



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*  
**TRANSCRIPT IN CONFIDENCE**

1052654

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

**AM2014/305**

**s.156 - 4 yearly review of modern awards**

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

**Melbourne**

**9.00 AM, FRIDAY, 6 NOVEMBER 2015**

**Continued from 5/11/2015**

PN22124

MR DOWLING: Just one preliminary matter from me. You will recall on Wednesday afternoon I mentioned the emails that had exchanged between Mr Parker and Mr Hart were not tendered at the time Mr Parker was recalled. I can confirm that Ms Burke has had some communication with Mr Clarke who represents Restaurant Catering Industrial and they don't oppose the tender of that material. I have five copies of each of those emails.

PN22125

JUSTICE ROSS: Thanks, Mr Dowling. We'll mark that SDA35.

PN22126

MR DOWLING: Thank you, your Honour.

PN22127

JUSTICE ROSS: I'm sorry, UV29. Sorry, Mr Moore.

**EXHIBIT #UV29 EMAILS EXCHANGED BETWEEN MR PARKER  
AND MR HART**

PN22128

MR DOWLING: I did also mentioned, your Honour, the other day on the same afternoon the common material. Can I just tell your Honour that there's some ongoing communication about the best form in which to provide that. So we'll leave that for another day.

PN22129

JUSTICE ROSS: That's fine.

PN22130

MR DOWLING: Thank you, your Honour.

PN22131

JUSTICE ROSS: Yes, Mr Moore.

PN22132

MR MOORE: Your Honour, before I call Dr Watson, can I deal with one aspect in relation to this evidence - his proposed evidence. There are two reports that we'll seek to tender in a moment.

PN22133

JUSTICE ROSS: Yes.

PN22134

MR MOORE: The second, if I could ask the Bench to go to that.

PN22135

JUSTICE ROSS: Is that the Peetz Watson report?

PN22136

MR MOORE: Correct, dated 2 September 2015.

PN22137

JUSTICE ROSS: Yes.

PN22138

MR MOORE: If the Bench turns to page 20 of that report, in the second paragraph which commences, "The ABS data".

PN22139

JUSTICE ROSS: Yes.

PN22140

MR MOORE: In the second line there's a sentence which commences, "However" - well, I'll read it in full.

PN22141

*However, any full-time student over 25 years is likely to be going back to university after a period of work, and either supporting themselves or at least partly reliant on their partner.*

PN22142

We do not seek to read that sentence. The other matter to note before I call Dr Watson is as the Bench is not doubt aware, Professor Peetz hasn't been required for cross-examination. I call Dr Watson.

PN22143

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

PN22144

DR WATSON: My name is Ian Watson and my address is [REDACTED].

**<IAN JEFFREY WATSON, AFFIRMED**

**[9.13 AM]**

**EXAMINATION-IN-CHIEF BY MR MOORE**

**[9.14 AM]**

PN22145

MR MOORE: Dr Watson, could you please restate for the Commission your full name and professional address?---Yes, my full name is Ian Jeffrey Watson and my address is [REDACTED] and I have affiliations with Macquarie University and University of New South Wales, both in Sydney.

PN22146

Thank you, Dr Watson. What's your occupation, Dr Watson?---I'm a freelance researcher and an academic researcher.

PN22147

I'll have handed to you two documents. Could you please look at the document entitled;

\*\*\* IAN JEFFREY WATSON

XN MR MOORE

PN22148

*Employee earnings in the National Retail Industry, a report for the Shop Distributive and Allied Employees Association SDA, dated 30 April 2015.*

PN22149

Do you have that in front of you?---Yes, I do.

PN22150

Is that a copy of a report that you prepared for this proceeding?---It is.

PN22151

Do the contents of that report accurately reflect the opinions formed by you on the basis of your expertise?---They do.

PN22152

I tender that if the Commission pleases.

PN22153

JUSTICE ROSS: Mark that exhibit SDA35.

**EXHIBIT #SDA35 COPY REPORT PREPARED BY DR WATSON  
DATED 30/04/2015**

PN22154

MR MOORE: Thank you. Dr Watson, if you could look at the other report which is entitled;

PN22155

*Characteristics of the workforce in the National Retail Industry with regard to age, weekend work and student status, dated 2 September 2015.*

PN22156

And it bears the name of David Peetz and your name as well. Is that a copy of a report you co-authored for use in this proceeding?---It is.

PN22157

Thank you. If you could turn to the second page, which is the contents page. You'll see that it's there set out that there are four substantive parts of the report of introduction, and the HILDA data, and the third section ABS data and a conclusion. Could I ask you to confirm in relation to chapter 1, do the contents of that chapter accurately reflect the opinions formed by you on the basis of your expertise?---They do.

PN22158

In relation to chapter 2, does the contents of that chapter accurately reflect the opinions formed by you on the basis of your expertise?---They also do, yes.

\*\*\* IAN JEFFREY WATSON

XN MR MOORE

PN22159

In relation to chapter 4, the conclusion, does that chapter and the contents of it accurately reflect the opinions formed by you on the basis of your expertise?---They do.

PN22160

In relation to - could you tell the Commission about the authorship of chapter 3, based on your knowledge?---Yes. That's the chapter that David Peetz authored. We each read each other's chapters and conferred about it, gave each other feedback, but essentially chapter 2 is solely my authorship and chapter 3 and is solely David Peetz's authorship.

PN22161

So you've read chapter 3?---Yes.

PN22162

Do you agree with its contents?---I think it's a very good account of the data. It's David's work and I see no problems at all with it, I would agree with his conclusions, yes.

PN22163

Thank you. I tender the report, if the Commission pleases.

PN22164

JUSTICE ROSS: Mark that exhibit SDA36.

**EXHIBIT #SDA36 COPY REPORT CO-AUTHORED BY DR  
WATSON DATED 02/09/2015**

PN22165

MR MOORE: I just want to, with the leave of the Commission and having raised this with my learned friend Mr Dixon, just raise one short matter with the witness.

PN22166

JUSTICE ROSS: Yes.

PN22167

MR MOORE: In relation to the second report, Dr Watson, in chapter 2 that you authored dealing with HILDA data, if I could ask you to turn to page 9. You'll see that there's a table 11 there and immediately under the table the source is identified as being HILDA release 13, population employees in retail (ANZIC Division G Australia 2013), you see that?---Yes.

PN22168

You'll see that there's a similar description and by that I refer in particular to the words "ANZIC Division G" appearing through most of the tables in this chapter including, for example, table 13 on page 10, table 15 on page 11, table 17, you see that?---Yes.

\*\*\* IAN JEFFREY WATSON

XN MR MOORE

PN22169

If you can go to chapter 3 and turn to page 15. You'll see table 20 there is headed "Employed aged 24 or under in retail", and there's data set out, and the source is ABS FOS 2011/2013 employees in retail, and if you look at the following table, table 21, there's a similar reference and in particular the words "population employees in retail". If I could ask you to turn to page 17 and the two tables there set out in tables 22 and 23, the source is identified and the word "population employees in retail"?--Yes.

PN22170

Based upon your collaboration with Professor Peetz in preparing this report, are you able to say whether the references in the tables on pages 17 and 15 to employees in retail, whether that corresponds to the references in your - the chapter that you authored in your report in which you refer to ANZIC Division G?--Yes, it's the same category. All of the report co-authored with David Peetz is ANZIC Division G. That's what retail means and that's what retail ANZIC Division G means. It's only in the first report in the retail earnings report for 30 April where I draw a distinction between ANZIC and retail, and I explain what that distinction is. That does not apply in the second report with David Peetz. His data did not have the capacity to make the distinction that I drew in the first report, so it is purely Division G, even though we're using different nomenclature in our footnotes to our tables.

PN22171

Thank you, Dr Watson. Nothing further.

PN22172

JUSTICE ROSS: Cross-examination.

PN22173

MR DIXON: Matter for clarification, we don't seek to cross-examine, if the Commission pleases.

PN22174

JUSTICE ROSS: Any other cross-examination?

PN22175

MR MOORE: No re-examination.

PN22176

JUSTICE ROSS: Well, no. Any questions for Dr Watson? Thank you, Dr Watson. You're excused.

<THE WITNESS WITHDREW

[9.21 AM]

PN22177

We might have done that in writing but - - -

PN22178

MR MOORE: We had understood that he was required for cross-examination but - - -

\*\*\* IAN JEFFREY WATSON

XN MR MOORE

PN22179

JUSTICE ROSS: Not by Mr Izzo, I'm assuming because Mr Izzo, who can hear us I understand but we can't hear him. I've always longed for that circumstance, Mr Izzo. I take it you don't require the first two witnesses for cross-examination, is that right? Just nod. Well, I'll take that as no, you don't require them. Next witness.

PN22180

MR SECK: Your Honour, the next witness is Steven Armstrong. Your Honour will recall on the last occasion where we were dealing with Mr Armstrong the parties were directed to go away and seek to sort out any issues in relation to Mr Armstrong's statement, in particular which parts are to be read as a submission, and to provide the objective data that supports a number of the factual propositions contained in Dr Armstrong's statement.

PN22181

The parties have undertaken that process and I'm glad to say that we've resolved those particular issues. Before I call Dr Armstrong I might hand up some documents which reflect the agreement between the parties and the additional data. Might I firstly hand up a copy of Mr Armstrong's statement which has highlights in yellow, containing - which sets out the parts which are to be read as a submission. The Bench will see that there are a number of parts which are highlighted in yellow, the parties agree that those parts of Mr Armstrong's affidavit should be read as a submission.

PN22182

JUSTICE ROSS: Right.

PN22183

MR SECK: The second issue is the Bench hopefully should have a binder containing documents which - - -

PN22184

JUSTICE ROSS: Two volumes?

PN22185

MR SECK: Two volumes, and there should be hopefully a table which the Bench has been provided which sets out the relevant paragraph number of Mr Armstrong's statement, the relevant part of the paragraph, the source and location of the document and then to the extent there's any reference to surveys, some information about the surveys. Might I hand up a revised document which contains some small modifications to address some of the issues raised by the SDA.

PN22186

JUSTICE ROSS: Was the document that you refer to headed "Steven Armstrong affidavit supporting documents" and it's a table?

PN22187

MR SECK: I think that's correct, your Honour.

PN22188

JUSTICE ROSS: It goes through from paragraph 6 to 109, or thereabouts.

PN22189

MR SECK: That's so, your Honour. There's an updated one which I wish to hand up to the Bench, so might I hand that up. The Bench will see what we've - it's only in a few spots that there are some mark-ups in that table. Those mark-ups reflect the additions or modifications which have been made since this table has been filed with the Commission. I won't take the Bench through that but they're plainly apparent on the face of the table. So might I ask the Bench to substitute the table which was provided initially with this revised table containing the mark-ups.

PN22190

The third issue is - - -

PN22191

JUSTICE ROSS: Just before you leave the second one, I've just had a quick look through, I can't see any mark-ups. Can you take me to one?

PN22192

MR SECK: Yes, of course, your Honour. The first one is in paragraph 35.

PN22193

JUSTICE ROSS: I see, it's the underlined section.

PN22194

MR SECK: The underlined part.

PN22195

JUSTICE ROSS: Yes. No, I saw that because I thought it was a formatting change because of the note on the right.

PN22196

MR SECK: Anything underlined is a mark-up.

PN22197

JUSTICE ROSS: I see, so 49 et cetera.

PN22198

MR SECK: Indeed.

PN22199

JUSTICE ROSS: So you just want us to replace this in the folders.

PN22200

MR SECK: Yes, your Honour.

PN22201

JUSTICE ROSS: Right.

PN22202

MR SECK: Next in paragraph 35 there's a reference to an additional document which is called Program Specific Guidelines Pharmacy Practice Initiatives and the Bench will note there it says "a copy to be provided". Might I hand up a copy of that document.

PN22203

SPEAKER: Your Honour, whilst that's happening, I'm sorry to interrupt my friend, I wonder if Ms Burke and I might be excused?

PN22204

JUSTICE ROSS: Yes, certainly.

PN22205

SPEAKER: Thank you.

PN22206

JUSTICE ROSS: Do you want us to mark that separately?

PN22207

MR SECK: Yes, your Honour.

PN22208

JUSTICE ROSS: We'll mark that exhibit PG28.

**EXHIBIT #PG28 DOCUMENT ENTITLED PROGRAM SPECIFIC  
GUIDELINES PHARMACY PRACTICE INITIATIVES**

PN22209

MR SECK: Your Honour, that addresses the documents which I need to hand up or tender. Might I note that the Bench should hopefully have a supplementary statement of Mr Armstrong, which is dated the 4th of November?

PN22210

JUSTICE ROSS: Yes.

PN22211

MR SECK: And it has a number of annexures to it. That statement is designed to address issues in relation to the survey evidence to which Mr Armstrong makes reference in his statement, plus some other issues about the calculation or determination of various figures contained in his affidavit, so I will obviously ask Mr Armstrong to affirm its contents as being true and correct at the appropriate time.

PN22212

JUSTICE ROSS: Mm-hm.

PN22213

MR SECK: Those documents together address the concerns that were raised by the Bench on the last occasion. Subject to those matters I call Steven Armstrong.

**<STEVEN BRUCE ARMSTRONG, AFFIRMED**

**[9.29 AM]**

PN22214

MR SECK: Mr Armstrong, what is your occupation?---I am an economist by profession. I'm not currently employed in that role. I am also a business owner.

PN22215

Mr Armstrong, you've prepared one affidavit and one statement in these proceedings, that's correct?---Yes.

PN22216

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

PN22217

Might I take you to your affidavit? That's the one affirmed on the 13th of August 2015?---That's right, yes.

PN22218

And it has 112 paragraphs?---Yes.

PN22219

Have you read that affidavit recently, Mr Armstrong?---Yes, I have.

PN22220

Do you wish to make any changes to the affidavit?---Yes, there are three small changes that I would like to make just for the purposes of clarity and completeness.

PN22221

Could you take us through those changes?---I can. The first is in relation to paragraph 36 which currently states:

PN22222

*The payment under the 5CPA for the PPI program was based on how many consultations an accredited pharmacy conducted.*

PN22223

For clarity I'd like to insert the words 'in part' between the word 'based' and 'on' so that would read "...payment under the 5CPA for the PPI program was based in part on...", and also the word 'consultations' to be more consistent with the government terminology around the program should be 'services', so that will read:

PN22224

*...payment under the 5CPA for the PPI program was based in part on how many services an accredited pharmacy conducted.*

\*\*\* STEVEN BRUCE ARMSTRONG

XN MR SECK

PN22225

Thank you. What's the second change you wish to make?---The second change relates to paragraph 57, just again for clarity and completeness, the second sentence of paragraph 57 states:

PN22226

*The PBS is a government subsidised scheme that provides free medicines for pensioners.*

PN22227

I would like to insert the words 'subsidised or' between 'provides' and 'free', so it would read:

PN22228

*The PBS is a government subsidised scheme that provides subsidised or free medicines for pensioners.*

PN22229

And I would like to insert also the words 'subsidised or' before the second 'free' in that sentence, so the last part of that sentence would read:

PN22230

*A schedule of essential medicines subsidised or free of charge for others in the community.*

PN22231

Thank you, and what's the third amendment you wish to make?---The third amendment is in relation to paragraph 112. This is just a wording error in the final line of that paragraph, which stated "access the come of the benefits." That should state "access some of the benefits", so please replace the words 'the come' with the word 'some'.

PN22232

Might I ask one more question about your affidavit, Mr Armstrong? Can I take you to page – I'm using the page numbers at the bottom – 13 at paragraph 84?---Yes.

PN22233

You'll see there, it says:

PN22234

*Overall the Guild estimate a pharmacy gross profits would fall by an average of \$90,000 in 2014 to 2015 due to price disclosure.*

PN22235

I understand you wish to just change that number slightly?---Yes, to be consistent with the original estimation I would like to change that number to \$88,725.

