



TRANSCRIPT OF PROCEEDINGS

*Fair Work Act 2009*

1052822

**JUSTICE ROSS**

**AM2014/305**

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

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

**Melbourne**

**1.03 PM, MONDAY, 7 DECEMBER 2015**

**Continued from 6/11/2015**

PN22967

JUSTICE ROSS: Could I have the appearances for Melbourne please.

PN22968

MS BURKE: Ms Burke appearing for United Voice, if it please the Commission.

PN22969

MS A FORSYTH: Your Honour, I appear on behalf of the Shop Distributors and Allied Employees Associations, Forsyth, initial A.

PN22970

JUSTICE ROSS: Thank you.

PN22971

MS G STARR: Starr, initial G, for the ACTU.

PN22972

MR C BREHAS: Your Honour, Brehas, C, for the NRA.

PN22973

MR WHEELAHAN: Wheelahan, for the ARA, NRA and MGA.

PN22974

JUSTICE ROSS: In Sydney?

PN22975

MR GOTTING: May it please the Commission, my name is Gotting and I appear for the Australian Industry Group.

PN22976

JUSTICE ROSS: Thanks, Mr Gotting.

PN22977

MR J ARNDT: Arndt, initial J, appearing for Australian Business Industrial and New South Wales Business Chamber.

PN22978

MS J LIGHT: Light, initial J, for the Pharmacy Guild of Australia.

PN22979

MR J STANTON: May it please, Stanton, initial J, for the Hotels Association and the Accommodation Association of Australia.

PN22980

JUSTICE ROSS: It might be easiest if I go through the issues I've got and then if I miss anything or anyone has anything else you can raise those at the end. I've received from ABL some revised cross-examination estimates in respect of the union witnesses to be called on Tuesday the 15th. The schedule now looks that Dr O'Brien would be called at 9 o'clock, it's estimate he'd be an hour and 45 minutes for cross-examination. It's then proposed to call Professor Charlesworth at 11 am. Professor Charlesworth's likely to be two hours and 15 minutes, so

we've scheduled her also at 2 o'clock, just in case, after the adjournment but it may be that her evidence can be completed before the luncheon adjournment.

PN22981

After Professor Charlesworth, Dr Fiona McDonald it's estimated an hour and 15 minutes, we've provisionally put her in at 2.30 but if she could be available at 2 o'clock then in the event that Professor Charlesworth's evidence finishes earlier then we can deal with Dr McDonald earlier. United Voice has indicated it wishes to cross-examine or have further cross-examination in relation to the additional material of Mr Lovell, Mr Ovenden and Mr Madden. Probably the convenient time to do that is after Dr McDonald's evidence concludes on the Tuesday. Are they AHA witnesses or - - -

PN22982

MS BURKE: They are, your Honour. We don't seek to cross-examine Mr Lovell.

PN22983

JUSTICE ROSS: Right, so you don't require Mr Lovell.

PN22984

MS BURKE: We're in ongoing discussions with regard to Mr Ovenden and Mr Madden, but an issue has been raised with regard to Mr Madden and the production of his documents which I could go through now, or we can discuss at the end of your Honour's list.

PN22985

JUSTICE ROSS: We might return to that. When do you imagine you'll be able to let us know whether - well, if they are required for cross-examination then they be dealt with after Dr McDonald's evidence. Perhaps we can leave it on that - - -

PN22986

MS BURKE: Yes, that's our preference as well.

PN22987

JUSTICE ROSS: Is there anything the AHA wants to say about that?

PN22988

MR STANTON: Your Honour, I understand that both Mr Madden and Mr Ovenden are available. In fact they're available on both days but Tuesday appears to be the preferable day.

PN22989

JUSTICE ROSS: I think so. I think we'll be occupied with Ms Pezzullo on the Wednesday.

PN22990

MR STANTON: Yes, your Honour. I just should raise there is an issue of documentation which is relevant to Mr Madden. On the previous occasion he gave evidence in Melbourne and there was an outstanding issue of material to be provided. I understand from my instructing solicitors that they are attending to that as a matter of urgency, that Mr Madden understands the urgency of it and we

hope to be in a position to have that material produced in due course. I don't have a specific time, but the urgency is appreciated and he is available on the Tuesday.

