



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT WATSON
DEPUTY PRESIDENT GOOLEY
COMMISSIONER SPENCER**

AM2015/1

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2015/1)
Family and domestic violence clause**

Melbourne

10.03 AM, WEDNESDAY, 16 NOVEMBER 2016

Continued from 15/11/2016

PN1413

VICE PRESIDENT WATSON: Ms Burke.

PN1414

MS BURKE: Good morning. The first witness - sorry, before I call my first witness, perhaps I can just update the Full Bench about the discussions I've been having with my learned friends about the next few days. I understand that of the five witnesses listed to give evidence today, Ms Bignold and Ms McCormack are no longer required for cross-examination. There are some objections pressed by AiG and the Australian Chamber as to their evidence and I'll say something about those at the end of the witnesses this morning.

PN1415

VICE PRESIDENT WATSON: Yes.

PN1416

MS BURKE: So as a result, we are doing our best - and some adjusted estimates have been provided for the cross-examination times for the witnesses scheduled on Thursday, and we are doing our best to try and move witnesses around to use that time efficiently but there are some challenges with that. Witnesses have got other work commitments and some of them can be moved but some of them cannot. So we're doing our best and we'll keep the Bench informed.

PN1417

VICE PRESIDENT WATSON: Well, we appreciate those efforts.

PN1418

MS BURKE: That does mean that there are only three witnesses scheduled to give evidence this morning, so we will be finishing, I think, I can say with confidence before lunch. So the three witnesses we'll hear this morning are Mr Doleman, Mr Gandy and Ms Smallwood and with regard to Mr Doleman, there were two objections made to his witness statement and the ACTU has agreed to withdraw those sentences that are objected to and they are at paragraph 13 of Mr Doleman's statement.

PN1419

The first sentence to be withdrawn is right at the bottom of paragraph 13 on the first page, it goes over two pages. Unfortunately the pages aren't numbered but it's the third page, and that the sentence beginning:

PN1420

Leave is there for vitally important -

PN1421

all the way to -

PN1422

care of any children.

PN1423

That sentence comes out and then the next sentence:

PN1424

This clause is one of the most important clauses in the modern industrial relations system in this country.

PN1425

That sentence comes out as well. Finally, I have sought agreement from my friends which has been met to annex the Maritime Union of Australia's model clause, that's in their log of claims, it's referred to in the statement 2 statement, and I'd just like to hand up copies of that now.

PN1426

VICE PRESIDENT WATSON: Thank you.

PN1427

MS BURKE: That concludes the administrative matters with regards to the statement and I now call Mr Mick Doleman.

PN1428

VICE PRESIDENT WATSON: Mr Doleman.

PN1429

THE ASSOCIATE: Please state your full name and address.

PN1430

MR DOLEMAN: Michael Thomas Doleman, (address supplied).

PN1431

THE ASSOCIATE: Do you wish to give oath or affirmation?

PN1432

MR DOLEMAN: Affirmation please.

<MICHAEL THOMAS DOLEMAN, AFFIRMED

[10.07 AM]

EXAMINATION-IN-CHIEF BY MS BURKE

[10.08 AM]

PN1433

VICE PRESIDENT WATSON: Thank you, Mr Doleman, please be seated?---Thank you.

PN1434

Ms Burke.

PN1435

MS BURKE: Mr Doleman, can you please repeat your full name for the Commission?---Michael Thomas Doleman.

PN1436

Your address?---(Address supplied)

*** MICHAEL THOMAS DOLEMAN

XN MS BURKE

PN1437

Your occupation?---Trade union official.

PN1438

Thank you. Mr Doleman, have you prepared a statement for the purposes of these proceedings?---I have.

PN1439

Can I ask you to look at the folder in front of you. That document there which is a 13 paragraph statement signed and dated by you on 27 May 2016, and following a document headed 29.0 Domestic violence support, which is the MUA model clause?---Yes.

PN1440

Is that your statement?---That is my statement.

PN1441

Can I ask you please to turn to paragraph 13 - - -?---Sorry, paragraph 30?