PN22236

You were responsible for undertaking those calculations, that's correct?---Yes.

\*\*\* STEVEN BRUCE ARMSTRONG

XN MR SECK

PN22237

You set out how you did those calculations in your second statement, that's so? Is that right?---Yes.

PN22238

Those calculations are set out in annexure A to your supplementary statement dated the 4th of November 2015?---Yes, that is a summary of the calculations.

PN22239

The calculations you undertook in annexure A, the methodology for it is set out in paragraph 4 of your statement, that's right?---Yes.

PN22240

Subject to those changes, Mr Armstrong, do you wish to make any other changes to your affidavit?---No.

PN22241

Have you read your statement recently, the second statement?---Yes, I have.

PN22242

Do you wish to make any changes to that statement?---No.

PN22243

You should also have two folders of documents in front of you, Mr Armstrong, that's right?---Yes.

PN22244

And you also should have a table which is headed: Steven Armstrong, affidavit supporting documents, that's right?---Yes, I do have that.

PN22245

And it goes from using the numbers in the left-hand column, paragraph 6 to paragraph 109?---Yes.

PN22246

You've seen that table beforehand?---Yes, I have.

PN22247

And you were involved in preparing that table, is that so?---Yes.

PN22248

The table sets out the source document supporting various factual propositions containing your affidavit, that's correct?---Yes, it does.

PN22249

You've read that?---Yes.

PN22250

Can I ask you firstly whether or not, subject to the changes that we've made, your affidavit is true and correct to the best of your knowledge and belief?---Yes, it is.

\*\*\* STEVEN BRUCE ARMSTRONG

XN MR SECK

PN22251

Are the contents of your statement dated the 4th of November true and correct to the best of your knowledge and belief?---Yes.

PN22252

Are the contents of the table which I've just shown you true and correct to the best of your knowledge and belief?---Yes.

PN22253

Can I show you one more – you should have another document, Mr Armstrong, which is a document entitled: The Program-Specific Guidelines Pharmacy Practice Initiatives PPI. Do you have that?---Yes, I do.

PN22254

That's the document referred to in paragraph 35 of the table, that's right?---Just let me confirm that. Yes, it is.

PN22255

I read the affidavit and tender the statement and the table with the accompanying documents.

PN22256

JUSTICE ROSS: We'll mark the affidavit as exhibit PG29. PG29 will also encompass the two folders and the table. And we'll mark the statement as exhibit PG30.

**EXHIBIT #PG29 AFFIDAVIT OF STEVEN ARMSTRONG DATED  
13/08/2015 WITH ACCOMPANYING DOCUMENTS  
ENCOMPASSING TWO FOLDERS AND TABLE**

**EXHIBIT #PG30 STATEMENT OF STEVEN ARMSTRONG DATED  
04/11/2015**

PN22257

MR SECK: As it may please.

**CROSS-EXAMINATION BY MR MOORE**

**[9.38 AM]**

PN22258

MR MOORE: Good morning, Mr Armstrong. I'd just like to ask you some questions. Mr Armstrong, you say in your affidavit in paragraph 5 that after leaving your role with the Guild you commenced working as a consultant economist with the Guild?---Yes.

PN22259

Are you still so engaged?---On an 'as needs' basis on a contractual basis. I'm no longer employed by the Guild.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22260

I understand that, so you have an ongoing engagement on a needs basis, is that what you're saying?---On a needs basis, yes.

PN22261

Is there a retainer by which you're engaged?---No, there is no retainer.

PN22262

On what sorts of tasks are you engaged upon by the Guild?---I have been engaged in relation to matters that have related to work I conducted while at the Guild, such as there's an annual conference that is held overseas that I generally attended and presented a paper to, and I was asked not to attend that conference but to provide some assistance with the preparation of the relevant documents this year for that particular conference. That is one example.

PN22263

Have there been other engagements since you finished with the Guild? I think you finished with the Guild in July, is that right?---Yes, I finished with the Guild formally in July. There have been no other engagements other than in relation to this case at the moment.

PN22264

You give evidence in your affidavit and in your statement about the regulatory framework of the Community Pharmacy industry and the operation of the Community Pharmacy Agreements, and I'd just like to begin with asking you some questions to better understand your knowledge of those agreements and their effect on pharmacies. You say in paragraph 3 that you were working within the economic analysis area of the Guild since 1998, and you referred to when you ceased as Chief Economist and Group Chief Executive of the Pharmacy Viability Group, namely in July this year. What is the Pharmacy Viability Group? Can you tell the Commission briefly what that was?---The Pharmacy Viability Group is one of I believe four groups in the structure of the Pharmacy Guild's national secretariat. It undertakes work in relation to the analysis of the pharmacy trends, particularly economic and financial trends, impacts of changes to government policy, the management of communications to members regarding changes to the Pharmaceutical Benefits Scheme and the monitoring of changes around the Pharmaceutical Benefits Scheme as they occur. An area of the Pharmacy Viability Group, which I wasn't responsible for, as per my title there was joint group executives; the other part of the group managed the implementation of certain programs on behalf of the Commonwealth, programs funded through the Community Pharmacy Agreements. There's a range of other areas, particularly to do with the regulation of pharmacy, the scheduling of medicines; we provide submissions to reviews of scheduling of medicines and other matters pertaining to pharmacy. We also have a stream of activity in relation electronic health as it expands into pharmacy.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22265

Thank you. In paragraph 4(a) you refer to your role in managing a team of around 14 people involved in a number of things. In (a) you refer to people involved in an analysis of economic trends that have an impact on pharmacies in the

regulatory environment in which they operate. Can you outline briefly what that work generally involved?---Yes, I can. The work involves the conduct of surveys in relation to Community Pharmacy and the collection of the data, the monitoring of official data from other sources, including official government data in relation to the PBS, data sourced from the Australian Bureau of Statistics, the Australian Taxation Office and a range of other relevant sources that are useful in helping us to keep an up-to-date understanding of the state of the industry in terms of any changes that are occurring, and modelling of the impact of changes or potential changes to government policies or the operating environment in which pharmacies exist, and in some cases the provision of tools and services and information to the Guild's members in relation to all of those matters that may assist them.

PN22266

Thank you. One of the matters you mentioned was modelling of the impact of potential changes or changes to government policy, so I take it by that that would include modelling the impact of the Fifth Community Pharmacy Agreement and also the potential or anticipated impact of the Sixth Community Pharmacy Agreement?---It does include those, yes.

PN22267

So that was work that you had overall responsibility for?---Yes.

PN22268

You mentioned provision of tools to members. Can you just elaborate upon that?---Yes, I can. Two of those tools, one is a tool or a system that we refer to as ScriptMAP. The MAP stands for modelling and analysis for pharmacy. That has been an ongoing service provided to members since 2008 which provides information to members based on their own prescription volume information of the impact of changes to pricing of medicines on the PBS.

PN22269

I think you were going to mention another model or tool?---Sorry, yes. Another example of the provision of information to members would be the Guild Digest and the survey that we conduct annually. We publish annually the Guild Digest and also provide a service called Guild Digest Interactive, which is an online dynamic version of the Guild Digest.

PN22270

I think you mentioned before a model or tool called ScriptMAP. Is that spelt one word s-c-r-i-p-t then capital M-A-P?---Correct.

PN22271

So the development and implementation of that tool was within your purview in your role with the Guild?---Yes, it was.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22272

And in simple terms, that was a tool which enabled the Guild to communicate with its members so as to estimate or forecast the effects of different regulatory

changes on pharmacies? Is that a reasonable description?---Yes, specifically those regulatory changes being changes in PBS pricing and remuneration.

PN22273

Changes in PBS and what sorry?---Changes in the prices of PBS medicines and the remuneration received for dispensing PBS medicines.

PN22274

So was the ScriptMAP tool a tool that was used within the Guild to estimate the effect on pharmacies of 6CPA?---We used related systems, not specifically the ScriptMAP system but the modelling that was used was consistent and related.

PN22275

I see, so modelling was - going back a step, there was modelling undertaken to forecast and estimate the effects of 6CPA on pharmacies?---Yes.

PN22276

That modelling forecasting was developed on the basis of various analytical methods, no doubt, but including ScriptMAP?---Including the same modelling framework as ScriptMAP. ScriptMAP is designed as a particular - for a particular purpose to provide reports on a per pharmacy basis, for an individual pharmacy. So the modelling that we conducted for the Sixth agreements and for other more broad changes to the industry in recent years is consistent with that but is not on a per pharmacy basis.

PN22277

You say in paragraph 4(f) that one of your roles was managing a team of people involved in the negotiation and management of the five year Community Pharmacy Agreement with the federal government, in particular the remuneration arrangements and drug pricing arrangements. So I take it you were centrally involved in the formulation of the Guild's position for the negotiations for the Community Pharmacy agreements, by which I mean let us say 5CPA and 6CPA?---Yes, the position though is determined by our national council who are our elected - the Guild's elected officials.

PN22278

Yes?---But it was partly based on advice provided from the staff of the Guild including myself and my team.

PN22279

So the position ultimately adopted by the Guild is a matter for the elected officer bearers, but you were centrally involved in the provision of advice through - as part of a secretariat and as the senior executive in the secretariat?---Yes.

PN22280

You were involved in the actual negotiations for 6CPA?---Yes.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22281

How many agreements have you - well, I take it there's been six Community Pharmacy agreements. Were you involved in that way in formulating the Guild's

position and advising officers of the Guild in relation to all of those Community Pharmacy agreements?---In relation to the Fourth and Fifth Community Pharmacy Agreements, I was involved. At that stage I wasn't managing the group, I was part of the relevant team. But yes, apart from that distinction, yes.

PN22282

Thank you?---Only in relation to the Fourth, Fifth and Sixth agreements.

PN22283

So in the context of let us say the Sixth Community Pharmacy Agreement negotiations, I take it as part of your role in overseeing a team of people whose role it was to provide advice as secretariat to the elected officer bearers of the Guild, you developed or your teams developed models of typical or average pharmacy operations to try and gauge the potential effects of different remunerations proposed or advanced in the negotiations for that agreement?---Yes.

PN22284

You would have been able to develop those sorts of models by reference to detailed information and data collected by the Guild from its members and other information, no doubt?---Yes.

PN22285

Thank you. Collectively, that information, by which I mean information which the Guild itself derives from its members and other information, ABS data no doubt and other regulatory information, you're in a position or your teams are in a position to develop an understanding of the profile, if you like, of the average or typical pharmacy?---Yes.

PN22286

Thank you. You were able to develop an understanding of the profile characteristics if you like of an average and typical pharmacy including how different aspects of the regulatory regime might bear upon their revenue and profitability?---Yes.

PN22287

The key factors which bear upon the revenue of the pharmacy - I'm sorry, no doubt you have - given your experience you've got detailed knowledge of these matters but I want to try and simplify it. This would be - is this correct, the key factors that determine the revenue of a pharmacy would include the following, and I'll go through a list with you. 1) the volume of scripts filled by a pharmacy each year?---Yes.

PN22288

The proportion of the scripts sold by a pharmacy or filled by a pharmacy which are of a lower or higher cost, the cost of the scripts?---Yes.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22289

The proportion of the scripts dispensed under the co-payment level?---Yes, that has some bearing, yes.

PN22290

How the scripts dispensed under the co-payment are priced, that is whether at PBS levels or otherwise?---Yes.

PN22291

Would I be right in thinking that as a rule of thumb the proportion of the income or revenue that pharmacies receive which is referable to remuneration from dispensing medication is approximately 70 per cent?---There are different ways of describing remuneration. I do need to clarify that. In relation to remuneration for PBS medicines, as that word is used by government and generally by the Guild I would say no.

PN22292

I understand what you mean. I have perhaps been unclear but thank you for that clarification. The proportion - is it your understanding that for a typical average pharmacy, the proportion of its income which is referable to remuneration paid for dispensing medications is usually around 70 per cent?---For revenue derived both from the government and consumers in relation to the dispensing of PBS medicines, it is approximately 65 to 70 per cent.

PN22293

In paragraph 70 of your affidavit you say that the Guild estimates that the gross profits would fall by an average of \$90,000 in 2014/2015 due to price disclosure, and you make the same reference in paragraph 84. So I assume that that estimate was derived from some sort of algorithm or model, rather than being plucked from thin air?---Yes.

PN22294

I assume that that algorithm or model included information and factors of the type that I've just asked you about, namely the volume of scripts filled by pharmacies, the proportion of lower and higher cost scripts sold, the proportion of scripts dispensed under the co-payment, those sorts of things plus others?---To clarify, that analysis did not include the under co-payment prescriptions, so - - -

PN22295

It didn't include that?---To that extent and a couple of other points, it actually - which is why we describe it as a conservative estimate. The table at attachment A of my second statement dated 4 November, is the summary table of that calculation.

PN22296

Thank you. I'll come back to that in a moment. I noticed on the Guild website an article saying farewell to you by I think it's the chief executive or the executive director David Quilty, and he commends you in your unparalleled knowledge and understanding of the economics of pharmacy and your ability, I quote;

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22297

*To translate this knowledge into practical and implementable solutions that enhance business outcomes for pharmacies has been invaluable for the Guild and our members.*

PN22298

So going back to some evidence you gave before, an important part of your role has been in general terms deploying and applying that modelling and analytical capacity which you and your teams have developed, for the benefit of members so that they can understand the potential effect of changes in the regulatory regime on their business?---Yes.

PN22299

Thank you. Reading the - there's a large volume of material that's annexed to your affidavit which I've enjoyed reading, would I be correct to assume that - my understanding of the Guild Digest material that I've seen in there indicates that at the present time on average - I withdraw that - an average Community Pharmacy dispenses around 50,000 prescriptions per annum. Do you agree with that?---Yes, approximately.

PN22300

The other understanding I've developed is that the average Community Pharmacy dispenses about 20 per cent of its scripts under the co-payment level. Is that a reasonable proposition?---Yes.

PN22301

Those scripts are either priced under the co-payment level at either the PBS price or a discounted price?---Yes, that - yes, there is no regulation around the pricing.

PN22302

One would assume for the average - if one wanted to model the average Community Pharmacy you would look at the PBS price?---For under co-payment, just to clarify?

PN22303

Yes?---For under co-payment prescriptions?

PN22304

Yes?---No.

PN22305

So under the co-payment level it could be either a PBS or at a discounted price?---Yes.

PN22306

In paragraph 78 of your affidavit you say that as a result of the increase in the number of pharmacies, on average each pharmacy has seen very little growth in prescription volume?---Yes.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22307

The material that the Guild has supplied in this proceeding, I'm sorry I'll withdraw that. The material provided with your affidavit and statement in this proceeding, including a document - and I can take you to it if necessary but you may know it off the top of your head, so I'll deal with it in a general way first to see if you're able to deal with it at that level. I was looking at a document called;

PN22308

*PBS information management section pharmaceutical policy branch expenditure prescriptions, 12 months to 30 June 2014.*

PN22309

That document records that the number of pharmacies increased by 3.35 per cent between July 2011 and 30 June 2013. Does that accord with your understanding?---Yes, that would be.

PN22310

That over the same period, the number of prescriptions dispensed increased by 4.87 per cent. Does that accord with your understanding?---Without checking the document, but yes that's - - -

PN22311

Sounds about right?---Yes.

PN22312

Is it reasonable to say that at the present time for an average Community Pharmacy the expected annual volume in growth, having regard to the percentages that I've just referred to, is about 3.5 per cent?---No.