PN22991

JUSTICE ROSS: Well there's not much point in having him on the Tuesday if he hasn't produced the material by then.

PN22992

MR STANTON: Yes. Well we'll do our best to push that matter along.

PN22993

JUSTICE ROSS: I mean we can issue - I mean if need be we can issue a summons and he can appear before the Tuesday and explain why he can't provide the material.

PN22994

MR STANTON: That might be premature at this stage. As I say my instructing solicitors are doing their best to resolve that matter.

PN22995

JUSTICE ROSS: Well you might explain to him that an order's been issued and he should comply with it, otherwise we'll need to take further steps.

PN22996

MR STANTON: Yes, of course. Yes, may it please.

PN22997

JUSTICE ROSS: Is that the issue you wanted to raise?

PN22998

MS BURKE: That is the issue and of course your Honour will know that that order for production was made on 21 August.

PN22999

JUSTICE ROSS: It's nice that you think that I would know that but it's - but the point is it was made some time ago and it hasn't been complied with.

PN23000

MS BURKE: When Mr Madden was in the witness box in September that was discussed with him, and he said he would comply with that order for production. Some documents have been provided but complete compliance is still absent. The purpose of recalling Mr Madden for cross-examination is to put certain matters to him resulting from the documents that he has produced and I don't want to speculate but it's highly possible, I think, that further documents he produces will generate a few more questions. Obviously, the sooner that we have those documents the better. The suggestion of a summons is not unattractive.

PN23001

JUSTICE ROSS: See how you go in the discussions and if need be it can be brought back on for mention. Finding a time to do that might be tricky but we'll endeavour to accommodate a request for a mention in relation to it if you seek further action. But for the moment let's see if it can be resolved by discussion.

PN23002

MR ARNDT: Your Honour.

PN23003

JUSTICE ROSS: Yes.

PN23004

MR ARNDT: Arndt from Australian Business Industrial. It's probably timely just to provide the Bench with an update from Mr Izzo's email earlier this morning, in regards to the timing of Dr O'Brien's evidence.

PN23005

JUSTICE ROSS: Yes.

PN23006

MR ARNDT: The revised estimate is in fact now one hour and 30 minutes, instead of one hour and 45 minutes, so just a slight shaving off of 15 minutes.

PN23007

JUSTICE ROSS: You've seen there's been a further statement filed by Dr O'Brien.

PN23008

MR ARNDT: I have seen that.

PN23009

JUSTICE ROSS: No, that's fine. Well that might mean it - look, we might start Professor Charlesworth, at least have her available from 10.30 and that might mean that we can complete her evidence before the luncheon adjournment.

PN23010

MS FORSYTH: Your Honour, it is the preference of the SDA to have Ms Charlesworth heard first prior to the lunch break - sorry, Ms McDonald heard first prior to the lunch break. So the order being Mr O'Brien or Dr O'Brien then Ms McDonald and then Ms Charlesworth.

PN23011

JUSTICE ROSS: Why?

PN23012

MS FORSYTH: Simply because the estimate with respect to Ms Charlesworth is quite a bit longer, we think that the chances of fitting both Dr O'Brien and Ms McDonald in before the lunch adjournment might be higher.

PN23013

JUSTICE ROSS: Yes, but then we can have Professor Charlesworth anyway, because we're not stopping the case at - - -

PN23014

MS FORSYTH: Understood, your Honour.

PN23015

JUSTICE ROSS: Yes. Look, with the revised estimate I think it's less likely, and we would extend into the adjournment if it's only going to be a short period. So we'll be flexible about that but on the face of it, it looks like we should be able to complete Professor Charlesworth's evidence before the luncheon adjournment, and then have Dr McDonald at 2 o'clock.

PN23016

MS FORSYTH: Understood, thank you, your Honour.

PN23017

JUSTICE ROSS: Yes. These things are - as we've seen they're estimates and people do the best they can with what they've got. There are a couple of other matters that bear on the schedule before I get to Ms Pezzullo. ABL has filed a consolidated witness statement of Ms Baxter to replace the three earlier statements. I understand the SDA consents to that course. That's correct?

PN23018

MS FORSYTH: That is correct, your Honour.

