.

PN19799

That was a conscious voluntary choice that you made?---It was one that I felt I had to make for the sake of my life and my family.

*** APESMA WITNESS

XXN MR SECK

PN19800

Can I also then ask you about your observations about the industry at the moment? Have you heard, as a pharmacist, any feedback from customers about

the fact that the pharmacy is not open on a Sunday?---Not really. Most customers don't expect us to be open on a Sunday.

PN19801

Sorry, when you say that, have you received direct feedback on this particular issue from customers?---Yeah. Well, we - in my previous job, like I said, the boss discussed the possibility of opening on a Sunday for the sake of servicing nursing homes, which we didn't end up going ahead with and a few small discussions with some of our customers gave us the impression that they didn't feel they needed us to be open on a Sunday. There are some that find it helpful but, yeah, some do and some don't.

PN19802

So are you saying that the feedback that you've heard is mixed?---Yes.

PN19803

Would it be the case, Mr Witness, that in seeking full-time employment, you were seeking to increase your income so you could support your young family?---The full-time work that I'm currently in is - sorry, can you repeat the question, sorry?

PN19804

In seeking full-time employment, Mr Witness, you were seeking to derive income so you could support your young family, that's right?---Yes, that's correct.

PN19805

If it was a matter for you that you couldn't support your young family but there were jobs available on a Sunday, you would take up a job which required you to work on a Sunday, that's right, isn't it?---Sorry, can you repeat that again? I couldn't quite hear.

PN19806

If you had to find a job to support your family and the only jobs available were ones which required you to work on a Sunday, you would make yourself available to work on a Sunday, would that be correct?---No, I don't think I would be able to. I'd have to make significant changes in my personal life to a point where I'm not sure I could - I could meet that. I would find some way to make it work without having to work on a Sunday.

PN19807

Is the primary issue for you working on Sundays the fact that you attend Sunday church?---I'm sorry, I can't hear you again.

PN19808

Sorry. Is the primary issue for you deciding not to work on Sundays the fact that you attend church on Sundays?---That is the primary reason and the - yeah, there's only one meeting of church each week, so it's not really negotiable.

PN19809

No further questions.

PN19810

VICE PRESIDENT CATANZARITI: Any re-examination?

PN19811

MR BORGEEST: No re-examination.

PN19812

VICE PRESIDENT CATANZARITI: Thank you, Mr Witness. You're excused. We will take a short adjournment to allow the next witness to be summoned.

<THE WITNESS WITHDREW

[2.21 PM]

SHORT ADJOURNMENT

[2.21 PM]

RESUMED

[2.25 PM]

< [REDACTED], SWORN

[2.26 PM]

EXAMINATION-IN-CHIEF BY MR PARKES

[2.26 PM]

PN19813

MR PARKES: Mr [REDACTED], it's Greg Parkes from the Restaurant and Catering Association. Can you hear me okay in Brisbane?---Yes, I hear you fine.

PN19814

Thank you. Can you please state your full name again for the record?---My name is [REDACTED].

PN19815

You are the business development manager for [REDACTED], is that correct?---That is correct.

PN19816

Did you prepare a statement for this case?---Yes, I did.

PN19817

Do you have a copy of that statement with you?---Yes, I do.

PN19818

Is that statement 10 paragraphs dated 10 August 2015?---Yes, it is.

PN19819

Thank you. In relation to objections, I have indicated to the Bench that the parties have reached agreement with this statement on the basis that the word "excessively" be removed from paragraph 9 and that Restaurant and Catering Industrial will not read the entire paragraph 10.

XN MR PARKES

PN19820

VICE PRESIDENT CATANZARITI: Thank you. With those redactions, this will become RCI21.

**EXHIBIT #RCI21 STATEMENT OF MR [REDACTED]
DATED 10/08/15.**

PN19821

MR PARKES: Thank you.

PN19822

VICE PRESIDENT CATANZARITI: Mr Moore?

PN19823

MR MOORE: Thank you, Your Honour.

CROSS-EXAMINATION BY MR MOORE

[2.28 PM]

PN19824

Mr [REDACTED], can you hear me?---Yes, I can.

PN19825

Thank you. My name is Steven Moore. I'm a barrister for the SDA. I just want to ask you a few questions about your statement?---Yes.