PN22313

Well, it seemed to me that 3.5 per cent was a reasonable estimate of the expected annual growth in volume of prescriptions having regard to the fact that the number of pharmacies increased by 3.35 per cent between 2011 and 2013, and the number of prescriptions in that time increased by 4.87 per cent. My understanding from the material is that a useful working measure of the average pharmacy's expected annual volume of growth prescription volume is 3.5 per cent. Is that not the case?---No, that is - if I can explain in relation to the two figures that you've just provided, if the growth over a two year period in the number of prescriptions is 4.9 per cent for the whole population but the number of pharmacies within that population grows by 3.3 per cent, I believe you stated, then the growth in the number of prescriptions per pharmacy in that period will be approximately 1.5 per cent, which is the difference between those two percentage growth figures.

PN22314

So you say that the - - -?---And that's over - sorry, that is over a two year period, so annualised that is less than one per cent growth.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22315

The Sixth Community Pharmacy Agreement provides for a \$1 discount in relation to all applicable scripts or an optional discount of \$1 on all applicable scripts from 1 January next year, that's correct?---Yes.

PN22316

That's not a feature of the Fifth - that wasn't a feature of the Fifth Community Pharmacy Agreement?---No.

PN22317

So from January next year there will be an option for pharmacies to apply the \$1 discount to co-payments?---Yes.

PN22318

Now you're aware that the Guild has made available to its members through its website something called the 6CPA forecaster?---I am aware of that. I haven't been involved in its development or ongoing management because it has post-dated when I left the Guild. I am aware of it though.

PN22319

You're aware of it. Well, I'll ask you this question before I perhaps show you a document. The Guild says on its website that;

PN22320

*The 6CPA forecaster is a brand new online tool for projecting the impact of 6CPA on pharmacies dispensary remuneration over the next five years.*

PN22321

Is that your understanding?---Yes.

PN22322

The Guild also says on its website that;

PN22323

*The forecaster, the 6CPA forecaster compares a pharmacy's 2014 to 2015 dispensary remuneration with projected dispensary remuneration and contrasts this with the estimated value of remuneration had 5CPA continued unchanged.*

PN22324

Is that your understanding?---Yes.

PN22325

The Guild website says that what the forecaster does is;

PN22326

*Illustrates the impact of 6CPA over the next five years and allows pharmacies to specify the parameters of their business and forecast the change in official remuneration.*

PN22327

Is that your understanding?---I wasn't involved in the formulation of that sentence. I can't comment on that.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22328

Is it your understanding that the forecaster provides an accurate general estimate of pharmacies' core remuneration?---As I say, I haven't been involved in the development of that so I would expect that the Guild intends it to be that.

PN22329

If the witness could please be shown this document. Mr Armstrong, this is a document that we printed off the Guild website and it's the document that I've just been asking you some questions about. You'll see on the second page, on the fourth paragraph down;

PN22330

*The forecaster covers the core remuneration forecasting capacity of ScriptMAP but is not a personalised report based on your own dispensing data. While it will provide an accurate general estimate the specific variations of your dispensing will not be reflected in the forecast.*

PN22331

So it's your understanding that the model, if I can call it that, to which you referred earlier in your evidence, ScriptMAP, has been deployed as it were to aid communications with Guild members about the potential impact of 6CPA through this forecaster?---The remuneration forecasting capacity of ScriptMAP was only one component of the ScriptMAP system.

PN22332

I see.---The remuneration does not encompass the full range of what I would refer to as gross profit per prescription from dispensing. It is part of that model.

PN22333

Yes, so ScriptMAP can do more but it can do this?---ScriptMAP does that in part but provided a more complete picture.

PN22334

I seek to tender that document, if the Commission pleases.

PN22335

JUSTICE ROSS: I mark that exhibit SDA37.

**EXHIBIT #SDA37 DOCUMENT PRINTED FROM GUILD WEBSITE  
RE SCRIPTMAP**

PN22336

MR MOORE: Is it your understanding that for a pharmacy to make use of the 6CPA Forecaster it allows a pharmacy to input data into certain fields to generate certain forecasts and estimates?---Yes, that is my understanding.

PN22337

In particular, what it invites a user of the system to do is to input in relation to the 2014/2015 financial year the pharmacy's annual script volume?---Yes.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22338

As well as the proportion of scripts dispensed under the co-payment level?---Yes.

PN22339

And how scripts under the co-payment level are to be priced, whether it PBS or otherwise?---Yes.

PN22340

And it also allows a user to enter into the system whether a pharmacy mainly sells higher, average or lower cost scripts?---Yes.

PN22341

Before the user enters that data into the system, default values are pre-entered into the forecaster for each of the indicia that I've just asked you about?---I'm not familiar with those default values. I can't comment on that.

PN22342

Well, you've just stated you're not familiar with those default values, but are you aware that putting aside what the actual values precisely are that the way the system works is that when one enters into the forecaster there's an invitation for the user to enter into the data of the type I just asked you a moment ago, but that on the screen what there is is certain default data in relation to each of those indicia?---Yes.

PN22343

And you understand that the default data that appears in relation to those indicia is intended to represent the position in respect of the average community pharmacy?---I cannot comment on that.

PN22344

I'm not asking whether it does, I'm asking whether or not it's your understanding that the default data is intended to represent the position of the average community pharmacy?---Without knowing what the default values are, which I don't, I cannot comment on that.

PN22345

I'll show you the document. Have you got this one - three pages? Mr Armstrong, let me tell you what the provenance of the document is. Again, this has been printed off the Guild website; after one logs in to the 6CPA Forecaster, and the page that first appears, I'm instructed, is the first page you have in front of you. Mr Armstrong, have you seen that page before or a page like that, on the screen or in hard copy?---I have seen an early version of this page, I have not seen this page – an early draft version, I will clarify.

PN22346

I see, yes, and you'll see that there is a section at the top Instructions, and it states that the 6CPA Forecaster shows the impact of the Sixth Community Pharmacy Agreement on your pharmacy's dispensary remuneration over the next 5 years, and going down to the third paragraph, Mr Armstrong, it states:

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22347

*To use the 6CPA Forecaster enter values to reflect your pharmacy's 2014/2015 situation in the boxes on the left on this input page. Default values represent the average community pharmacy.*

PN22348

And then in the next paragraph:

PN22349

*Anticipated values for 2015 to 2020 should be entered into the boxes on the right on this input page. Default values shown represent the average community pharmacy, and these values may be altered to show the impact of varying business models.*

PN22350

Do you see that?---Yes.

PN22351

So I can tell you that the page you have in front of you, in the bottom half of the page which has the two columns, values as at 2014/15 financial year and expected values 2015-2020. The values that appear in each of those fields were the values which appeared on the screen when one enters the forecaster, do you follow me?---I do follow you.

PN22352

So do you understand then that what appears there in those two columns are the default values?---Yes.

PN22353

Thank you. Excuse me a moment. If you look at page 2, which is headed: Official 6CPA Remuneration – Change Relative to 2014 to 2015, just take a moment to look over that document.---Yes.

PN22354

Have you seen perhaps not that precise document although maybe perhaps that precise document either in hard copy or soft copy before or an early draft of it?---I have seen the format of that page; I haven't seen those precise figures.

PN22355

Thank you. Can you just confirm my understanding of looking at this document, page 2, and I should say before I go on, this is a page that is able to be generated – I'll withdraw that. Excuse me a moment. After a user looks at page 1 with the default entries there is a tab that one can move across at the top of the page. If you go to page 3 for a moment you'll see at the top of the page there there are some tabs?---Yes.

PN22356

So a user can, when they see the default entries on page 1, can tab across to look at the different pages. Do you follow me?---Yes.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22357

And what page 2 is is one of the pages that becomes visible on the screen. Having looked at page 1 containing the default data, one can then click on the tab to see page 2, do you follow me?---Yes.

PN22358

So what page 2 is, on its face, is official 6CPA remuneration change relative to 2014-2015 by reference to the default data on page 1, do you agree with that?---Yes.

PN22359

Thank you. Looking at page 2, do you agree with this? So what it shows in numerical and graphical form is a comparison between the projected official remuneration under 6CPA until 2020, as compared to the projected remuneration over that time under 5CPA?---Sorry, which page are you referring to?

PN22360

Page 2. Would you like me to repeat that?---Yes, please.

PN22361

Do you agree that what it shows is a numerical and graphical representation of a comparison between the projected official remuneration under 6CPA until 2020 as compared to the projected remuneration over that time under 5CPA?---No.

PN22362

Thank you, my learned junior clarifies what page 2 shows is the comparison between the projected official remuneration under 6CPA until 2020 as compared to the official remuneration in 2014-2015?---In the 2014/15 financial year, yes.

PN22363

Thank you, and that is done using the default values on page 1?---That would be my understanding, yes.

PN22364

So what it shows – still on page 2, Mr Armstrong – is that, to take as an illustration the 2016-2017 year, is that 6CPA for the average community pharmacy using the default entries would receive official remuneration of \$78,305 in excess of the remuneration received in the year 2014-2015, is that a correct statement of what appears there?---Based on the default values, yes.

PN22365

And one sees that represented in the bar graph in the yellowish-shaded colour, that's right?---Yes.

PN22366

And one can do that comparison, or it generates that comparison for each of the years through to 2020, that's right?---That appears to be what those figures represent, yes.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22367

So looking at the numbers in the table at the first half of the page, what it's showing is that for the average pharmacy, using the default values over the 5 years ending in 2020, the average pharmacy would receive \$662,619 more than the 2014-2015 levels. Is that a correct statement of what this document shows?---No.

PN22368

Well, you see the number \$662,619?---Yes.

PN22369

Is that number not the sum of the numbers that appear in the bottom row, that is, change in official remuneration relative to 2014-2015?---Yes.

PN22370

All right, so you add those numbers up and you get \$662,619, that's right?---Yes.

PN22371

And that is the amount which it is forecast that the average pharmacy, using the default values on page 1, it is forecast that that pharmacy would receive in excess of the remuneration it was otherwise forecast they would receive under 5CPA?---No.

PN22372

All right, well, can you tell the Commission your understanding of what the number \$662,619 is?---Okay. The reason I say no – two reasons, because, sorry, you again referred to a comparison against what would happen under the 5CPA.

PN22373

I did in that question, yes.---That wasn't the only reason. That was one reason. The other reason is, as per my earlier discussion around prescription volume, I do not agree that 3.5 per cent represents the annual average volume growth rate that can be expected over the next 5 years.

PN22374

I see, and the default values on page 1 include in the right-hand column what is your expected annual volume growth rate to 3.5 per cent?---Yes.

PN22375

And you take issue with that?---Yes, I do.

PN22376

You think it's a lower number?---Yes.

PN22377

All right, excuse me a moment. I understand your evidence that you don't accept that the expected annual volume growth rate is 3.5 per cent, I understand that.---I do not accept that.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22378

Can I ask you to assume that that is the expected annual volume growth rate and answer this question, that on the basis that that is the percentage expected annual

volume growth rate, and having regard to the other default entries in page 1 of this document, what the number \$662,619 represents is the – that for the average pharmacy using the default values over the 5 years ending in 2020 it would receive \$662,619 more than 2014-2015 levels?---In terms of official 6CPA remuneration, which is one part of the income derived from dispensing, yes.

PN22379

Thank you. Now, turning to page 3 – excuse me a moment – sorry, thank you. Going back to page 2 and the graph on page 2, the bar graph which is in grey is the 5CPA trajectory, that's right?---Based on their default values would be my understanding, yes.

PN22380

Yes, that's right.---Yes.

PN22381

So that graph tells us that putting aside 6CPA that it was forecast that over the period from 2015 through to 2020 the official remuneration under 5CPA would increase each year in line with the grey bars on that graph?---That was not the forecast at the time of the negotiating of the agreement.

PN22382

I don't think that's quite addressed my question. Can I - - -?---Can you rephrase the question?

PN22383

Certainly. As I read this graph, what it tells me is that – and I'm looking at the grey bar graph – is that putting aside 6CPA, under the default values, the average pharmacy on page 1, it was forecast that the official remuneration for dispensing would increase each year from 2015 through to 2020 under 5CPA?---Under the default values, yes, however I do not agree that that represents the average balance.

PN22384

Let's go to page 3, and to explain again, this is a – by reference to the default data on page 1, one can click on a tab which you can see at the top of page 3 relative to 5CPA trajectory and one then sees this page. Do you follow me?---Yes.

PN22385

What this page does, as you pointed out - I'll withdraw that. What this page does is compare the difference the average pharmacy would receive by way of official remuneration for dispensing, using the default values under 6CPA as compared to 5CPA forecast?---Compared to the 5CPA trajectory using the default values, yes.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22386

Thank you. To illustrate the point the table and graph shows that for the 2015/2016 year it is forecast that the average pharmacy would receive additional funding of \$53,938 over the funding projected under 5CPA for that period. Is that correct description of what this document on its face shows?---Only based on the default values, which again I do not agree represents the average pharmacy.

PN22387

You're agreeing with my statement, are you, subject to the qualification you just made?---Yes.

PN22388

To complete the examination of page 3, what the table shows is that over the period of 6CPA it is forecast that the average pharmacy using the default values on page 1 would receive \$509,211 more than what it had been projected to receive under 5CPA. Is that an accurate description of what this document shows?---Only if you refer to - specifically refer to official remuneration. As I said earlier, that does not provide a complete picture of the impact on the pharmacy incomes or gross profitability of the agreement. I also clarify that I do not agree that it represents the average pharmacy.

PN22389

This three page document is only speaking of remuneration, agree?---Yes.

PN22390

It says nothing about profitability, agree?---Yes.

PN22391

So accepting that, do you accept that what the document is showing, this is page 3 of the document, is showing that over the period of 6CPA, that is out to 2020, it is forecast that the average pharmacy using the default values on page 1 would receive \$509,211 more than what it had been projected to receive under 5CPA. Agree with that, that's what the document shows?---The document shows that. Again, I do not agree that that represents the average pharmacy.

PN22392

Thank you for that. Just bear with me a moment.

PN22393

JUSTICE ROSS: It might be a convenient time, Mr Moore.

PN22394

MR MOORE: Certainly, your Honour.

PN22395

JUSTICE ROSS: We might take a 10 minute break.

**<THE WITNESS WITHDREW** [10.31 AM]

**SHORT ADJOURNMENT** [10.31 AM]

**RESUMED** [10.43 AM]

**<STEVEN BRUCE ARMSTRONG, RECALLED ON FORMER AFFIRMATION** [10.43 AM]

**CROSS-EXAMINATION BY MR MOORE, CONTINUING** [10.43 AM]

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22396

JUSTICE ROSS: Yes, Mr Moore.

PN22397

MR MOORE: Thank you, your Honour. Before I continue I'll tender that document before I forget.

PN22398

JUSTICE ROSS: That's 6CPA forecaster?

PN22399

MR MOORE: Yes, the three page document, thank you, your Honour.

PN22400

JUSTICE ROSS: We'll mark that exhibit SDA38.

**EXHIBIT #SDA38 6CPA FORECASTER**

PN22401

MR MOORE: Mr Armstrong, before the break you'd given evidence to the effect if I might hopefully accurately paraphrase that you didn't accept or disagreed with some of the averages that appear as the defaults in the document that I've been asking you about. Can I ask you to look at page 1 of that document. You've given evidence earlier today that in relation to the first entry on the left-hand column;

PN22402

*What is your annual script volume 2014-2015?*

PN22403

you accepted that the average volume is about 50,000. Do you recall that?---Yes.

PN22404

You, in relation to the next entry;

PN22405

*How many scripts do you dispense under the co-payment level?*

PN22406

you also agreed that the average is about 20 per cent. Do you recall that?---Yes.

PN22407

In relation to the next entry;

PN22408

*How do you price scripts under the co-payment level?*

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22409

can I suggest to you that the default value in that field at PBS price is a reasonable value if one wants to ascertain the average position, for an average Community Pharmacy?---No.

PN22410

Do you accept that in relation to the last entry;

PN22411

*Do you sell mainly higher or lower cost scripts?*

PN22412

the value that there is entered "average" is self-evidently a reasonable value if one wanted to ascertain the average?---Yes.