PN1442

Thirteen?---13, yes, got it.

PN1443

Yes, it begins on page 3. At the bottom of that paragraph there's a sentence beginning:

PN1444

Leave is therefore vitally important.

PN1445

?---Yes.

PN1446

Can I ask you to, and I'll have a pen handed to you. Can I ask you to put a line through that statement - that sentence please?---"Vitaly important"?

PN1447

The whole sentence?---"Leave is vitally important"?

PN1448

Yes, yes?---Yes.

PN1449

Over the page, to the sentence that follows please:

PN1450

This clause is one -

PN1451

Just that sentence?---From "Dignity", through to "children"?

*** MICHAEL THOMAS DOLEMAN

XN MS BURKE

PN1452

Yes, and then from "This clause" through to "country"?---So struck out.

PN1453

Thank you. Does that statement there with those amendments and the annexure thereto form your statement and your evidence to this Commission?---Yes, it does.

PN1454

Thank you. I tender that statement and the annexure.

PN1455

VICE PRESIDENT WATSON: Exhibit B9.

**EXHIBIT #B9 WITNESS STATEMENT OF MICHAEL DOLEMAN,
TOGETHER WITH ONE ANNEXURE**

PN1456

MS BURKE: Thank you. Mr Doleman, please just wait there for a moment.

PN1457

VICE PRESIDENT WATSON: Mr Ward.

CROSS-EXAMINATION BY MR WARD

[10.10 AM]

PN1458

MR WARD: Thank you, your Honour. Mr Doleman, good morning. I don't think we've met before. My name's Nigel Ward, I appear in these proceedings for the Australian Chamber of Commerce and Industry. You've had a long experience with the MUA?---Yes, I became an official of the MUA in 1984 as the Victorian Secretary of the Seaman's Union at that time.

PN1459

Do you have much knowledge of modern awards?---A reasonable knowledge.

PN1460

Are you aware of which modern awards the MUA has members covered by?---It would be the Maritime Industry Seagoing Award, the Stevedoring Award and I'm not too sure what other awards might apply.

PN1461

Those would be the major awards?---They would be the major awards, yes.

PN1462

You've had a fair amount of involvement in bargaining for the MUA over the years?---In enterprise bargaining, yes, though I have not been involved in the modernisation of the award process.

*** MICHAEL THOMAS DOLEMAN

XXN MR WARD

PN1463

Do you know what percentage of MUA members are covered by enterprise agreements?---I would - I would say that 95 or more per cent.

PN1464

So you'd agree with me that the MUA is a very active union when it comes to enterprise bargaining?---Yes.

PN1465

In terms of how the MUA goes about bargaining, does it formulate a standard log of claims that it applies across a sector?---We have what is an enterprise bargaining clause template document, that is used as a guide to assist the negotiation team to draft an enterprise agreement. But also the workforce and their representatives draft up logs of claims which also form part of that process.

PN1466

Do you draft those logs of claims company by company or do you draft those logs of claims as a standard log and then add things to them?---As a standard log and each company is a bit different in some circumstances, so there might be some variations to accommodate that particular company.

PN1467

On average how many claims would be on that log?---Well, in some cases quite a lot. Ambit is still very much in the fore in some areas but in many other cases that's the starting point and then you get down to five, maximum 10 core key issues.

PN1468

When you say quite a lot, could a log of claims from the MUA have a 100 claims on it?---Yes, it could do in the start.

PN1469

You've used the phrase there ambit, it's not your understanding, it's not your expectation that an employer would agree to all those claims?---Absolutely. I've never ever seen that.

PN1470

Now when you bargain, is it the case that employers normally just respond to the MUA log of claims or do they normally serve a log on you?---More often than not, in fact I'd say in nearly all cases the employers will have a list of issues that they want addressed in the process as well.

PN1471

Those would be company specific?---Yes, company specific.

PN1472

In most cases are you able to reach an amicable agreement in terms of enterprise bargaining?---Yes, in all the cases we've reached agreement. Sometimes with the assistance of this Commission, other times with conciliation and more often than not just through hard bargaining between the parties.