PN23019

JUSTICE ROSS: So we'll make the necessary changes to the exhibit numbers and the like, load up the correspondence and note all of that. The SDA's to advise whether it will require Ms Baxter for further cross-examination. Do you?

PN23020

MS FORSYTH: Your Honour, at this stage that is highly unlikely. It is subject to Mr Izzo and I working through a further couple of issues, which may see some further amendments to the consolidated statement, not the exhibits.

PN23021

JUSTICE ROSS: Yes.

PN23022

MS FORSYTH: But we anticipate being able to inform the Commission in due course that primarily we don't require her to be recalled.

PN23023

JUSTICE ROSS: I think you'd need to do that by the end of the week because finding time to deal with her evidence isn't going to be easy and we would probably need to do it, we'd need to deal with her evidence late on the Tuesday I think.

PN23024

MS FORSYTH: I think that won't be necessary, your Honour.

PN23025

JUSTICE ROSS: Yes. There's correspondence from Meridian Lawyers on behalf of the AHA about Mr Lovell's revised calculations, seeking confidentiality in relation to those. You should submit a draft order under section 594, which covers the point you want to raise, discuss it with the - well presumably United

Voice and settle the terms of the consent order and file it. If you can do that by the end of the week then we'll take care of that.

PN23026

MR STANTON: Yes.

PN23027

JUSTICE ROSS: The other issue that I wanted to raise before we get to Ms Pezzullo is really the process for dealing with the other evidence. My recollection is that there's still an argument about the Productivity Commission report. Is it still the case that the employer interest wish to tender the Productivity Commission report? The interim report I should say.

PN23028

MR GOTTING: Your Honour, it's Gotting in Sydney from the Australian Industry Group.

PN23029

JUSTICE ROSS: Yes.

PN23030

MR GOTTING: The answer is yes but subject to the possibility of the final report being released in the next few days.

PN23031

MS BURKE: Can I say something about that which might assist.

PN23032

JUSTICE ROSS: Sure.

PN23033

MS BURKE: As far as I understand, the final Productivity Commission report has been released to government, government has - - -

PN23034

JUSTICE ROSS: Well media reports suggest that it was provided on 30 November.

PN23035

MS BURKE: That's correct and - well that's according to the website. As I understand it, government has 25 sitting days within which to table it to parliament and then release it to the public and the next sitting day is not until 3 February. The Productivity Commission report was something that was also on my list to raise in terms of the tendering of that draft report or otherwise. I understand that the employer's submissions are due on 3 February.

PN23036

JUSTICE ROSS: Yes.

PN23037

MS BURKE: So - - -

PN23038

JUSTICE ROSS: Let's not - look, in some ways I think we should deal with - given the likelihood of the final report being available in the next few days I think is pretty much zero. So it's then a question of whether you seek to tender the interim report, unless you have some other knowledge that I'm not aware of but government usually prepares a response to the report before they release it, particularly a report of this nature. So it's really whether you press for the interim and if you do then I just had a suggestion about how we might deal with that.

PN23039

If the final report becomes available at some later stage in these proceedings and a party wants to tender it, we'll hear that argument and we'll then provide if we admit it an opportunity for parties to say what they wish to say about it. We'll just have to manage that as best we can. None of us have got any control over when that final report is going to be released. I don't know when the 25 sitting days actually ends and whether the case will be over by then or - - -

PN23040

MS BURKE: It ends on 23 May.

PN23041

JUSTICE ROSS: Yes, well I'm hoping the case will be finished by then. Let's see how that emerges. In the meantime Mr Gotting, having heard all of that it may be the case that you never see the final report until after we have reserved and perhaps after we've handed down the decision. So on that basis, do you press the interim report, the admission of that?

PN23042

MR GOTTING: We do, your Honour.

PN23043

JUSTICE ROSS: All right. What I was going to suggest, given that I don't really want to cut into the hearing - limited hearing time we've got scheduled and I don't particularly want to bring you back in the week of 21 December to argue this point, and I'm pretty sure you don't want to come back then either. I was going to suggest this course, that SDA and the United Voice to file a written submission setting out the basis of the objection. I'll come back to timelines in a moment. Is it just the Ai Group who wishes to file it? Is it intended that it be filed and be able to be used by parties across all of the areas?