PN22413

Looking at the - going back to the one above;

PN22414

*How do you price scripts under the co-payment level?*

PN22415

you have a view, do you, that the average would be - I'll withdraw that. Going to the right-hand column, the second row;

PN22416

*How will you price scripts under the co-payment level -*

PN22417

Do you see that?---Yes.

PN22418

Continuing;

PN22419

*- at the PBS price?*

PN22420

Do you accept that that is a reasonable value if one was interested in ascertaining the position of the average pharmacy?---No.

PN22421

Then underneath that there is the entry;

PN22422

*Do you intend to apply the \$1 discount to the co-payment?*

PN22423

and the value which appears is "No". Do you accept that that's a reasonable value, if one is interested in ascertaining the position of the average Community Pharmacy?---I don't know.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22424

You don't know. Was that your answer?---I don't know.

PN22425

Thank you. So I take it from that, where you depart from in relation to these default values is you say well, you take issue with the entries in relation to;

PN22426

*How do you price scripts under the co-payment level -*

PN22427

both in the 2014 and 15 financial year, and into the future, that's right?---Yes.

PN22428

You take issue with - you say that the expected annual volume growth will be something less than 3.5 percent?---Yes.

PN22429

But save for those matters, you accept that these entries are representative and appropriate of a profile of the average community pharmacy?---In relation to the \$1 discount, I - - -

PN22430

You don't know?---I don't know because it hasn't started yet. It starts on 1 January 2016. In relation to that, I find it difficult to believe that an average would be no.

PN22431

I understand that you don't know the answer to that question?---Given that some pharmacies definitely will. I would expect that some pharmacies would discount.

PN22432

Alright thank you. Now I want to ask you some other questions in relation to your affidavit. Paragraph 67 which is on page 11, you say at about the fourth line down "The average remuneration per prescription has increased as a result of the implementation of the AHI fee on 1 July 2015. However, the average level of remuneration during the 6CPA will not increase in real inflation adjusted terms compared with the average remuneration of the 5CPA". Just pausing there. Do you accept that your statement in that regard is entirely at odds with the position that the guild has communicated to its members through exhibit STA38?---No, I do not accept that it's entirely at odds.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22433

You assert that the average level of remuneration during 6CPA will not increase, compared with the average remuneration of 5CPA. You accept though, don't you, that the forecast that I've asked you questions about this morning plainly suggests, in relation to the default increase for a positive average pharmacy, that in fact that remuneration would increase during the period of 6CPA?---It does not show that on a per prescription basis and my paragraph 67 refers to average remuneration per prescription.

PN22434

I see, thank you. If one wanted to understand the impact in real terms on pharmacies, one would not confine oneself to a consideration of the remuneration per script. Would you accept that?---Yes.

PN22435

If one wanted to better understand the impact of 6CPA on pharmacies, one would, in terms of remuneration, one would look at the values contained in exhibit STA38. Would you accept that?---Can you clarify what exhibit STA38 is.

PN22436

The forecaster?---Forecaster, you would take into consideration the factors that are included in that forecast.

PN22437

Well, they are the decisive and significant factors?---Yes.

PN22438

You go on to say in paragraph 67 "Any increase" - and you're there referring to any increase in average remuneration per script. Am I reading that properly?---In average remuneration per script, any increase in remuneration will largely be offset.

PN22439

Sorry, I'll be clear what - you go on to say in paragraph 67 "Any increase will also largely be offset by the flow-on effects of the government's new PBS savings measures as well as the ongoing impact of the pre-existing price disclosure mechanism". Do you see that?---Yes.

PN22440

When you refer in that sentence to *any increase*, I take it, in light of your evidence before that you were referring to any increase in average remuneration per script. Is that what you were referring to?---In non-inflation adjusted terms, yes.

PN22441

I see. In terms of the forecaster that I was asking you about before exhibit STA38, the fields that can be entered into, including in particular, how do you price for example the co-payment level and other entries in that field, would I be correct in assuming that the default values that appear for those fields would incorporate and include any effects that might be forecast or anticipated in relation to pre-existing price disclosure mechanisms?---No.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22442

Can I ask you at paragraph 60 of your affidavit, on page 10, you say in the first part of that paragraph, 60(b) I'm referring to that from 1 January pharmacists will have the option to apply \$1 discount, you go on to say "Although the reduction is optional, unless it is passed onto customers, the customers may go to another pharmacy for a reduced price on their PBS medicines and pharmacies will lose sales of those medicines entirely. Charging less for co-payments means pharmacies will be forced to make up the difference for the \$1 discount for

medicines." You don't know what proportion of pharmacies operate under competitive conditions such that they may be forced to discount, as you say. Is that right?---No.

PN22443

This is all speculation by you, isn't it, in that paragraph?---I stand by the statement. The customers may go to another pharmacy for a reduced price, that's an economic fact.

PN22444

I think I recall you giving evidence a few moments ago, that we don't know how the - I'll withdraw that. Paragraph 70, can I ask you to look at that. You say there "As a result of the price disclosure reforms, there's been a significant decline in the profitability of pharmacies and reduced growth of the pharmacy sector in the last five years. In 2014/15 it was conservatively estimated that price disclosure reduced the net profit before tax of an average pharmacy by approximately \$90,000 per year." In your affidavit you don't cite any material to support what you say in paragraph 70, that the table which has been tendered - have you got that in front of you, the table?---Can I clarify that this is attachment A of the - - -

PN22445

Is it headed Stephen Armstrong affidavit of supporting documents?---Not what I'm looking at, no, but I can find all that.

PN22446

It's actually not necessary for me to direct you to it. I can deal with this orally, unless it's a problem. Can I deal with it this way Mr Armstrong? You understand that you provided a good number of volumes of documents to support the claims you make in your affidavit?---Yes.

PN22447

A table was provided which is in the nature of a road map which you said - - -

PN22448

VICE PRESIDENT CATAMZAROTO: Mr Moore, just to be fair about this, are you actually referring to - he actually has an annexure in the second statement as referring to - - -

PN22449

MR MOORE: I'm not referring to the second statement.

PN22450

VICE PRESIDENT CATAMZAROTO: But aren't you referring to his paragraph 70? It's cross-referenced in the second statement. That's what supporting material is, so maybe you're not putting the question fairly.

PN22451

MR MOORE: Alright, I apologise for that, your Honour, and I thank you for the clarification. I will clarify that in my own mind now before I proceed.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22452

JUSTICE ROSS: I think it's paragraph 4 of the second statement.

PN22453

MR MOORE: It is, thank you. Could you please Mr Armstrong look at your statement?---Yes.

PN22454

4 November, and the same paragraph 4, you refer to paragraph 70 of your initial affidavit. Do you see that?---Yes.

PN22455

Which contains the sentences that I just read to you before and you refer to a summary table from an analysis I completed on 4 August and that's at annexure A. See that?---Yes.

PN22456

If you go to annexure A, this is not an analysis is it? This is just the results of an analysis?---It's the summary table as stated. It's the summary table of the analysis.

PN22457

What analysis did you undertake?---I can explain that in detail, because it was quite detailed. The drugs listed on that table are those drugs that were included based on official PBS data in the top 50 drugs by PBS cost in 2011/12. Of those top 50, the drugs listed are those that would have been impacted by price disclosure due to them actually being part of the price disclosure system. All of the other top 50 drugs were not part of the system, because generally speaking they were on patent drugs, the single brand drugs and therefore they were not part of the price disclosure arrangements as they stand. So this represents only the impact of the top 50 drugs.

PN22458

The methodology behind this was to take the volumes of each one of these drugs from the official PBS data which provided the base line information on the number of prescriptions that are dispensed for each one of these drugs in any year and then to apply an analysis of changes in prices that were forecast to take place as a result of price disclosure under both the pre-existing price disclosure arrangements and those that would apply under the announced price disclosure changes that were announced on 2 August 2013.

PN22459

Each one of those drugs were analysed individually based on market data which provided an input into the forecasting of the price disclosure price reductions that would be applied on various dates as a result of the price disclosure system and price disclosure mechanism that is well known and published in relation to the time frames that are well known and published in the industry in relation to price disclosure.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22460

Those changes in prices were then applied in two ways, one in relation to how they directly flowed through to the mark-up component of remuneration for PBS dispensing. That mark-up for most prescriptions under the fifth agreement was a percentage of the drug price so therefore, when the drug price reduced, there is a direct impact or flow-on through to that percentage of the price in terms of the mark-up component.

PN22461

The other reduction or impact of price reductions as a result of price disclosure, is the reduction in trading terms or commonly called discounts, trading discounts, on medicines which pharmacies purchase and those forecast changes in those trading terms were analysed again on a drug by drug basis based on the pre-existing arrangements and the new arrangements to determine the changes or the reductions in trading terms that would be accounted for by both the existing arrangements and the new arrangements.

PN22462

Then those totals, the total changes in relation to the new arrangements were compared with the pre-existing arrangements to determine the difference which is presented in the final column. That difference was summed across those drugs that were included in the analysis to reach a figure of \$470 million which is an annual figure and then that was divided by the number of PBS approved pharmacies in that year to arrive at the \$88,725 estimate.

PN22463

One last thing I will say about this is that it is conservative in particularly two ways. One, it does not include drugs that were outside the top 50 and secondly, the prescription volume information that was used only accounted for subsidized prescriptions, it did not account for under co-payment prescriptions. So the impact in terms of pricing and trading terms on prescriptions that are priced below the co-payment which is the 20 percent that we were referring to earlier, is not captured within that analysis.

PN22464

MR MOORE: Thanks, Mr Armstrong. If you can go to paragraph 83 of your affidavit. You're there referring to the pharmacy services expectations report of April 2014 and you say that it was revealed, one in 10 pharmacies would reduce trading by at least one day per week in the coming year because of revenue pressure and that a quarter of pharmacies would reduce opening hours on average by 5.4 hours a week because of lower remuneration from the sale of PBS medicines. You deal with that in your statement at paragraph 6 where you refer to that survey, do you see that?---Yes.

PN22465

You've annexed that survey as C to your statement. Could you just go to that attachment please? Do you have that?---Yes.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22466

I take it you weren't involved in the conduct of this survey, directly?---I was, it was performed in my team, yes.

PN22467

In your team?---Yes.

PN22468

This is a survey that was undertaken before 6CPA commenced?---Yes.

PN22469

You'll see it says on the first page, what's numbered page 1, after the heading "This survey takes two to three minutes to complete". It commences with the continuing financial impact of price disclosure this survey seeks to assess and then can I draw you attention to the next paragraph;

PN22470

*The Guild will aggregate all results and use them anonymously to advocate for you key decision makers.*

PN22471

See that?---Yes.

PN22472

Towards the bottom of the page it says, under the heading;

PN22473

*Services offered and expected impact.*

PN22474

This is one of the questions in the survey which reads;

PN22475

*With the ongoing impacted price disclosure some pharmacies may have a reduced ability to provide services to the community.*

PN22476

Do you see that?---Yes.

PN22477

Do you accept that this survey was in substance a vehicle to use for the purposes of advocacy to government?---The Guild's role, one of the major roles of the Guild is advocacy, yes.

PN22478

Do you accept that that is manifested in this survey?---One of the purposes of the survey was advocacy, yes.

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22479

The survey sought to, in effect, enlist Guild members to express their views so that government could be lobbied to bring about changes which the Guild sought?---The survey was performed to understand the impact of the changes.

PN22480

Do you accept that the survey posited at the very commencement, under the heading, "This survey takes two to three minutes", it put upfront and in headlights the proposition that there was continuing financial impact of price disclosure. Do you accept that the survey proceeded by planting that clear position in the minds of people who might undertake it?---The people who undertook it were well aware of that financial impact.

PN22481

The people who undertook it you would expect would be people who had strong views about wanting to limit the effects of price disclosure?

PN22482

MR SECK: Objection.

PN22483

MR MOORE: I withdraw the question. Do you accept that the way in which this survey - I should draw your attention to another part of it. The numbers are to the bottom right, if you go to page 10 of 10. Do you see that?---Yes.

PN22484

There's a heading;

PN22485

*Examples. Real life examples provide compelling evidence to be used in advocating on your behalf.*

PN22486

So that was an opportunity, am I right in thinking, for survey respondents to set out real life examples to support the campaign for change in relation to price disclosure?---To provide real life examples, yes, yes.

PN22487

So do you accept that the contents, the way this survey was set up, would likely mean that the results of the survey would be biased in favour of those who had strong views about wanting to bring about change in price disclosure?

PN22488

MR SECK: Objection.

PN22489

JUSTICE ROSS: What's the basis for the objection?

\*\*\* STEVEN BRUCE ARMSTRONG

XXN MR MOORE

PN22490

MR SECK: Your Honour, again it's requiring Mr Armstrong to speculate as to what the survey respondents would do. He can give evidence as to what he

understands the survey to ask but he can't give evidence as to how the respondents might react.

PN22491

MR MOORE: I'm not attempting to peer into the minds of the respondents to the survey, I'm just asking for the witness' view about how he might regard the results of the survey.

PN22492

JUSTICE ROSS: All right.

PN22493

MR MOORE: Do you want me to repeat the question, Mr Armstrong?---Yes, please.

PN22494

Do you accept that the contents of this survey and the way in which it was framed is such that the results of it would likely be biased in favour of those pharmacists who had strongly held views in relation to price disclosure, and wanted to actively support the Guild's campaign to bring about changes in relation to price disclosure?---No.

PN22495

Excuse me a moment. Nothing further, if the Commission pleases.

PN22496

JUSTICE ROSS: Any re-examination? I'm sorry, any other cross-examination? No.

**RE-EXAMINATION BY MR SECK**

**[11.13 AM]**

PN22497

MR SECK: Thank you, your Honour. Mr Armstrong, during cross-examination you were asked questions about the key factors which would influence the revenue of pharmacies. Do you recall that?---Yes.

PN22498

My learned friend Mr Moore took you through a number of factors, yes?---Yes.

PN22499

He said that there might be also other factors which would influence the revenue of pharmacies. Do you recall that?---Yes.

\*\*\* STEVEN BRUCE ARMSTRONG

RXN MR SECK

PN22500

In addition to the factors which were set out by Mr Moore in cross-examination to you, would you please tell the Commission what other factors may influence the revenue of pharmacies?---In relation to the revenue of pharmacies changing over time, the major impact is the changing price of PBS medicines. In relation to other aspects outside of the PBS, clearly there are impacts on the other 30 per cent approximately of sales that are not related to the PBS, that are open to a whole

range of commercial factors that are in some cases in common with other sectors, and in some cases unique to pharmacy.

PN22501

Could you please tell the Commission what those factors would be in relation to that remaining 30 per cent?---Sure. Well, the remaining 30 per cent is made up of - I'll just provide that background, private prescriptions, so these are prescriptions that are not part of the PBS system. Scheduled medicines, so these are medicines that are scheduled as pharmacy only or pharmacist only medicines, so they're restricted for sale within a pharmacy, and then there are a whole range of other products that pharmacies are able to sell just as any other retailer or business can sell. The impact of, for example, the scheduled medicines can be affected by changes in scheduling over periods of time, be it if medicines as has recently been the case with Codeine medicines, if they're announced to be up-scheduled as we say to prescription only, that will affect the volume of those medicines and therefore affect revenue because patients and consumers will need to go to a doctor to ascertain or obtain a prescription. In relation to other medicines they may become unscheduled which means that those medicines can be supplied or sold in other outlets, such as supermarkets, and therefore that also impacts the sale or the revenue of the pharmacy for those medicines.

PN22502

Thank you, Mr Armstrong. You were then also asked questions about exhibit SDA38 which is the 6CPA forecaster. Can I ask you to go to that document?---Yes.

PN22503

You were asked by Mr Moore a number of questions regarding the operation of the 6CPA forecaster and in answer to one of my learned friend's questions you said it did not reflect gross profit per dispensation, I think you said. That's right?---Correct.