*** MICHAEL THOMAS DOLEMAN

XXN MR WARD

PN1473

Your union's got a reputation of being both a hard and competent bargainer?---I'd just say that we work very, very diligently to try and get an agreement with the employer.

PN1474

You're always acting in the best interests of your members?---We'd like to think we are, yes.

PN1475

Now can I take you to your statement. You say at paragraph 11, could I ask you to go to that. You say that:

PN1476

The MUA has a draft DV leave clause that includes 10 days paid special leave. The draft DV leave clause is put forward at every enterprise agreement as they are being renewed and a view of the National Council Unions that unless there was a DV clause in the agreement it will not be ratified by the National Council.

PN1477

I take it the National Council's the governing body of the MUA?---It is, in terms of signing off on agreements.

PN1478

Would I be right in saying that if an employer resisted that clause, you would try and encourage them to change their mind and if needed use protected industrial action to support that position?---We have not had to do that in any EBA around this particular issue to this point. Might I clarify, if I can, that there may be extenuating circumstances where we may not necessarily force this clause because of the timeframe that the clause was served to the employee. It might have been served after the commencement of enterprise bargaining, so therefore we give them the benefit that it can be subsequently negotiated in future enterprise agreements because of the time that we actually served them with this particular clause.

PN1479

So it's part of what your union's agitating for, so far you've been successful?---Yes, we have approximately 17 enterprises agreements with this clause.

PN1480

But there may well be some companies that you will agitate this issue with in the next round of bargaining?---Yes, we will continue to roll this clause out as the enterprise agreements expire and fall due to negotiations.

*** MICHAEL THOMAS DOLEMAN

XXN MR WARD

PN1481

Can I just ask this, if an employer is not agreeing to what you want, have you in the past resorted to use protected industrial action?---To the best of my knowledge not in relation to this clause, no.

PN1482

No, I'm asking more generally?---Yes, we have taken protected industrial action.

PN1483

You take that action to try and persuade the employer to agree to your claims?---Yes.

PN1484

Is that normally successful?---It varies. Sometimes the intervention of this great house sort of steers it in a different direction, and sometimes the issues are about employer clauses that we want them to withdraw. So it's a bit of each way.

PN1485

No further questions. Thank you, Mr Doleman.

PN1486

VICE PRESIDENT WATSON: Mr Ferguson.

PN1487

MR FERGUSON: No.

PN1488

VICE PRESIDENT WATSON: Ms Burke.

PN1489

MS BURKE: No re-examination, if the witness could be excused.

PN1490

VICE PRESIDENT WATSON: Thank you for your evidence, Mr Doleman. You can step down?---Thank you very much.

<THE WITNESS WITHDREW

[10.16 AM]

PN1491

MS BURKE: The next witness is Mr Gandy.

PN1492

VICE PRESIDENT WATSON: Mr Gandy.

PN1493

MS BURKE: Just before I call Mr Gandy, I'll go through the same exercise of - -
-

PN1494

VICE PRESIDENT WATSON: We can bring him in though, can we?

PN1495

MS BURKE: Yes, he can be brought in, yes.

*** MICHAEL THOMAS DOLEMAN

XXN MR WARD

PN1496

VICE PRESIDENT WATSON: Yes.

PN1497

MS BURKE: While he's being - I'm asking the witnesses to stay well away and so there's a little bit of running to go and fetch them.

PN1498

VICE PRESIDENT WATSON: Right.

PN1499

MS BURKE: I might just use that time to take the Full Bench through where we've landed on objections.

PN1500

VICE PRESIDENT WATSON: Yes.

PN1501

MS BURKE: There were a number of objections made and the ACTU agreed to withdraw some of Mr Gandy's evidence. The first of those is at paragraph 15.

PN1502

VICE PRESIDENT WATSON: 15.

PN1503

MS BURKE: That's just the last words there of that paragraph:

PN1504

And I believe they would utilise it.

PN1505

So if those words could be struck out.