PN23044

MR WHEELAHAN: For my part, your Honour, I understood that to be the case, yes.

PN23045

JUSTICE ROSS: Let's work on that assumption. Then the employer interest would file a reply submission and then SDA and United Voice a reply to the employer reply, and then we deal with the matters on the papers. That was what I was going to propose. In terms of the timelines, bearing in mind, you know, I think the issue's a relatively confined one. I was going to suggest that SDA and United Voice by 4 o'clock Monday the 14th, so Monday of next week, the

employers to reply by Friday the following, 18th. SDA and unions by Tuesday the 22nd and then we'd make a decision and let you know on the 23rd or 24th. I think you'd want to know before Christmas and I can't think of another way to.

PN23046

MS BURKE: Certainly, and my proposal was also going to be for written submissions and for the matter to be dealt with on the papers with a slight reversing of the sequence. My timetables less generous than your Honour's.

PN23047

JUSTICE ROSS: Yes.

PN23048

MS BURKE: Because as I understand it the Productivity Commission draft report is intended to be used by all employer groups to go to different perhaps awards and aspects of awards, and it's not clear from our position the relevance of it, I would propose that the employers first put their submissions on, first indicating in particular the relevance of the report to their case.

PN23049

JUSTICE ROSS: What findings that they wish us to make on the basis of the report, yes.

PN23050

MS BURKE: I say that also on the basis of the limited extent to which the report's been used to date and putting it to experts, saying this article for example, how does this relate to the restaurants award or sector. My suggestion was that the employer parties file their submissions on the end of Thursday or Friday and United Voice, if it was Thursday, United Voice could file submissions by 4 pm on Monday.

PN23051

JUSTICE ROSS: Yes, I don't think we need to do it quite that quickly.

PN23052

MS BURKE: Perhaps I'm just very keen to get the year done with.

PN23053

JUSTICE ROSS: No, no, I appreciate that but we're not going to be able to decide it shortly thereafter because we'll be in the hearing in any event. Well what do the parties say to the proposition that the employer parties - and I'd ask you to do this in a coordinated way so there's perhaps one submission that identifies - consolidates the findings. I might ask you, Mr Gotting, if you wouldn't mind coordinating those efforts, simply setting out your submission as to the relevance of the report and what findings you seek to draw from it. Rather than have you do that by Thursday - - -

PN23054

MR GOTTING: Your Honour, can I - - -

PN23055

JUSTICE ROSS: Yes.

PN23056

MR GOTTING: I'm sorry to interrupt your Honour but the Australian Industry Group has already set out in the form of written submission the relevant sections of the report.

PN23057

JUSTICE ROSS: Yes.

PN23058

MR GOTTING: And the findings that it seeks based on that.

PN23059

JUSTICE ROSS: Yes, but the other parties haven't. The other employer parties.

PN23060

MR GOTTING: Well in those circumstances I undertake to coordinate the preparation of a single document.

PN23061

JUSTICE ROSS: Thank you. If you wouldn't mind incorporating what you've already submitted then it will all be in the one document, and that'd be helpful. I appreciate that it's a bit of a burden to place on you given that you've already done the work from your organisation. But I think given the tight timeframes it might go a bit easier. If that can be done by 4 pm on Monday, 14 December, United Voice and SDA reply by 4 pm on Friday, 18 December and then the employer parties if they wish to say anything in reply to what the unions submit, they should do that by 4 pm on 22 December.

PN23062

MR WHEELAHAN: Your Honour, could I just ask is it intended that only parts of the report might be tendered rather than whole - - -

PN23063

JUSTICE ROSS: I don't know, you're the ones tendering the report.

PN23064

MR WHEELAHAN: Yes, well hearing the discussion sounds like in part but - - -

PN23065

JUSTICE ROSS: No, that's fine. Look, I think if you sort that out amongst yourselves and then if it can be confined so much - but parts of the report plainly are not relevant to these proceedings.

PN23066

MR WHEELAHAN: Yes.

PN23067

JUSTICE ROSS: I don't think it's - - -

PN23068

MR WHEELAHAN: It's just whether you deal with it as a document or whether you're actually - - -

PN23069

JUSTICE ROSS: No, I deal with it as an extract just to avoid the - - -

PN23070

MR WHEELAHAN: Yes.