PN22504

When you said it doesn't reflect gross profit per dispensation, could you explain that to the Commission?---I'm just looking for a relevant section of my submission - my affidavit. The reason I made that statement in relation to gross profit is that the remuneration received for PBS dispensing through the agreement is only one component of the gross profit that is derived from dispensing PBS medicines. The other component is the trading terms that are received through the competitive market between suppliers, both wholesalers and manufacturers of medicines. That is being impacted by - overtime by price disclosure and the price reductions that are being implemented as a result of price disclosure are being removed. I refer to this in my affidavit. Are being removed over time by that mechanism. That is why or that is what I refer to when I say that the impact of price disclosure on pharmacies is likely to exceed the impact of any benefit of increased remuneration per prescription, because the gross profit will in fact not increase in line with remuneration.

\*\*\* STEVEN BRUCE ARMSTRONG

RXN MR SECK

PN22505

Thank you, Mr Armstrong. You were also asked questions about the default values which are entered into the 6CPA forecaster, and my learned friend Mr Moore asked you whether or not you agreed or disagreed with the number of default values. Do you recall that?---Yes.

PN22506

You said you - just going to the front page of exhibit SDA38, you said you disagreed with the default entry for;

PN22507

*How do you price scripts under the co-payment level*

PN22508

It says "at PBS price", and you said you disagreed that it reflected the average pharmacy?---Yes.

PN22509

Can you explain why to the Commission you disagreed with that proposition?---I disagree with that proposition because of the range of pharmacies that discount medicines below the co-payment, discount those medicines in terms of the price paid or offered to the consumer and any discount that is offered is by definition below that PBS price. Therefore the average in my opinion, in my view, cannot be at the PBS price when there are clearly some pharmacies that discount below that PBS price.

PN22510

Is your answer the same for the expected values 2015 to 2020, in the right-hand column, for that same question?---Yes.

PN22511

Now can you go to the second column of the default values where it says:

PN22512

*What is your expected annual volume growth rate?*

PN22513

Mr Moore put to you that 3.5 per cent reflected the average pharmacy, and you said it was not accurate and it was 1.5 per cent, and you gave a calculation for how you came up with 1.5 per cent in answer to one of the questions. Do you have any idea where that 3.5 per cent came from?---No.

PN22514

In relation to the last question in the right-hand column where the question is;

PN22515

*Do you intend to apply the \$1 discount to the co-payment?*

\*\*\* STEVEN BRUCE ARMSTRONG

RXN MR SECK

PN22516

The answer is "No". In answer to a question from my learned friend Mr Moore as to whether or not you thought that reflected the average pharmacy, you said you

did not know but you find it difficult to believe that it is an average - the average pharmacies would apply the \$1 discount to the co-payment. What is the basis for your claim that it would be difficult to believe that?---This is a very similar point to the one I just made about the pricing of medicines below the co-payment, in that if you apply a "No" to that question and say that that relates - that is the average response to the discounting, then that means that no pharmacies mathematically - that means that no pharmacies would discount the co-payment. That is what I find difficult to believe, given that the government has through the 6CPA introduced this mechanism to encourage competition between pharmacies. There is competition between pharmacies as shown by the discounting models and I find it difficult to believe, as I stated, that 100 per cent of pharmacies would choose not to discount the co-payment at all.

PN22517

Mr Armstrong, you were also asked questions by Mr Moore in the context of the 6CPA forecaster about the impact of the 6CPA, and I think the question put to you by Mr Moore was to better understand the impact of the 6CPA one would have to look at the values that or the outcomes that result from inputting the default values. Now in order to understand - better understand the impact of the 6CPA, would you please tell the Commission what other impact from the 6CPA needed to be taken into account to understand it better?---Yes, I can. The major impact that is not being taken into account and this is referred to expressly in paragraph 2 under the instructions, there is a sentence there that - the final sentence of that paragraph that says;

PN22518

*A version taking into account trading terms for the next five years is being developed.*

PN22519

I'm not aware of the state of that or the ongoing development of that, but clearly that component which I referred to earlier is the trading terms that are being removed as a result of price disclosure. The exclusion of those trading terms from the forecaster means that this - while it provides a forecast based on the entered or default values, in relation to official remuneration, it does not encompass the full range of gross profit that pharmacies derive from dispensing PBS medicines, and in particular it excludes the component that is reducing overtime significantly as a result of price disclosure. To my knowledge, the - and I make this statement on the basis of the annual volume rate as well, this would not take into consideration the de-listing of certain medicines from the PBS which has been announced just in the last week by the commonwealth government, that is going to take place on 1 January 2016. That is a list of 17 medicines that are non-prescription but were listed on the PBS, including paracetamol and aspirin, for example, that are being removed from the PBS and therefore removed from the scope of 6CPA remuneration. They can only be captured in this model through the volume growth rate and the volume growth rate in my view is already too high at 3.56 per cent, the default rate, and it will be reduced further through the implications of those de-listings of significant volumes of PBS medicines.

\*\*\* STEVEN BRUCE ARMSTRONG

RXN MR SECK

PN22520

No further questions.

PN22521

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

**<THE WITNESS WITHDREW**

**[11.26 AM]**

PN22522

I think we've got to adjourn for a short period to re-establish the or to check that the link's working. I'll bring one thing to your attention that I only noticed when I saw the front cover of Dr Yu's report. I note that she's an academic with the Business School at the University of Sydney. I wanted to draw to your attention that I'm an adjunct professor at the Business School at the University of Sydney. To the best of my knowledge I've never met Dr Yu and I certainly haven't discussed any of the evidence with her or anybody else.

PN22523

MR MOORE: Thank you, your Honour. Might I just deal with one matter to do with Ms Yu before she's called after the break. Ms Yu's requested formally that because she's pregnant she may need to have some more breaks than would normally be permitted.

PN22524

JUSTICE ROSS: That's fine. If you can just let her know whenever she feels the need, just to indicate and we'll take a short break.

PN22525

MR MOORE: Yes, thank you. I have some folders containing the reports which I'll make available to the associates.

PN22526

JUSTICE ROSS: Okay, anything else before we break?

PN22527

MR MOORE: No.

PN22528

JUSTICE ROSS: All right.

**SHORT ADJOURNMENT**

**[11.27 AM]**

**RESUMED**

**[11.36 AM]**

PN22529

JUSTICE ROSS: I should let you know that for various reasons we need to adjourn at 12.15 and then resume at 2.

\*\*\* STEVEN BRUCE ARMSTRONG

RXN MR SECK

PN22530

MR MOORE: I'll call Ms Serena Yu.

<SERENA YU, AFFIRMED

[11.37 AM]

**EXAMINATION-IN-CHIEF BY MR MOORE**

[11.37 AM]

PN22531

MR MOORE: Good morning, Ms Yu. Could you please re-state for the transcript your full name and your work address?---My name is Serena Yu. My address is [REDACTED]

PN22532

Thank you, and what's your occupation, Ms Yu?---I'm a senior research fellow at the Centre for Health Economics, Research and Evaluation.

PN22533

Ms Yu, I've had placed in front of you in the witness box there a red folder. If you could open that?---Yes.

PN22534

You'll see that there's a table of contents on the first page?---Yes.

PN22535

If you can go behind tab 1?---Yes.

PN22536

You should see a document which on the cover page reads: Evaluating the impact of Sunday penalty rates on the New South Wales retail industry, a report prepared for the Shop, Distributive and Allied Employees Association (SDA). Do you see that?---Yes.

PN22537

Over the page you'll see – it commences with your name, some acknowledgements and a declaration, and then has the date 30 October 2015?---That's right.

PN22538

You'll see if you look at the page numbering at the bottom right this document goes to 38 pages, including the annexures?---Yes.

PN22539

Ms Yu, is that a copy of a report that you've prepared for this proceeding?---Yes, it is.

PN22540

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

PN22541

Thank you. I tender that, if the Commission pleases.

\*\*\* SERENA YU

XN MR MOORE

PN22542

JUSTICE ROSS: I'll mark that exhibit SDA39.

**EXHIBIT #SDA39 REPORT OF SERENA YU COMPRISING 38 PAGES, DATED 30/10/2015**

PN22543

MR MOORE: Ms Yu, if you could go to tab 2 you should see a document which has the heading AM2014/305 Four yearly review of modern awards' penalty rates – the review, and then the date 5 November 2015, do you see that?---Yes.

PN22544

If you look at the bottom right-hand of each page this document goes for 17 pages, do you see that?---That's correct.

PN22545

Is that a copy of a further report prepared by you for use in this proceeding dated 5 November 2015?---Yes, it is.

PN22546

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

PN22547

Thank you. I tender that.

PN22548

JUSTICE ROSS: I'll mark that SDA40.

**EXHIBIT #SDA40 FURTHER REPORT OF SERENA YU COMPRISING 17 PAGES, DATED 05/11/2015**

PN22549

MR MOORE: Just wait there, please, Ms Yu.

PN22550

JUSTICE ROSS: Cross-examination, Mr Wheelahan?

**CROSS-EXAMINATION BY MR WHEELAHAN**

**[11.40 AM]**

PN22551

MR WHEELAHAN: Thank you. Ms Yu, your first report, SDA39, can you please turn to page 36?---Thirty-six, was it?

PN22552

Thirty-six, have you got that?---Yes.

PN22553

The fifth paragraph down starts with "The research set out in this proposal seeks to interrogate", do you see that paragraph?---Yes, I do.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22554

That paragraph and the following one, that contains the purpose for which you prepared your report, correct?---That's correct.

PN22555

You said in there Sunday penalty rates – the contention around Sunday penalty rates and penalty rates more broadly. What did you mean by "and penalty rates more broadly"?---At the time that we prepared the research proposal we were considering – we, I mean the Workplace Research Centre – we were considering weekend penalty rates more broadly, but as the research design progressed we narrowed down the research question to just Sunday penalty rates.

PN22556

So just Sunday?---That's right.

PN22557

Your purpose was only to consider whether there was an adverse effect on aggregate employment outcomes because of the increasing penalty rates on Sunday, is that correct?---It does say adversely, but we were estimating any effect.

PN22558

Any effect on an increase?---Sorry, any effect on employment from the rise in Sunday penalty rates in New South Wales.

PN22559

All right, and where does it say that?---It doesn't say it directly in the proposal. You have to understand the proposal is prepared at a stage where we don't know what our data sources are likely to be or what the research design might end up looking at. It is prepared to be a bit more general than the ultimate report.

PN22560

Further, it says there that you were investigating increases, and you specified on 1 July 2010 and 1 July 2012, do you see that?---Yes.

PN22561

So you were specifically looking at an increase in 2010 to 160 per cent, correct, in Sunday penalty rates?---Sorry, could you repeat the numbers again?

PN22562

One hundred and sixty per cent, so it moved from 150 to 160 per cent?---That's right.

PN22563

That's correct?---Yes.

PN22564

And the following year, 170 per cent?---That's correct.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22565

And the following year, 180 per cent?---Yes, but can I add there the reason those initial dates were in the proposal, so between 2010 to 2012, was because we didn't know what data would be available while we were preparing the proposal. It was anticipated that we would only have a shorter period of data availability, and it turned out that we would have more.

PN22566

Well, page 37 of your report you set out some data limitations. You'll see in the middle of the page there's a paragraph that says there's no single data source?---Mm-hm.

PN22567

Do you see that paragraph there?---Yes, I do.

PN22568

And you note the limitation in paragraph 1 - - -?---That's right.

PN22569

- - - where you used the Australia at Work data?---Yes.

PN22570

And you were limited to data only between 2007 and 2011, that's correct?---For that data set, yes.

PN22571

And for the Household, Income and Labour Dynamics in Australia data set, again you were limited to data only to 2012?---In the first instance it was only available to 2012 but it was ultimately available to 2013.

PN22572

Did you take any account of enterprise agreements in Victoria where persons were not paid 200 per cent loadings on Sundays?---We did not – in the proposal or in the report itself?

PN22573

In the report?---In the report itself, no, we did not have data on specific wage instruments.

PN22574

All right. If you turn the page, again - your page 38?---Yes.

PN22575

The second paragraph, again you refer to a comparison of the treatment group to the control group?---Yes.

PN22576

And again referenced to the three changes to penalty rates only?---Yes.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22577

Is it your position that you changed to actually consider the five complete changes to penalty rates?---Sorry, what's the question?

PN22578

The question is, in your proposal you were only to look at three changes to the penalty rates?---Yes.

PN22579

I'll just hand you – I won't hand this to the Bench because I don't propose to tender it – you prepared a draft proposal on the 25th of February 2015 – I'll just hand it to you.---Yes.

PN22580

At the bottom right of one page you'll see 1012?---Sorry, which page am I looking at?

PN22581

1012, it should be?---Yes.

PN22582

Do we have that? And I'll just read it onto the transcript, this is your initial proposal?---Yes.

PN22583

*The research set out in this proposal seeks to investigate the following proposition: That the three increases in award Sunday penalty rates in the New South Wales retail industry between 1 July 2010 and 1 July 2012 had no effect on the number of total workers or on the aggregate number of hours worked, and had no effect on the probability of individual workers working on Sundays.*

PN22584

Do you see that?---I do.

PN22585

Were you setting out to prove a proposition, that very proposition?---We specifically were testing that hypothesis, yes.

PN22586

Were you seeking to prove it as a proposition?---Within statistical procedures, yes. Can I just comment again that the dates from 2010 to 2012 reflected our best understanding of the data available at the time of the proposal but not what happened in the end.

PN22587

I'll hand to you another document which again I won't hand it to the Bench to save paper. You forwarded your final report by email dated 29 May 2015. Do you recall that?---Yes.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22588

To your solicitors?---Yes.

PN22589

Can I just ask you by the time you forwarded that final report, had you confined the data period. Without looking at that, do you know whether you'd confined the data period, the report?---From memory I believe we had all the data available.

PN22590

If you turn to the executive summary at the bottom right, it has a number 914 at the bottom?---914, was it?

PN22591

Yes?---Yes.

PN22592

The second last paragraph, you'll see the last line;

PN22593

*This research reports the effects following the increases in 2010, 2011 and 2012.*

PN22594

Do you see that?---I do.

PN22595

Was that a mistake in this final report that you sent to the solicitors?---I believe it was.

PN22596

It was. In your report filed here, tendered SDA19, in the executive summary at page 3 - - -?---Sorry, am I still looking at the handout.

PN22597

You're now looking at your report filed in the proceeding that Mr Moore took you to?---Yes.

PN22598

In the red folder?---Yes.

PN22599

The executive summary in the second paragraph refers to the period 2010 to 2014?---Yes.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22600

Yet at page 9 of the report in the last paragraph, you refer to an analysis using data between 2000[sic] and 2013?---If I can explain. The data - we received some new data halfway through the project. This was HILDA wave 13, which we had to apply for and it didn't arrive until quite late in the project. So there are some typos because the analysis was initially done on the more limited data and when we

received the additional data, the analysis was undertaken then but there appear to be some typos in the report.

PN22601

Can I ask you this, you use in the executive summary and the conclusion looking at the effects on employment following increases between 2010 and 2014?---Yes.

PN22602

That might suggest that you're not looking at five increases but the years between?---Well, no, the 2010, 11, 12, 13, 14 and we have data past July 2014, so all five with the ABS data, and for the HILDA data that was only up to 2013. They did not have the same time periods.

PN22603

So when one turns to your instruction letter from your solicitors, which is - it doesn't have a page number but it's - - -?---It's after page 32.

PN22604

- - - at the back. Four pages in. Do you have that from A J Macken & C?---Yes.

PN22605

Again, your instructions on page 2 were to specifically look at the retail industry between 1 July 2010 and 1 July 2012?---Yes, but again those instructions were based on our best understanding of the available data at that time.