PN1506

VICE PRESIDENT WATSON: What is struck out?

PN1507

MS BURKE: The words at the end of paragraph 15 which start:

PN1508

And I believe they would utilise it.

PN1509

VICE PRESIDENT WATSON: Right. Full-stop after "entitlement".

PN1510

MS BURKE: Yes, thank you. The ACTU also withdraws all of paragraph 18.

PN1511

VICE PRESIDENT WATSON: Yes. Mr Gandy.

PN1512

THE ASSOCIATE: Please state your full name and address.

PN1513

MR GANDY: Sure. Brad Gandy, (address supplied).

PN1514

THE ASSOCIATE: Do you wish to give an oath or affirmation?

PN1515

MR GANDY: Oath.

<BRAD ALLEN GANDY, SWORN

[10.18 AM]

EXAMINATION-IN-CHIEF BY MS BURKE

[10.18 AM]

PN1516

VICE PRESIDENT WATSON: Thank you, Mr Gandy. Please be seated. Ms Burke.

PN1517

MS BURKE: Mr Gandy, can you please repeat your full name for the Commission?---Certainly. Brad Allen Gandy.

PN1518

Your address?---(Address supplied)

PN1519

Your occupation?---Assistant secretary of the WA AWU Branch.

PN1520

I'm sorry, I missed that last part, WA?---Yes, AWU WA Branch.

PN1521

Thank you. Mr Gandy, have you prepared a statement for the purposes of these proceedings?---I have.

PN1522

Can I ask you to look at the folder in front of you. Is that document in front of you there headed Statement of Brad Gandy? You'll note - I'm sorry, is there a tab in that folder there with your name on it?---Yes.

PN1523

Can I ask you just to turn to that please?---Yes.

PN1524

Is that statement in front of you the statement of Brad Gandy, currently has 18 paragraphs, the version in front of you does. It's signed and dated by you on 27 May 2016 and there are six annexures attached to it?---Yes.

PN1525

I understand that you wish to make a correction to one part of this statement?---Yes, if you draw me to that part, I - - -

*** BRAD ALLEN GANDY

XN MS BURKE

PN1526

Certainly. Can I ask you to look at paragraph 10 please?---Yes.

PN1527

That begins:

PN1528

On 17 December 2016 -

PN1529

Should 2016 be 2015?---It should.

PN1530

Thank you. Can I also please now ask you to turn to paragraph 15?---Yes.

PN1531

In the last sentence of paragraph 15, the last few words, and I'll read them:

PN1532

And I believe they would utilise it.

PN1533

Can I ask you please to put a line through those words?---Sure.

PN1534

Can I also ask you please to put a line or cross through all of paragraph 18?---Sure.

PN1535

So does that statement which is now 17 paragraphs with six annexures, signed and dated 27 May 2016 form your evidence to this Commission?---It does.

PN1536

Thank you. I tender that statement.

PN1537

VICE PRESIDENT WATSON: Exhibit B10.

**EXHIBIT #B10 WITNESS STATEMENT OF BRAD ALLEN GANDY
DATED 27/05/2016, TOGETHER WITH SIX ANNEXURES**

PN1538

MS BURKE: Thank you. Please just wait there, Mr Gandy.

PN1539

VICE PRESIDENT WATSON: Mr Ferguson.

CROSS-EXAMINATION BY MR FERGUSON

[10.21 AM]

*** BRAD ALLEN GANDY

XXN MR FERGUSON

PN1540

MR FERGUSON: Your Honour. Morning, Mr Gandy, my name's Mr Ferguson. I'm from the Australian Industry Group?---Good morning.

PN1541

I just have a small number of questions. In your statement you refer to a claim for paid domestic violence leave that the AWU pursued in bargaining for a new EA covering certain Spotless employees at Alcoa sites. You also raised a claim for paid personal business leave during those negotiations, didn't you?---I did.

PN1542

I'm just going to show you a copy of a document that sets out that claim. Just take a moment to review that?---Sure.

PN1543

Now the second page doesn't necessarily need to be provided to you but it relates to your family violence leave claim. Can you just confirm that that first page reflects the proposal you advanced to the company?---Yes.