PN19826

You are the business development manager, so I take it your job, in very general terms, is to grow the [REDACTED]?---That is correct, yes.

PN19827

By the sounds of things you've had quite a bit of success. You started with one outlet in 2010, is that right?---That is correct, yes.

PN19828

When did that open in 2010 approximately?---That was in the - I believe the September/October of 2010.

PN19829

Thank you. You have grown the business successfully from one in 2010 through to I think nine outlets now, is that right?---Yes, that's correct.

PN19830

Are there further openings planned?---Yes. We're working through potential sites at the moment.

PN19831

How many sites have you got under consideration to open up further outlets?---Approximately three more at this stage.

PN19832

Are they in Queensland?---Yes, all in Queensland, yes.

XXN MR MOORE

PN19833

In paragraph 4 you say that the operating times are typically 9 am to 7 pm weekdays. I had a look at your website. It tells me that three of your outlets trade to 9.30 pm on Thursday nights. Is that correct?---Yes, that's correct.

PN19834

I take it that that's because, in the case of those three outlets, the level of trade justifies them opening to the later hour of 9.30?---Yes. And all the current outlets are in shopping centres, so that's the late-night trade night.

PN19835

I see. And in relation to the other six outlets, the level of trade doesn't justify you opening past about 7 pm on weeknights?---Correct.

PN19836

All right. Thank you. In paragraph 7 you say:

PN19837

The company would consider extending its evening trading hours across all outlets if the late-night penalty was altered from 9 pm to midnight.

PN19838

By that you mean if the 10 per cent penalty or the applicable penalty to apply for late-night work was shifted back, as the commencement point, to midnight, rather than 9 pm. Is that right?---That's right, yes.

PN19839

Yes, I see. It's the case, though, that you understand that under the Fast Food Industry Award as it presently stands, penalty rates don't impede you can't impede you in any way from opening up until 9 pm on weeknights. Understand that?---Yes, we do. Yes.

PN19840

Yes. And as you've indicated a few moments ago, all of your stores except for three, I think you said - I withdraw that. As you indicated before, all of the stores - all of the outlets that you have open until 7 pm on weeknights, save for the three, I think you said, which open later on Thursdays. That's the situation?---Yes, it is. Yes.

PN19841

So it would follow, then, that the existing penalty rates don't operate to restrict you from expanding your trading hours from 7 pm to 9 pm in respect of those six outlets. Do you accept that?---In respect to the current outlets, that is correct.

PN19842

Yes. So I would suggest to you that your claim in paragraph 7 that the company would consider extending its evening trading hours across all outlets if the late-night penalty was altered out to midnight, you would accept that that's an overstatement because you already, in relation to all but three of your stores, only trade to 7 pm. Do you accept that's so?---Yes, I would agree to that. Yes.

XXN MR MOORE

PN19843

Thank you. Now, you say that - in paragraph 8 you say that:

PN19844

Any reduction in the Sunday and public holiday penalty rate would benefit the company.

PN19845

And you go on to say:

PN19846

And would boost casual employment in each outlet.

PN19847

So putting aside that last remark, that it would boost casual employment in each outlet, I take it what you're saying is that any cut in Sunday and public holiday penalty rates would benefit the company simply by reducing the dollars you pay per hour on those days?---Yes.

PN19848

And you say in relation to the statement that it would boost casual employment in each outlet. I take it you haven't sat down and done any - worked out how a reduction in Sunday and public holiday penalties would specifically result in an increase in casual employment?---Not specific numbers, no.

PN19849

No. So this is just really just surmise or speculation on your behalf as to what might happen. Is that a fair comment?---That's a fair comment, yes.

PN19850

Nothing further, thank you.

PN19851

VICE PRESIDENT CATANZARITI: You're excused, Mr Witness. Thank you very much for your attendance today?---Thank you.

<THE WITNESS WITHDREW

[2.34 PM]

PN19852

VICE PRESIDENT CATANZARITI: Is there anything outstanding of any of the parties?

PN19853

MR MOORE: Happily, no.

PN19854

VICE PRESIDENT CATANZARITI: Mr Gotting?

XXN MR MOORE

PN19855

SPEAKER: Mr Dixon looked like he was going to say something before we adjourned last time and he didn't get a chance.

PN19856

MR GOTTING: The only intention was to seek leave to be excused from this afternoon.