PN22606

So did you take it upon yourself to extend beyond that period in order to prove the propositions that you were interrogating?---We took it upon ourselves to use the maximum data available.

PN22607

If you turn to page 11 of your report?---Yes.

PN22608

You refer at the top to the analysis based on three data sources?---Yes.

PN22609

The first data source being the ABS statistics and you've said the number of retail workers in New South Wales and Victoria?---Yes.

PN22610

You then have a footnote to that which notifies the reader that we're not just dealing with the General Retail Award but several other awards that apply to employees. Do you see that?---Yes.

PN22611

So it's correct isn't it that with your data we're not able to differentiate between those people covered by the General Retail Industry Award and those other awards that you've then specified?---Yes, I have to emphasise that - - -

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22612

Sorry, I didn't hear you?---Yes, I have to emphasise that the analysis is done on the best available data. The richness of the data that's been used in this analysis is far richer than has been brought to bear on the issue in earlier times.

PN22613

So the answer to the question though is yes?---Is yes.

PN22614

I want to - - -

PN22615

THE ASSOCIATE: Sorry, was that me?

PN22616

MR WHEELAHAN: Will I proceed, your Honour, or - - -

PN22617

JUSTICE ROSS: Can you still hear us, Mr Izzo?

PN22618

MR IZZO: I can.

PN22619

MR WHEELAHAN: Now I want to put to you what you were not considering and what you were not asked to consider by your instructors?---Sure.

PN22620

You were not asked to consider and you did not consider whether reducing penalty rates on a Sunday from 200 to 150 per cent would increase employment. That's correct?---That is correct. The research takes advantage - am I allowed to qualify that? The research takes advantage of a natural experiment that took place in one direction which was the increase - - -

PN22621

I'll just premise, I am not putting this by way of criticism of you, Ms Yu. I'm just confining what it is that your report deals with?---Sure.

PN22622

So far you accept and you've annexed a letter of instruction from your solicitors, correct?---Yes.

PN22623

Beyond that letter of instruction you have taken it upon yourself to go beyond the three years that they asked you to report on, correct?---Correct.

PN22624

Is there anything else beyond that that you've taken it upon yourself to report on?---No.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22625

I'll go back to just putting these propositions to you?---Yes.

PN22626

You were not considering and you were not asked to consider that reducing Sunday penalty rates from 200 per cent to 150 per cent would increase aggregate hours worked?---No.

PN22627

Nor to consider any increase in staffing numbers in businesses on a Sunday, correct?---What do you mean by staffing numbers?

PN22628

I'll put the full question again to make clear. You were not asked to consider and you were not considering if reducing Sunday penalty rates from 200 per cent to 150 per cent would increase staffing numbers in businesses on Sunday?---No.

PN22629

You were not considering and were not asked to consider if reducing Sunday penalty rates from 200 per cent to 150 per cent would increase aggregate hours worked on a Sunday?---This was not possible within the research design.

PN22630

Yes, and you were not considering and were not asked to consider if reducing Sunday penalty rates from 200 to 150 per cent would affect the ability of businesses to obtain sufficient number of employees to work on Sundays?---Again, no possible.

PN22631

The type of research that would be pertinent to those questions would, I put to you, be one, direct evidence from employers?---It's one form of evidence, yes.

PN22632

A second form of evidence might be a survey of representative samples of employers?---Yes, another form of evidence.

PN22633

Now I next want to deal with the control group?---Yes.

PN22634

That you've - it's critical to have an identical control group?---Yes.

PN22635

You deal with the trend in aggregate employment and hours worked?---That's right.

PN22636

Commencing page 11 of your report?---Yes.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22637

At the bottom of - you'll see the last paragraph there in the last three lines you say - does the Commission have that? Yes.

PN22638

*Figure 2 shows the total number of retail workers in New South Wales and Victoria for 1991 to 2009.*

PN22639

You then say;

PN22640

*It shows that over a long period the two states have moved in parallel, suggesting that Victoria is an appropriate control group for investigating total employment.*

PN22641

Do you see that?---Yes.

PN22642

Further in your proposition you describe figure 2 there as a total number of retail workers 1991 to 2009?---Yes.

PN22643

Again, is this data including people covered by the Pharmacy Award and other awards - - -?---That's right, it's the retail industry defined by the ABS.

PN22644

If you turn the page to figure 2?---Yes.

PN22645

The data that in fact says August 1991 to May 2010, my question to you is, is your statement on the previous page correct or is the data to May 2010?---The data is to May 2010.

PN22646

So the change should be to the previous page description. Again, at page 12 under that figure you describe the trends as parallel?---Mm-hm.

PN22647

Again you then refer to paragraphs 3 and 4 and to clarify it again you've described the data - you've described it in the previous paragraph as going to 2009. Again, just confirm that the heading of the table is how the data should be read, which is to May 2010?---That's correct.

PN22648

So the description above paragraph 3, 1984 to 2009, is that just an error?---I apologise, that is.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22649

Yes, the paragraph above figure 3, the tables title "Figure 3". Now you accept over the period to May 2010 the Victorian trend was upward for both aggregate employment and hours worked? Was an upward trend for the entire period?---If I can actually draw your attention to tab 2 in the red folders, I extended the analysis in response to Pezzullo critique which is in tab 3. Actually if I could draw your attention to tab 3 first.

PN22650

I'm not sure, if I can just interrupt, Commissioner, I think you're anticipating my question rather than just - -?---I'm trying to establish - no, I'm trying to establish whether the trend is up and I can do that in my second report. But to start with, in tab 3, on page 8, figures 3.1 and 3.2, there was some trend analysis undertaken in the Pezzullo critique which suggested that my conclusions that the trends were parallel was incorrect. I sought to address that in the report which is under page 2 - I mean tab 2. So in tab 2, on page 4, I've extended the analysis there listed at figure 1 and figure 2, and actually put the equations of that trend data and yes, they are both parallel and trending upwards.

PN22651

That wasn't the question though?---You asked - - -

PN22652

I didn't ask you about both. I asked you about Victoria?---Yes.

PN22653

So I'll ask the question again. Do you accept that the trend over the entire period you've reported in Victoria was upward?---For hours for total numbers.

PN22654

For both aggregate hours and employment numbers?---Yes.

PN22655

Now if you turn to the Pezzullo report behind tab 3 of your folder?---Yes.

PN22656

Page 8?---Yes.

PN22657

We'll start with figure 3.1?---Yes.

PN22658

Do you accept that from February 2009 to May 2010, and I want you to focus on this period, I know you've written about other periods. From February 2009 to May 2010 there is a downward trend in New South Wales for both total employed and total hours?---This is not relevant to the methodology.

PN22659

No, that's not the question?---Yes.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22660

You do accept that?--- Yes.

PN22661

I suggest to you that if you accept that there's a downward trend in New South Wales with respect to those two matters, in circumstances will you accept that the entire period of Victoria that's an upward trend, that the trends are not parallel for the entire period?---No, I don't accept that because you're - - -

PN22662

You don't accept that they're not parallel?---That's right, because you're comparing a full period to a sub-period.

PN22663

Do you accept that - you've accepted that for February 2009 to May 2010 there's a downward trend in New South Wales and you've also accepted that for the entire period in Victoria there's an upward trend?---Yes.

PN22664

So I suggest to you that for the period February 2009 to May 2010, that period, the trend is not parallel?---The same period for two states, for both states.

PN22665

Is not parallel?---That's right.

PN22666

Now are you aware and I don't have the full citation but the decision announcing the penalty rates increase was 19 December 2008, in the General Retail Industry Award. Are you aware of that announcement?---Yes.

PN22667

Are you also aware that the decision announcing transitional provisions was on September 2, 2009. Are you aware of that?---Yes.

PN22668

Isn't it the fact then that the downward trend for that period in New South Wales, that I've taken you to could be explained by the announcement of forthcoming increases to penalty rates in that state?---I would say that's insufficient data points to conclude that trend.

PN22669

Yes, but that could be one of the explanations for it, couldn't it?---Potentially.

PN22670

Isolating that data, that could also be described as a structural change or a structural break in the trend at that point, at that period, correct?---Not based on so few data points.

PN22671

The way to resolve that would be to undertake a Chow testing, is that right?---Not exactly.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22672

Did you undertake Chow testing?---No, but there's a reason.

PN22673

No?---The Chow test is designed to detect the structural break. In the research by construction we have used a structural break to inform the research design so it's a bit of a catch 22, it's not a useful test.

PN22674

Ms Yu, in your report you haven't considered that this downward trend in New South Wales, any correlation that that might have had to the decisions of this Commission announcing an increase in penalty rates in that state?---Again, with so few data points, given the period that you're talking about, it would not have been a statistical standard of practice.

PN22675

My question to you though is you haven't undertaken that analysis?---Not on that sub period, no.

PN22676

You're not able to say whether or not it constitutes your structural growth?---No.

PN22677

No, okay. See, I suggest to you that it does constitute, or it could constitute a structural break and that's one of the reasons why Victoria is an inappropriate control group?---No, I disagree.

PN22678

I suggest to you that given your concessions about the downward trends for that period, that it's wrong to describe them as identical control groups?---No, I disagree and if I could just draw your attention to my second report under tab 2, page 4, figures 1 and 2 for both the total number employed and the aggregate hours. If you use a long enough period of data, which is from 2000 when trading hours were deregulated up until May 2010, you can see that the trends are parallel and this is the more relevant time period to define as before the interventions.

PN22679

It took no account of the announcements of this Commission for increased penalty rates in your report in 2009?---I did not, but might I also add that they coincided with the economic crisis. So even if I had, it would have been difficult to disentangle.

PN22680

Well, Ms Yu, you've accepted in Victoria that the economic crisis hasn't affected the continuous upward trend in Victoria for aggregate hours worked in aggregate employment. Correct?---For that sub period, yes.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22681

Yes, so doesn't that in fact bolster the proposition that if Victoria didn't decline and New South Wales did, again one plausible explanation is the announcement

of the forthcoming increase in Sunday penalty rates?---It doesn't take away from the fact that I would have been unable to test that based on three or four data points.

PN22682

That's not the question. I put to you that that's a plausible explanation that you didn't interrogate, isn't it?---Potentially, yes.

PN22683

I want to ask you about other factors other than Sunday penalty rates that may have affected aggregate hours and employment in New South Wales and Victoria. They include the demand for retail goods in each state?---Yes.

PN22684

They could be state based demand factors, correct?---Yes.

PN22685

Regional factors?---Yes.

PN22686

Metropolitan factors?---Yes.

PN22687

I'll just hand to you and the Bench, this is a report of the Australian government, Department of Education, Employment and Workplace Relations, Australian jobs 2013. It's just an extract. Do you have that in front of you Ms Yu?---Yes.

PN22688

If you turn to page 6, it firstly deals with the New South Wales employment and you'll see the second paragraph. Employment is concentrated in Sydney which is 65.5 percent of the state's employment. Do you see that paragraph?---Yes.

PN22689

The largest regional employment is Newcastle, Richmond/Tweed, Mid-North Coast, Northern/North Western Central West. These three regions combine to have employment of almost three quarters of a million people. Do you see that?---Yes.

PN22690

Then if you turn the page to the demographics of Victoria, I suggest to you that they're quite different?---Yes.

PN22691

You accept that they're quite different?---Yes.

PN22692

That they're set out there in the paragraph commencing employment is concentrated in Melbourne and outside Melbourne which is different to New South Wales, employment is spread relatively evenly across the regions. I tender that document, your Honour.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22693

JUSTICE ROSS: I mark that as Retail 10.

**EXHIBIT #RETAIL 10 REPORT OF THE AUSTRALIAN  
GOVERNMENT, DEPARTMENT OF EDUCATION,  
EMPLOYMENT AND WORKPLACE RELATIONS, AUSTRALIAN  
JOBS 2013**

PN22694

MR WHEELAHAN: That could be another matter that has an impact on assessing appropriate control groups between states, isn't it?---The analysis was based on quarterly data and the quarterly data is not available at that level of detail. It was based on best available data, but yes, that could be a factor.

PN22695

Another factor that might affect, other than Sunday penalty rates is the margin on sales that businesses achieve?---You would have to speak to the businesses, yes.

PN22696

Also, their operating profits?---Yes.

PN22697

And that would be different between states?---I don't know, I don't have that data.

PN22698

Don't know? Might be different between the various regions in New South Wales compared to rural Victoria, correct?---Could be.

PN22699

Another factor might be employee productivity?---Yes.

PN22700

Flexible workplace agreements?---Yes.

PN22701

Total labour costs, meaning WorkCover premiums, payroll tax between states, superannuation. It's not just penalty rates?---I'm sure there are many things.

PN22702

Many things, and these are what is referred to as omitted biases, aren't they, in regression analysis?---That's right.

PN22703

That's right. You didn't take into account all factors such as these, did you?---No, we took into account what was available.

PN22704

Yes, okay. Your Honour, I note the time.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22705

JUSTICE ROSS: No, we can go another 10 or 15 minutes. How much longer are you likely to be?

PN22706

MR WHEELAHAN: I won't be more than 15 minutes.

PN22707

JUSTICE ROSS: Alright, let's see how we go.

PN22708

MR WHEELAHAN: I'll now deal with your empirical model process which commences at page 17?---Yes.

PN22709

In the third paragraph you note - it's an acknowledgement of the weaknesses in your analysis?---Sorry, I think I'm on a different page. Is it 18?

PN22710

17, it's the third paragraph. "It's important to acknowledge some weaknesses in the analysis"?---Yes.

PN22711

Then in your second report at page 6, you describe some of the specification tests that were put by Ms Pezzullo as irrelevant?---Yes.

PN22712

Further, at page 12, you again describe - - -?---In the second report?

PN22713

In the second report, yes? You describe them as irrelevant again?---That's right.

PN22714

Yet despite them being irrelevant, you then rely on irrelevant matters to come to the conclusion that your results or your opinions are more robust. Is that right?---Yes.

PN22715

If you go to your first report please, figure 6.

PN22716

JUSTICE ROSS: What page?

PN22717

MR WHEELAHAN: Page 19. You've sourced some ABS data for that table. Do you know how many hours a week a person is required to work before they're considered to be employed for that data?---More than zero.

PN22718

More than zero?---More than zero.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22719

Does it capture casual employees?---Yes. All employees.

PN22720

If you turn to figure 8 and 9 on page 23. Again this is data that you've stated in your report is for all industries?---Yes.

PN22721

So another deficiency insofar as you're unable to obtain data just for retail industry?---No analysis is based on those - that's for context figures. 8 and 9 is for context.

PN22722

Context? No analysis?---No.

PN22723

At page 25, again you make a conclusion in the last sentence and this generally relates to Sunday and employees who might work or not. Is this section again, just for context?---No.

PN22724

Would a better way to know employer/employee motivations would be firstly to ask them directly?---Yes.

PN22725

Secondly, survey evidence, properly undertaken, correct?---The reason I put that sentence in, if you look over the page at page 26, at table 6.

PN22726

Sorry, I'll just stop you there. My question again, and I'm not criticising you Ms Yu, I'm just suggesting and putting to you that the better way to obtain evidence about employer and employee motivations, my second question was to rely on survey evidence. Do you agree with that?---Surveys of employees?

PN22727

And employers - employer/employees?---Yes, this is not a paper about preferences.

PN22728

Yes. Just dealing with your conclusion, there's no evidence is there, that employers had any difficulty obtaining staff when the penalty rate was only 160 percent in New South Wales, is there?---Not in my paper, no.

PN22729

No. I conclude with this, with your first report, I'm just clarifying, all the working data and again, it's not a criticism. All the working data that sits behind that report, is it correct that you've changed employer and that that data has been destroyed or lost. Is that right?---Well, the ABS data is publicly available as is HILDA if you've got a licence, but I don't have the analysis.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22730

Yes, I mean your analysis, your working data. As I understand, the instructions given to me in relation to notices to produce documents, is that all your working analysis has been destroyed or lost because you changed employer. Is that right?---I have the ABS spreadsheets and the HILDA data.