PN23071

JUSTICE ROSS: I think it's reasonably clear which parts of the report is going to be sought to be tendered. But I think confine it to that part. It's plain on its face that much of the report isn't relevant to these proceedings. The contest is really about what's said about penalty rates and the like.

PN23072

MR WHEELAHAN: Yes, and what was put to witnesses presumably will be - - -

PN23073

JUSTICE ROSS: Certainly, yes. So if you can confine it to the - to what you need.

PN23074

MS FORSYTH: Your Honour, it might just be opportune at this time to mention that there are a few other outstanding objections issues that - - -

PN23075

JUSTICE ROSS: Just before we deal with that, does anyone have anything further that they wish to say about this Productivity Commission interim report issue? So you understand that the employer groups will file 4 pm Monday 14 December, United Voice and the SDA will file their objections by 4 pm Friday, the 18th. The employer interest can reply if they wish by 4 pm on 22 December and we'll determine that matter on the papers. Other objections?

PN23076

MS FORSYTH: Yes, thank you, your Honour. They're outlined in what were submissions dated 15 September 2015. There are a number of ARA and other documents that we still press objections with respect to. Perhaps I can take it upon myself to ensure that we notify the relevant employer parties this week or sooner rather than later as to what we continue to press so that those issues can also be dealt with by way of submission on the Monday.

PN23077

JUSTICE ROSS: Yes. Look, I think I'd leave it to you to have the discussions directly, to identify what the nature of the objection is.

PN23078

MS FORSYTH: Yes.

PN23079

JUSTICE ROSS: Probably the easiest way through is to deal with it on the papers but I'll leave the - if you can come up with some draft proposals as to the filing of those between you then so much the better.

PN23080

MS FORSYTH: Certainly.

PN23081

JUSTICE ROSS: Then the timelines will suit the parties, it doesn't trouble the Bench that much when those timelines are. We'll rule on them when the material comes in.

PN23082

MS FORSYTH: Thank you, your Honour.

PN23083

JUSTICE ROSS: In relation to, I think, the Pezzullo evidence, one of the purposes of today was to see if we could commence Ms Pezzullo's evidence on the - late on the Tuesday. That depends on where we end up with Mr Ovenden and Madden, and I mean at the moment they're scheduled for - well, I think it looks like we could start Ms McDonald at 2 o'clock and she's scheduled for an hour and 15 minutes. So 3.30 would be the Ovenden and Madden and wherever we end up with them. It's really then a case of bearing - you know, how much time would we have. I don't know how long the cross-examination of those witnesses is going but I imagine with two of them, it's probably not much more than 30 minutes in total, which might bring us around 4 o'clock.

PN23084

MS BURKE: That's right, your Honour. At this stage, subject to the production of further documents our estimate is half an hour in total.

PN23085

JUSTICE ROSS: Yes. Well - - -

PN23086

MR WHEELAHAN: Your Honour, I might add with Ms McDonald that that estimate's an up to. So it may be shorter. I note you said 3.30, we may well finish that by - - -

PN23087

JUSTICE ROSS: Three o'clock, yes.

PN23088

MR WHEELAHAN: Yes.

PN23089

JUSTICE ROSS: Look, can I ask the Pharmacy Guild who - look it's been a while since - I think you're the main or you're tendering Ms Pezzullo's evidence. The issue had been raised before that it will be a long day for Ms Pezzullo starting at 9 o'clock on the Wednesday. I think there were some inquiries about her availability on the Tuesday. There is at least the prospect that bearing in mind

what's been put about some of the other witnesses that we could commence her evidence on the Tuesday and perhaps even get an hour in, sitting a little late on that day, which would mean that we may not - you know, it might not be as extended a sitting in the following day.

PN23090

I'm trying to find a balance between it obviously means Ms Pezzullo is going to be there for two days and I can't guarantee that she'd be in the witness box at 3.30 on the Tuesday, because that's in the hands largely of the employer interests and the cross-examination of the other witnesses. But at least at the moment there seems there's a prospect of that. For my part I think it's worthwhile considering having Ms Pezzullo available from 3.30 on the Tuesday and even if we commence - even if it ends up being 3.45 we could give you the indication that we'd at least get an hour's worth of her evidence done on that Tuesday, even if we sit slightly later than normal. Then it might not be as long a day on the Wednesday. It was the Pharmacy Guild that raised the issue of it'll be a very long day for Ms Pezzullo if we have to sit extended hours at the end of the day on the Wednesday.