PN19857

VICE PRESIDENT CATANZARITI: He was very keen.

PN19858

MR GOTTING: But to answer your Honour the Vice President's question, no.

PN19859

VICE PRESIDENT CATANZARITI: On that basis the matter is adjourned until tomorrow.

ADJOURNED UNTIL WEDNESDAY, 28 OCTOBER 2015 [2.34 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

NICOLA AGOSTINO, AFFIRMEDPN19049
EXAMINATION-IN-CHIEF BY MR DIXONPN19049
EXHIBIT #AI GROUP 7 FIRST AFFIDAVIT OF NICOLA AGOSTINO PN19062
EXHIBIT #AI GROUP 8 SECOND AFFIDAVIT OF NICOLA AGOSTINO PN19062
CROSS-EXAMINATION BY MR MOOREPN19063
EXHIBIT #SDA27 COPY OF TIME OUT BOOKS FROM [REDACTED] TO [REDACTED]PN19093
EXHIBIT #SDA28 GRAPH DEPICTING TIME OUT BOOK ENTRIES .PN19107
RE-EXAMINATION BY MR DIXONPN19110
THE WITNESS WITHDREWPN19152
DAVID RONALD EAGLES, SWORN..........PN19157
EXAMINATION-IN-CHIEF BY MR DIXONPN19157
EXHIBIT #AI GROUP 9 FIRST AFFIDAVIT OF DAVID EAGLES DATED 10/08/2015, CONTAINING CONFIDENTIAL EXHIBITSPN19172
EXHIBIT #AI GROUP 10 SECOND AFFIDAVIT OF DAVID EAGLES DATED 06/10/2015PN19172
CROSS-EXAMINATION BY MR MOOREPN19173
EXHIBIT #SDA29 BOOK WHERE EMPLOYEES RECORD TEMPORARY AVAILABILITY FROM MR EAGLES' BUSINESS..........PN19196
EXHIBIT #SDA30 GRAPHS AND AVERAGES DRAWN FROM THE BOOK WHERE EMPLOYEES RECORD TEMPORARY AVAILABILITY FROM MR EAGLES' BUSINESS..........PN19208
RE-EXAMINATION BY MR DIXONPN19215
THE WITNESS WITHDREWPN19230
PATRICIA ANN DEASY, AFFIRMEDPN19236
EXAMINATION-IN-CHIEF BY MR DIXONPN19236
THE WITNESS WITHDREWPN19248

PATRICIA ANN DEASY, RECALLED ON FORMER AFFIRMATION .	PN19248
EXAMINATION-IN-CHIEF BY MR DIXON, CONTINUING	PN19248
EXHIBIT #AI GROUP 11 AMENDED FIRST AFFIDAVIT OF PATRICIA DEASY	PN19252
CROSS-EXAMINATION BY MR MOORE	PN19252
RE-EXAMINATION BY MR DIXON	PN19329
THE WITNESS WITHDREW	PN19357
MORRIS ALTMAN, AFFIRMED.....	PN19361
EXAMINATION-IN-CHIEF BY MR MOORE	PN19361
EXHIBIT #SDA31 REPORT OF PROFESSOR MORRIS ALTMAN DATED 01/09/2015	PN19370
CROSS-EXAMINATION BY MR IZZO.....	PN19399
CROSS-EXAMINATION BY MR WHEELAHAN.....	PN19634
CROSS-EXAMINATION BY MR BREHAS	PN19656
RE-EXAMINATION BY MR MOORE	PN19740
THE WITNESS WITHDREW	PN19744
APESMA WITNESS, SWORN	PN19755
EXAMINATION-IN-CHIEF BY MR BORGEEST.....	PN19755
EXHIBIT #APESMA1 STATEMENT OF APESMA WITNESS DATED 5 OCTOBER 2015	PN19763
CROSS-EXAMINATION BY MR SECK.....	PN19765
THE WITNESS WITHDREW	PN19812
[REDACTED], SWORN.....	PN19812
EXAMINATION-IN-CHIEF BY MR PARKES	PN19812
EXHIBIT #RCI21 STATEMENT OF MR [REDACTED] [REDACTED] DATED 10/08/15.....	PN19820
CROSS-EXAMINATION BY MR MOORE	PN19823
THE WITNESS WITHDREW	PN19851