PN22731

Other than that, do you have any other working notes or calculations?---I have stater code. When I left Sydney University, I took stater code with me.

PN22732

What notes did you leave behind?---All of my written notes, meeting notes with colleagues that provided advice. Obviously all my emails I no longer have access to. That would be it.

PN22733

Thank you.

PN22734

JUSTICE ROSS: Thanks Mr Wheelahan. Can I get an indication as to the likely time for the other parties that wish to cross-examine?

PN22735

MR GOTTING: Five to 10 minutes.

PN22736

JUSTICE ROSS: Okay.

PN22737

MR SECK: Same, your Honour.

PN22738

JUSTICE ROSS: Mr Izzo?

PN22739

MR IZZO: Five minutes at a maximum, your Honour.

PN22740

JUSTICE ROSS: The difficulty we've got is that one member of the Bench has a medical appointment and another has to catch a plane. So I regret we'll need to come back at 2 and deal with it then. We might deal with you now Mr Gotting, if you've only got five minutes.

PN22741

MR GOTTING: Certainly. Ms Yu, my name is Gotting and I appear for the Australian Industry Group, an organisation representing employees in the fast food industry?---Yes.

PN22742

JUSTICE ROSS: That's one minute.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22743

MR GOTTING: For the record, it's 12.22. Ms Yu, earlier this year you authored an article with Alison Preston on part time full time pay differential in Australia?---That's correct.

PN22744

That article was accepted for publication in the 2015 version of the Journal of Industrial Relations?---That's correct. It was online in 2014.

PN22745

I see. Conscious of the time, can I just show the witness a copy of the article and I've got a copy of the article for others, including members of the Full Bench, but it may not be necessary to tender the document?---Thank you.

PN22746

Ms Yu, I just wanted to concentrate on certain pages of the document. Could I first draw your attention to the first page and in particular the heading, Introduction?---It appears to be missing a page, no, sorry, got it.

PN22747

I'm sorry I was trying to draw your attention to the first page?---That's right, sorry, I didn't see the title at the bottom.

PN22748

I'm sorry. Do you see the title at the bottom?---Yes, I do.

PN22749

Is it your recollection that the results of your analysis that appear in the article was that as in January 2013, part time employment in Australia was about 29.9 percent of total employment?---That's right.

PN22750

Turning over the page, that level of part time employment was high when benchmarked internationally?---That's right.

PN22751

Additionally, staying in the first paragraph on the second page, part time employment in Australia was on the rise in terms of a percentage of total employment?---That's right.

PN22752

That material which was first published, I think you said on line in 2014, is, as you are sitting there in the witness box now, still correct, as far as you're aware?---That's right.

PN22753

Could I then ask you to turn to page 32 of the article, noting that the pages are on the top of the document?---Yes.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22754

Looking at the first paragraph on page 32, you and your co-author recorded that part time and casual work was not evenly spread across industry sectors in Australia?---I see that.

PN22755

You identified some of the sectors where there was higher part time and casual work in Australia?---Yes.

PN22756

One of those sectors was accommodation and food service?---Yes.

PN22757

As far as you're aware, even though the article was first available online in 2014, that material on the top of page 32 is still accurate?---Yes.

PN22758

Additionally, looking at the second paragraph on page 32, you noted that almost half of Australia's part time workforce in 2006 worked less than 20 hours per week?---Yes.

PN22759

You noted that fewer than 25 percent of part timers worked 30 to 35 hours per week?---That's right.

PN22760

Even though this article was online 2014, your understanding sitting in the witness box today, is that that material in the second paragraph on page 32 is still accurate?---It may have moved slightly.

PN22761

Slightly up or slightly down?---I couldn't say without looking at the data.

PN22762

I understand. Finally, in that second paragraph, you noted that Australia has a slightly higher share of younger part timers in comparison to the United Kingdom?---Yes.

PN22763

Relative to the OECD average, the incident of short hours work is much higher amongst younger workers in Australia?---Yes, as far as I'm aware.

PN22764

Sitting there in the witness box, those two statements are to the best of your knowledge, still accurate?---yes.

PN22765

I'm conscious of the time and in my estimate, I need probably two minutes.

PN22766

JUSTICE ROSS: No, that's fine.

\*\*\* SERENA YU

XXN MR WHEELAHAN

PN22767

MR GOTTING: I note it's 12.26.

PN22768

JUSTICE ROSS: Well, 12.27.

PN22769

MR GOTTING: I'll concentrate on asking the questions. Ms Yu, can I ask you to go to page 11 of your first report, behind tab 1 of the red folder?---Yes.

PN22770

You were taken to footnote 7 earlier and in particular your attention was drawn to the one digit classification retail trade?---Yes.

PN22771

Are you aware that that one digit classification is Division G for the purposes of the ANZIC classification system?---I wouldn't know off the top of my head. It's goes from A to T or U, but yes, I understand what you mean.

PN22772

Are you aware that Division G does not include fast food?---No.

PN22773

Finally, Ms Yu, am I right in understanding that the conclusions that you record in your report are industry specific conclusions?---Specific to the ANZIC definition, yes.

PN22774

In particular it's based upon - and it's also state specific?---Yes.

PN22775

Finally, it's time specific?---It's specific to the experiment that the design was based on, yes.

PN22776

Thank you. No further questions. I note the time, 12.28.

PN22777

JUSTICE ROSS: Thank you, Mr Gotting, well done. We'll adjourn until 2 o'clock.

**<THE WITNESS WITHDREW [12.28 PM]**

**LUNCHEON ADJOURNMENT [12.28 PM]**

**RESUMED [2.17 PM]**

**<SERENA YU, RECALLED ON FORMER AFFIRMATION [2.17 PM]**

**CROSS-EXAMINATION BY MR SECK [2.17 PM]**

\*\*\* SERENA YU

XXN MR SECK

PN22778

JUSTICE ROSS: Mr Seck.

PN22779

MR SECK: Thank you, your Honour. Ms Yu, my name is Michael Seck, I appear for the Pharmacy Guild of Australia. I just want to ask you a few questions about your report?---Yes.

PN22780

Can I ask you to go to your first report, which I think is under tab 1 or A?---Yes.

PN22781

Go to page 11, and I want to take you back to footnote 7?---Yes.

PN22782

You've been asked questions about footnote 7 already by others?---Yes.

PN22783

You note there that the retail industry is defined according to their ANZIC one digit classification in retail trade?---Yes.

PN22784

So I understand what you say in your footnote there, you acknowledge that the Pharmacy Industry Award would apply to employers covered by the classification for retail trade under the one digit classification, that's right?---That's right.

PN22785

Now you go onto say in the footnote;

PN22786

*Data from the 2011 census shows that about 76 per cent of retail workers.*

PN22787

Now does the census data use also the ANZIC classification to the best of your knowledge?---Yes, it does.

PN22788

When you go to the next sentence where it states further, "The General Retail Award"?---Mm-hm.

PN22789

You refer to a study or Wright and Buchanan?---That's right.

PN22790

Again you refer to retail?---Yes.

PN22791

Again, to the best of your understanding that's retail as defined in the ANZIC classification?---Yes, I believe so.

\*\*\* SERENA YU

XXN MR SECK

PN22792

Now I understand as part of your analysis you never - you did not look at the Pharmacy Industry Award, that's correct?---There's no data based on awards.

PN22793

Certainly, when you went through in appendix A to your report which starts at page 32?---Yes.

PN22794

You didn't analyse the changes in award entitlements in the pharmacy sector at any time?---No.

PN22795

Now can you go back to the body of your report?---Yes.

PN22796

Go to page 16?---Yes.

PN22797

First paragraph, you say - you refer to the deregulation of Sunday trading hours in Victoria and New South Wales?---That's right.

PN22798

Are you aware that the pharmacy industry is exempt from trading hours?---No.

PN22799

Can you go to the next sentence where it says;

PN22800

*Note that other smaller changes in the industrial relations system also affect retail industries in New South Wales and Victoria but were unlikely to have large employment effects.*

PN22801

?---Yes.

PN22802

Now I gather from that what you were seeking to do is to see whether or not there were any changes which may affect the retail industry, which would impact upon the data. That's correct?---That's right.

PN22803

When you were talking about changes that affected the retail industries in New South Wales and Victoria, I gather what you were talking about there was parts of the retail industry covered by the General Retail Award?---That's correct.

PN22804

Not the ANZIC definition of retail industries?---That's right.

\*\*\* SERENA YU

XXN MR SECK

PN22805

If there were changes to, for example, regulatory or government policy that affected a part of the retail industry, let's say the pharmacy industry, those would be potential factors that could affect employment effects during that period. You would agree with that?---That's correct.

PN22806

Of course you haven't studied the pharmacy industry to look at any of those government policy or regulatory changes?---Not specifically.

PN22807

No further questions.

PN22808

JUSTICE ROSS: Thank you, Mr Seck. Mr Izzo.

**CROSS-EXAMINATION BY MR IZZO**

**[2.21 PM]**

PN22809

MR IZZO: Thank you, your Honour. Doctor, my name is Mr Luis Izzo, I represent the Australian Business Industrial and New South Wales Business Chamber. I take it you can hear me all right?---Yes, I can hear you.

PN22810

Thank you. I'd just like to put a few general propositions to you. Can I just ask you, do you accept that business confidence is a matter that can affect employment in a particular location?---Yes.

PN22811

Do you accept that business confidence can vary from state to state?---I haven't looked at the data but it's possible.

PN22812

That it can vary from industry to industry?---Again, without looking at the data yes, it's possible.

PN22813

By your response about looking to the data, are you aware of surveys that measure business confidence?---Yes.

PN22814

Are you aware of the NAB business survey that comes out monthly?---Yes.

PN22815

Are you aware that it looks at business confidence on both a state by state and industry by industry basis?---Yes.

\*\*\* SERENA YU

XXN MR IZZO

PN22816

But I take it you did not have regard to any statistics regarding business confidence when looking at employment trends between New South Wales and

Victoria after 2010?---We looked directly at retail sales but not at business confidence.

PN22817

You accept that business confidence in the retail industry could have been different between New South Wales and Victoria?---Yes, could have been.

PN22818

Doctor Yu, can I ask you, are you aware of an overhaul that was conducted of the New South Wales Workers Compensation system in 2011/2012?---No, I was not aware.

PN22819

I'm just going to ask Mr Gotting if he could please hand the Associate a document that the Associate will hand to you, and also to members of the Bench. Do you have a copy of that document in front of you?---Yes, I do.

PN22820

Is it headed - is it clear that that's from the New South Wales WorkCover website? Is that the banner you see on the top?---I see Barry O'Farrell MP as the banner. Sorry, am I - - -

PN22821

Right. Is it headed;

PN22822

*Further premium cuts on the way for businesses as WorkCover returns to surplus.*

PN22823

?---Yes, that's the headline.

PN22824

I'd just like to take you to the fourth - sorry, to the first paragraph. If I can ask you to read - there should be a paragraph in bold and then underneath that there's a paragraph saying:

PN22825

*It means 200,000 employers across 376 industries.*

PN22826

Do you see that paragraph?---It's not in bold but it's the first paragraph you're referring to?

PN22827

Yes, after the bold writing?---After the headline, is that what you mean?

PN22828

I might just read it out to you, it might be easier?---Thank you.

\*\*\* SERENA YU

XXN MR IZZO

PN22829

It says;

PN22830

*It means 200,000 employers across 376 industries will benefit from an average premium rate deduction of 5 per cent, saving them more than \$130 million a year.*

PN22831

Do you see that?---I do.

PN22832

Further on, a couple of paragraphs down, there's quotes from Mr O'Farrell where he says;

PN22833

*The New South Wales governments -*

PN22834

Sorry, I'll go to the next paragraph;

PN22835

*The premium cuts announced today are on top of an average 7.5 per cent rate cut that came in earlier this year for 167,000 employers.*

PN22836

Do you see that?---Yes.

PN22837

Then do you see Mr O'Farrell goes onto say;

PN22838

*With these reductions combined, New South Wales businesses will receive an average 12.5 per cent rate reduction in the 2013 premium cycle, returning \$330 million to help grow the economy.*

PN22839

Do you see that?---Yes.

PN22840

Now can I ask you to assume that the statements that I've taken you to be correct. Assuming that they are correct, do you agree that these premium reductions may have a positive impact on employment in New South Wales?---I'm not aware of any research exploring that relationship but it's possible.

PN22841

Are you aware of whether there was any similar premium reduction in Victoria in the same period?---No, I'm not.

\*\*\* SERENA YU

XXN MR IZZO

PN22842

You didn't look at differences - sorry I withdraw that, you didn't look at changes to Workers Compensation premiums during the period 2010 in preparing your research, did you?---No.

PN22843

I'd just like to ask you a couple of further questions about a different matter. I think you gave evidence earlier, the differences in payroll tax between states might impact upon employment. Do you recall that?---No, I don't recall making any comments on payroll tax.

PN22844

Are you aware of the level of payroll tax in Victoria?---No, I'm not.

PN22845

Are you aware of the level of payroll tax - and sorry, when I say level I mean the percentage that is applied to particular employers. Are you aware of that level of payroll tax in New South Wales?---I'm not familiar with the tax rules, no.

PN22846

Can I ask you to assume this, that is that on 1 July 2010 the rate of payroll tax applicable to employers who are subject to payroll tax in Victoria reduced from 4.95 per cent to 4.9 per cent. So that is a .05 per cent reduction in payroll tax took effect in Victoria on 1 July 2010. Can I ask you to please assume that?---Sure.

PN22847

Can I also ask you to assume that in New South Wales, on 1 January 2010 payroll tax dropped from 5.7 per cent to 5.65 per cent. It then dropped again on 1 July from 5.65 per cent to 5.5 per cent and it then dropped again on 1 January 2011 from 5.5 per cent to 5.45 per cent. Can I accordingly ask you to assume that in New South Wales, from 1 January 2010 to 1 January 2011, payroll tax dropped a total of .3 per cent?---Yes.

PN22848

Did you understand what I've just put to you?---Yes.

PN22849

If you assume that the figures that I've given you are correct, do you accept that they would have had some possible impact on employment in a positive fashion in New South Wales?---It's possible but without actually researching the relationship, I couldn't say.

PN22850

But you didn't have regard to these matters when conducting your survey?---No.

PN22851

Sorry, I should just rephrase that question. You didn't have regard to these matters when conducting the analysis in your report?---That's right.

PN22852

Do you accept that business costs can impact upon employment?---Yes.

\*\*\* SERENA YU

XXN MR IZZO

PN22853

So costs such as energy costs or costs such as the costs of good?---Yes.

PN22854

But you didn't look at changes in energy costs between New South Wales and Victoria post 2010, did you?---I'm not aware of any data source that would provide quarterly, at the level of detail that would be required.

PN22855

Am I correct in understanding that you didn't look at any business cost inputs whatsoever other than wages, in the period post 2010 and whether there were industry level changes in such costs between New South Wales and Victoria?---The analysis was to measure the impact of the increase in Sunday penalty rates and we did not account for other measures of business costs.

PN22856

So I take it that your answer is you did not look at any changes to business costs in either New South Wales or Victoria after 2010, other than changes in wages?---That's right.

PN22857

I have no further questions.

PN22858

JUSTICE ROSS: Any further cross-examination? Mr Moore.

**RE-EXAMINATION BY MR MOORE**

**[2.31 PM]**

PN22859

MR MOORE: Ms Yu, I just want to ask you a few questions in relation to some evidence you gave this morning?---Yes.

PN22860

Excuse me a moment. If you could go to page 36 of your first report?---Yes.

PN22861

This is the research proposal?---That's right.

PN22862

Remember you were asked some questions about this earlier today?---Yes.