PN23091

MS LIGHT: Sorry, your Honour, as I understand it she is available to appear on the Tuesday. Certainly we'd be happy for her to be dealt with from 3.30. It may be that we are able to - I'm conscious also that we act for the AHA in this matter and subject to our discussions with United Voice about those matters that are outstanding with further documents to be produced, we might be able to provide you with an updated timetable for an earlier time for Ms Pezzullo to attend.

PN23092

JUSTICE ROSS: Well yes, certainly but let's work on the basis if she's at least available from 3 o'clock then if Dr McDonald is dealt with at two, and that's dealt with in a shorter time period than the estimate, and then it turns out that you're able to resolve the issues with United Voice, looking at it at its most optimistic, then 3 o'clock comes into prospect. That would mean we might be able to get an hour and a half done, which would also - we'd still start at 9 o'clock on the Wednesday just to make certain we get through it. So could you take steps so that Ms Pezzullo's available from 3 pm on the Tuesday and if you could keep my chambers informed of your discussions around the other witnesses.

PN23093

MS LIGHT: Yes, your Honour.

PN23094

JUSTICE ROSS: It may be that - which is the witness you're having trouble getting material from?

PN23095

MS BURKE: Mr Madden.

PN23096

JUSTICE ROSS: Well it may be Mr Madden's going to be heard very late on the 16th.

PN23097

MS BURKE: Yes.

PN23098

JUSTICE ROSS: That might be another option. That we deal with the main witnesses and then we'll deal with Mr Madden late on the Wednesday.

PN23099

MS BURKE: Certainly, your Honour. As I understand it, Ms Ovenden is in Queensland so he'll give evidence by video link but Mr Madden will be here.

PN23100

JUSTICE ROSS: Yes, but look that'll probably be over in 10 or 15 minutes.

PN23101

MS BURKE: I think so too.

PN23102

JUSTICE ROSS: So we can probably squeeze him but if Mr Madden - if this is an issue around the provision of material, give some thought to late on the Wednesday and have a discussion with the employer representatives and see if we can deal with it that way. I think that's preferable to - I think the most preferable outcome is we deal with Ms Pezzullo's evidence, an hour, an hour and a half of it on the Tuesday, in the later afternoon and then we go into the Wednesday and try and manage it that way.

PN23103

MS BURKE: Thank you, your Honour.

PN23104

JUSTICE ROSS: Now Ms Pezzullo's also - there's been a recent report filed in response to - I'm starting to lose track of them but Ms Yu's report as well.

PN23105

MS FORSYTH: Yes, your Honour, and unless there are any other issues on your list I do intend to address you on that response to the reply.

PN23106

JUSTICE ROSS: Yes.

PN23107

MS FORSYTH: The SDA's position is that it objects to that report being received into evidence. Your Honour will recall that on 6 November leave was sought to file what was described as a short statement, and I think your Honour referred to it as such, in if you like replacement of Ms Pezzullo having to deal with Ms Yu's reply report in examination in-chief. What we have since received as of Wednesday last week is a highly technical and very extensive report which goes well beyond a responsive report and what was intended by your Honour's grant of leave.

PN23108

JUSTICE ROSS: Well Ms Yu has criticised Ms Pezzullo's evidence. Ms Pezzullo is entitled to respond to that. There are two ways of doing it. They can ask questions of Ms Pezzullo in examination in-chief or they can tender a report which is directed at the issues. The issues to some extent are highly technical in the sense of the range of tests that were proposed in or were identified in Ms Pezzullo's criticism of Ms Yu's report. Ms Yu dealt with that and Ms Pezzullo wants to say something about Ms Yu's comment on her critique. So what's the best way for Ms Pezzullo to do that?

PN23109

MS FORSYTH: Well your Honour we would say that to either have Ms Pezzullo deal with it at this point in time by way of the sort of report that has been filed is highly prejudicial.

PN23110

JUSTICE ROSS: Why is it prejudicial?

PN23111

MS FORSYTH: I don't - well, your Honour, perhaps if I can take you to the report itself. It would at the very least require us to seek leave to extend to file a report by Ms Yu in response. That is because far from just being a responsive report, it does contain further analyses and regressions within the body of the report, and in addition - - -

PN23112

JUSTICE ROSS: Which party filed the Pezzullo report commenting on - - -

PN23113

MR WHEELAHAN: I did, on behalf of my parties.

PN23114

JUSTICE ROSS: Well I want the two of you to have a discussion and see if you can sort it out. If you can't we're not dealing with it next week. We'll deal with it in January and we'll bring her in to deal with it then.

PN23115

MR WHEELAHAN: Bring in - - -

PN23116

JUSTICE ROSS: Bring in both Ms Yu and Ms Pezzullo and we'll deal with their evidence then.

PN23117

MR WHEELAHAN: Yes.

PN23118

JUSTICE ROSS: So try and sort it out, if you can't then that's the course of action. Because there isn't another one available.

PN23119

MR WHEELAHAN: Yes.

PN23120

JUSTICE ROSS: It's a narrow issue relating to the Yu report and we'll deal with it as a discreet issue rather than in the course of the two days we have. There just isn't the time in the two days for you to have an examination in-chief around that issue - - -

PN23121

MR WHEELAHAN: As I say, that was the purpose of the report, your Honour.

PN23122

JUSTICE ROSS: Yes. No, no, well I just think you perhaps need to have a discussion about whether a revised report might accommodate both of your interests and if it doesn't then we'll mention it during the course of the two days, but that's where you'll be. Either in the week of 21 December dealing with it and calling both witnesses, they can both give evidence about what they want to say, you can ask them endless questions about it and that'll be the end of it. I'm not going for another report by Ms Yu, that will be replied to by Ms Pezzullo, I've already got half a dozen reports from Ms Pezzullo, and we're drawing it to an end. So that will be by oral evidence if you can't sort it out between yourselves. We'll either do it the week of the 21st or sometime in January.

PN23123

MR WHEELAHAN: If your Honour pleases.

PN23124

MS FORSYTH: Thank you, your Honour.

PN23125

JUSTICE ROSS: So hopefully you can sort it out but if you can't that's what we'll have to do. Is there anything else?

PN23126

MR ARNDT: Your Honour.

PN23127

JUSTICE ROSS: Yes.

PN23128

MR ARNDT: Can we just return very briefly to the unlikely event that Ms Baxter will be called for cross-examination.

PN23129

JUSTICE ROSS: Yes.

PN23130

MR ARNDT: I understand it's very unlikely that she will be. I should just note for completeness that she is on a cruise and will be returning on the 16th, so perhaps in line with your Honour's previous remarks, she might be tacked on at the end if need be.

PN23131

JUSTICE ROSS: Yes, and look if that doesn't work, I know at least I'm available on the 21st and I think I can grab another two members of the Bench on that day. I'm not sure Ms Baxter would welcome drifting in from the cruise and into cross-examination.

PN23132

MR ARNDT: I understand she packed a suit, your Honour, so she can come straight from the port if need be.

PN23133

JUSTICE ROSS: As has been indicated, it's highly unlikely and it may be that through discussions you can work out some sort of revision if needed to the consolidated statement. But it sounds like even if she is required it won't be for very long so yes, tacking on the end of the day. I'll leave that to the parties to continue to have discussions about - well, both Ms Baxter and where we get to with Mr Ovenden and Mr Madden but we'll work on the basis for the moment that - and I'll send out a revised schedule that we'll start dealing with Dr McDonald at 2 o'clock on the Tuesday. At 3 pm we'll provisionally schedule Ms Pezzullo, understanding that we may need to fit Mr Ovenden and Mr Madden and Ms Baxter in at some point towards the end of the day on either the Tuesday or the Wednesday. But I'll leave that to you to have further discussions. If you could let my chambers know by noon on Friday where you're up to with that, so that we can just make whatever arrangements need to be made for video links and the like. Is there anything else? I hesitate to ask but - no? Thank you very much, I'll see you next week.

**ADJOURNED INDEFINITELY**

**[1.38 PM]**