PN22863

About halfway down the page you were asked the paragraph there which reads;

PN22864

*The research set out in this proposal seeks to interrogate the contention around Sunday penalty rates.*

PN22865

The third line down;

\*\*\* SERENA YU

RXN MR MOORE

PN22866

*Specifically, the research will investigate whether the increases in award Sunday penalty rates in the New South Wales retail industry between 1 July 2010 and 1 July 2012 had any effect on -*

PN22867

And you then set out three dot points?---Yes.

PN22868

You said in relation - when you were asked some questions about that, you said that you were testing the hypothesis?---Yes.

PN22869

You also agreed to a question asked of you, that you were seeking to prove it within statistical procedures?---Yes.

PN22870

What did you mean by that last statement?---It means that when we say that an effect is significant, we attach a level of confidence to those results. So if I draw your attention to page 22 in the original report, table 3. In the table in the middle column, under "total employment", the numbers in the first column, the first one reads; -0.045, then 0.029 et cetera. The figures without stars we can't attach any confidence to those numbers and that's what I mean by statistical procedures. Those numbers without stars are effectively no different from zero.

PN22871

You agreed to the proposition that you took it upon yourself to report on results of your analysis post 2012?---That's right.

PN22872

Why did you do that?---To uphold the integrity of the research more data is always better than less data and the research proposal was written months in advance of the analysis, and is always an evolving project.

PN22873

You accepted that there was - the data showed that there was a downward trend in New South Wales in employment between February 2009 and May 2010, but you said that that was not relevant to the method you were adopting?---That's right.

PN22874

What do you mean by that?---If I could draw your attention to tab 2, my second report.

PN22875

Yes?---Page 4.

PN22876

Yes?---Figures 1 and 2. Figure 1 is for the total number employed, the second is for hours.

\*\*\* SERENA YU

RXN MR MOORE

PN22877

Yes?---In order to establish a trend you need an adequate amount of data points. The period that I've selected is between when trading hours was deregulated up until the first increase in Sunday penalty rates. The period that the other side asked me about is a very small component of that overall trend. It's too small to actually conclude anything about and had I conducted the analysis on just that small amount, it wouldn't have been statistically valid.

PN22878

Thank you. You were asked a number of questions about factors which might affect the choice of the control group. Do you recall a number of factors were put to you such as different profit margins in different - New South Wales and Victoria, different levels of productivity, different coverage of flexible work arrangements and various other matters. You agreed that these were known as omitted biases, and you said that you took into account what was available?---That's right.

PN22879

What do you mean by that?---So first of all with omitted variables bias, it only biases the estimates, which I pointed out earlier in table 3, if they're correlated with the variables of interest; the variables of interest were the dates – July 1, 2010/11/12/13/14. I can't imagine why those dates would be correlated with those additional variables, so omitted variable bias is not a given. Second of all, we don't have data on those things. It would be nice to account for everything but I work within the best available data, and the data that was brought to bear on this issue is still far richer than has been done before.

PN22880

Thank you. You accepted that you relied irrelevant matters in concluding or setting out in your report why you say your analysis was robust?---That's right.

PN22881

The robustness check?---Yes.

PN22882

What do you mean by that, that you relied on irrelevant matters?---Yes, in the Pezzullo critique, which is in tab 3, I was asked to engage with a long list of specification tests, which when I undertook the original analysis I deemed as irrelevant because I knew they wouldn't make a difference and the academic literature would never ask for such tests. I engaged with those tests from the Pezzullo critique because that was the basis of her critique, and I actually went and undertook each and every one of those specification tests and as expected found them to be irrelevant, but having tested them I can now say the conclusions are now robust to all these additional concerns, which weren't that important in the first place.

\*\*\* SERENA YU

RXN MR MOORE

PN22883

Thank you, one last question. You said that you only now have the HILDA data, the ABS data, and something that you referred to I think as the Slater code?---Stata code, it's a software statistical package.

PN22884

Thank you, and that you no longer have your working notes, meeting notes and emails from the time when you undertook this research?---That's right.

PN22885

Can you just explain to the Commission why that is so, why you don't have any of that material?---Well, I changed jobs, I'm not at UTS. When I left, all of my hard copies were shredded and I no longer have access to any of the email servers or storage devices at Sydney Uni.

PN22886

Thank you. Nothing further, if the Commission pleases.

PN22887

JUSTICE ROSS: Thanks very much, you're excused.---Thank you.

PN22888

My apologies for the delay in dealing with all of your evidence.---That's fine.

<THE WITNESS WITHDREW

[2.40 PM]

PN22889

JUSTICE ROSS: Mr Izzo, did you want to tender that media release?

PN22890

MR IZZO: Your Honour, I think it may be helpful to tender it for the purpose of establishing what was put to Ms Yu – or Dr Yu I should say. We might seek to – and we'll raise this with the union parties – there are a couple of matters I asked Dr Yu to assume. I think there's some objective material out there that I can probably seek to file to make good the assumptions I asked her to give, so in short, yes, we'd like to tender it but we might, with leave, and we'll speak to the union parties about this matter, seek to file some further material just to support the assumption.

PN22891

JUSTICE ROSS: No, that's fine. I'll mark it ABI14.

**EXHIBIT #ABI14 MEDIA RELEASE**

PN22892

JUSTICE ROSS: I was going to ask you for the material in any event, because to the extent that you're putting the proposition that a potential confounding factor was the reductions in WorkCover premiums in New South Wales, the document you're relying on doesn't tell us anything about the extent of those cuts or indeed if there were any in the retail trade sector, so - - -

\*\*\* SERENA YU

RXN MR MOORE

PN22893

MR IZZO: Indeed, your Honour, and I'm – I apologise.

PN22894

JUSTICE ROSS: No, that's all right.

PN22895

MR IZZO: Yes, indeed, and my understanding is that we're going to be able to produce some more objective material rather than the comments of the minister who introduced the cuts, and that's probably better material to rely upon, so we'll seek to do that in the course of the coming week.

PN22896

JUSTICE ROSS: And look also there was the discussion during cross-examination – I can't remember if it was Mr Gotting or Mr Wheelahan – about what's in ANZIC Code G, whether fast foods - - -

PN22897

MR IZZO: Yes.

PN22898

JUSTICE ROSS: Look as far as I've asked our research section that question, they say it's not in G, but to the extent there's any controversy you can file some material. There's probably some stuff on the public record about what's in the relevant ANZIC codes; it shouldn't be a matter that requires - - -

PN22899

MR GOTTING: There's an ABS report and we're happy to tender the entire report or the relevant sections.

PN22900

JUSTICE ROSS: Yes, okay. Anything further?

PN22901

MR GOTTING: I can do it now if that's - - -

PN22902

JUSTICE ROSS: Yes, sure.

PN22903

MR IZZO: Your Honour, by way of housekeeping there's perhaps two brief matters. I raised earlier this week the possibility of tendering a document that related to the history of public holidays.

PN22904

JUSTICE ROSS: Yes?

PN22905

MR IZZO: Having further reviewed that document and had some initial discussion with the unions, I think the document is properly characterised as a submission so there's no need to tender it. The second matter was some further material from Ms Baxter. We're going to endeavour to provide that material to

the SDA on Monday. We'll seek their consent to file. If that's not forthcoming then we'll contact the Commission in due course, but we hope to again make arrangements with the SDA and come to you with a streamline fashion for the tendering of that material.

PN22906

JUSTICE ROSS: Okay, thank you.

PN22907

MR GOTTING: Just for the record, can I indicate that I'm handing up an extract of the Australian and New Zealand Standard Industrial Classification 2006. It's from ABS catalogue number 1292 and relevantly the pages of the extract are pages 40, 46 and 47.

PN22908

JUSTICE ROSS: Thank you.

PN22909

MR SECK: Can I raise - - -

PN22910

JUSTICE ROSS: Let's deal with this first.

PN22911

MR MOORE: Yes, my learned friend has just shown me that and I don't expect there to be any difficulty with that, your Honour.

PN22912

JUSTICE ROSS: Yes, okay, thank you. I'll mark that exhibit AiG18.

**EXHIBIT #Ai GROUP 18 EXTRACT OF ANZSIC 2006 FROM ABS CATALOGUE NUMBER 1292, BEING PAGES 40, 46 AND 47**

PN22913

JUSTICE ROSS: Yes, Mr Seck?

PN22914

MR SECK: Just on one further housekeeping issue, your Honour?

PN22915

JUSTICE ROSS: Mm-hm.

PN22916

MR SECK: Your Honour will recall that there was some issue about Ms Pezzullo's availability, and there were directions for the employer groups and the SDA to have discussions on whether or not her dates could be swapped. Those discussions have occurred. Regrettably the witnesses on the 15th cannot move their dates for cross-examination, so that's the first issue. The second issue, and I've raised it with my learned friend, Mr Moore, who's given – since the last occasion Ms Pezzullo has filed a further report in response to Ms Yu's report. There may be additional time required for Ms Pezzullo, having regard to the fact that Mr Moore had raised that he thought he initially needed 1-and-a-half days.

I've spoken to Mr Moore about it. He's going to consider the issue. It may be affected by this question of the production of documents which is before Commissioner Johns at the moment, but I thought I'd simply flag that issue.

PN22917

JUSTICE ROSS: The resolution of the issues between yourself and the SDA, was it not that parts of the Pezzullo report were to be regarded as submissions, is that right?

PN22918

MR SECK: That's been done, your Honour. We're hoping - - -

PN22919

JUSTICE ROSS: No, no, but I had rather assumed that that – that's why we thought a day would be sufficient, because in the normal course you – well, it would be a matter for you, but you'd be unlikely to traverse submissions in cross-examination.

PN22920

MR MOORE: No, your Honour, I'm certainly not going to be cross-examining on submissions.

PN22921

JUSTICE ROSS: No.

PN22922

MR MOORE: And that is dealt with a number of parts of the report, but - - -

PN22923

JUSTICE ROSS: Yes.

PN22924

MR SECK: - - - there are now three Pezzullo reports and there is - - -

PN22925

JUSTICE ROSS: Well, it's only November.

PN22926

MR MOORE: Have I lost track of one? There's a reply. So there's more than I can keep up with. I understand a day has been put aside. I'm not able to say to you - to the Bench clearly now I definitely need more than a day. The previous estimate was a day-and-a-half; I'd reconciled myself to a day in light of the imperatives that we're working under. What I would say is that it would be – if it's convenient to the Bench – if it's possible to fix a longer day if necessary on that day?

PN22927

JUSTICE ROSS: We can certainly do that.

PN22928

MR MOORE: There's a 9 o'clock commencement. There is the question of the controversy around documents which remains to be dealt with before

Commissioner Johns. How that is resolved may well bear upon estimates of cross-examination, but the question of the treatment of parts of one of the Pezzullo reports as submissions constrained to some extent the extent of cross-examination, but I wouldn't want to overstate the extent of it.

PN22929

JUSTICE ROSS: No, that's fine. I wasn't sure of the extent of it in any event.

PN22930

MR MOORE: Yes.

PN22931

MR WHEELAHAN: Your Honour, sorry to add - - -

PN22932

JUSTICE ROSS: Just before you do, Mr Wheelahan, whereabouts are you up to with Commissioner Johns?

PN22933

MR MOORE: Commissioner Johns has listed the matter for next Wednesday and Thursday I believe for short periods on those two days, just around I think the Commissioner's availability, given the relative urgency of the matter, so the matter will be progressed at that time.

PN22934

JUSTICE ROSS: Can I suggest that once that matter is resolved and once you know or have a better idea of timelines, and I'd also ask Mr Izzo to have another look at the estimates for the union witnesses the day before, because it may be that some time is available later in that day for Ms Pezzullo to commence her evidence then. But once Commissioner Johns has resolved the matter that's before him, if you can contact my associate we might mention the matter, and then it will give people an opportunity to identify any sort of housekeeping issues we need to sort out and just make sure that we don't miss anything.

PN22935

MR MOORE: Yes.

PN22936

JUSTICE ROSS: And we can deal with issues of timing at that point.

PN22937

MR MOORE: Yes. Thank you, your Honour.

PN22938

JUSTICE ROSS: It may be also that by some appropriate concessions that the cross-examination of some of the other witnesses either may not be necessary or can be shortened.

PN22939

MR MOORE: Yes, I'm not sure, I don't recall off the top of my head what the estimates are for the union witnesses on the Tuesday.

PN22940

JUSTICE ROSS: No, neither do I.

PN22941

MR MOORE: But it would be – the attraction of potentially commencing Ms Pezzullo on the Tuesday afternoon is fairly considerable.

PN22942

JUSTICE ROSS: Yes.

PN22943

MR MOORE: If it's possible.

PN22944

JUSTICE ROSS: Well, Mr Seck, you might mention that to Ms Pezzullo just in the interim.

PN22945

MR SECK: Your Honour, we'll seek to reserve that time just in case.

PN22946

JUSTICE ROSS: Yes.

PN22947

MR SECK: I know that time is available. I think the other concern which Ms Pezzullo had was, if we sit a longer day there's obviously – it's going to be a lot harder on her in terms of her being in the witness box, and if we can spread it out over a day - - -

PN22948

JUSTICE ROSS: Well, we sat to 7 o'clock for you to cross-examine some of the union witnesses and you didn't seem too concerned about their welfare, so I'm afraid that's just going to be - - -

PN22949

MR SECK: I don't know if they were there the full day, your Honour.

PN22950

JUSTICE ROSS: It might have seemed that way, but look we'll do the best we can and if there can be some accommodation between the parties which shortens the cross-examination of some of the other witnesses then it'd be desirable to get Ms Pezzullo on the Tuesday afternoon if we can to commence her evidence and it can conclude the following day.

PN22951

MR SECK: May it please.

PN22952

MR WHEELAHAN: Your Honour, I'll be calling Ms Pezzullo as well or utilising the calling of her to tender that reply report that she had to Ms Yu.

PN22953

JUSTICE ROSS: Yes.

PN22954

MR WHEELAHAN: And then to deal with Ms Yu's reply to her reply, I can either deal with that in evidence-in-chief or have a written report prepared in advance. I'm content for either.

PN22955

JUSTICE ROSS: The practice has been – well, there's been no standard practice. Parties have either adopted one or the other, but it's not been unusual if there's been a report replying to something then it's put to them in chief.

PN22956

MR WHEELAHAN: I'm content to do that.

PN22957

JUSTICE ROSS: But probably a short statement would be better.

PN22958

MR WHEELAHAN: I thought it might be, all right.

PN22959

JUSTICE ROSS: Bearing in mind we may have limited time.

PN22960

MR WHEELAHAN: Yes, okay, I'll do that, your Honour.

PN22961

JUSTICE ROSS: But just be conscious that it not traverse – not go beyond - - -

PN22962

MR WHEELAHAN: No, I'll ensure that - - -

PN22963

JUSTICE ROSS: Yes, okay.

PN22964

MR MOORE: For my part, I thank my friend for his indication. I think that would be a more efficient way through it in terms of managing the cross-examination.

PN22965

JUSTICE ROSS: It also means that you're on notice as to what you're saying and you can confer with Dr Yu and whoever else you want to, so I think it'd be both fair and more efficient if we do it that way. Is there anything else? No? Well, can I encourage you to have discussions about the witnesses that are to be called on the Tuesday?

PN22966

MR DIXON: We've already done that, your Honour, and from our perspective we will reduce the scope – we've had discussions, and we will continue to do that.

PN22967

JUSTICE ROSS: Good, thank you. I'd encourage the others that are proposing to cross-examine those witnesses to engage in the same process, with a view to either - with appropriate amendments or clarification or concessions – of limiting the scope of the cross-examination. Nothing further? Well, I'll see you at a mention once Commissioner Johns has finished with that matter. Thank you.

**ADJOURNED TO A DATE TO BE FIXED**

**[2.52 PM]**

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