PN1544

I seek to tender that document, your Honour.

PN1545

VICE PRESIDENT WATSON: That document will be exhibit F3.

**EXHIBIT #F3 AQWU'S DRAFT PERSONAL BUSINESS LEAVE
AND FAMILY VIOLENCE LEAVE CLAUSES**

PN1546

MR FERGUSON: In the course of your negotiations for that agreement, you advised the company's representative, Mr Drake, that person business leave that you're proposing could be used by employees for purposes such as undertaking Christmas shopping, didn't you?

PN1547

MS BURKE: I object to the question. The witness is being asked about a representation that is not in evidence and that is not intended to be put in evidence.

PN1548

VICE PRESIDENT WATSON: So why can't it be the subject of cross-examination?

*** BRAD ALLEN GANDY

XXN MR FERGUSON

PN1549

MS BURKE: Well, I can't cross-examine Mr Drake, for example, on whether what he's saying is accurate because it's not in evidence, and I'm relying I appreciate very technically but for a proper purpose on section 44 of the Evidence Act, which provides that a cross-examiner cannot question a witness about a previous representation alleged to have been made a person other than the witness. The reason that section is relevant is because it goes to the fairness of what Mr Gandy is asked to comment on. There's no way to get the other side of

the story, to put it colloquially, in the absence of that representation being in evidence.

PN1550

VICE PRESIDENT WATSON: I'll allow the question. You might have to repeat it.

PN1551

MR FERGUSON: Yes, that's fine. In the course of negotiations, you advised the company's representative Mr Drake that such leave, that is personal business leave, could be used by employees for purposes such as doing their Christmas shopping, didn't you?---No.

PN1552

I put it to you that you also suggested that it could be used for purposes such as attending school events for the children - for those employee's children?---I may have used it in that context with regards to attending special children's events that sometimes you can't attend, sure.

PN1553

Well did you envisage or do you envisage that that clause could be used for the purposes of doing your Christmas shopping?---No.

PN1554

What purposes could it be used for?---I would imagine there would be a whole range of purposes you could use it for. One instance we had was someone trying to take leave to attend an urgent dental appointment that they couldn't seek leave for and they had to attend work. That might be one occasion where they might seek leave to have that appointment.

PN1555

Both of the additional forms of leave that you claimed, both the domestic violence leave and the personal business leave claims were rejected by the company, weren't they?---Not initially but I guess at the end of negotiations, yes.

PN1556

Well, initially the company never actually indicated that they intended to agree to those clauses did they?---That's incorrect.

PN1557

In your statement you refer to correspondence from the company suggesting that the claim forms of leave were covered in the National Employment Standards. You never advised the company that those forms of leave weren't covered in the NES, did you?---The company advised me that they were covered in the National Employment Standards, and when I asked for them to explain that to me or send me through the documents, they never did.

*** BRAD ALLEN GANDY

XXN MR FERGUSON

PN1558

No, but you never advised them that they weren't covered by the National Employment Standards did you?---I think verbally through our negotiations I

explained to them that I didn't think it was covered in the National Employment Standards, and that's why we were making the claim.

PN1559

But you never sent an email in response to their emails, did you?---There were a lot of emails sent, I don't recall particularly sending an email covering that unless I went through all my emails. But I don't recall sending an email about that particular matter, maybe not.

PN1560

Would you accept that once the company indicated to you that it was not agreeing to that clause, the domestic violence leave clause that is, that you never pressed that issue any further?---No, I wouldn't accept that. I raised it at the EBA meeting, I raised it on-site and raised it constantly when we had to highlight our outstanding items.

PN1561

I'll take you to paragraph 13 of your statement. You there refer to a revised agreement that was at the time you prepared this statement, due to be put to employees. That revised agreement did not include domestic violence leave did it?---It did not.

PN1562

The AWU did support that proposed agreement, didn't it?---When we - when the company filed the agreement for Fair Work I believe our industrial teams put through a form to support it, yes.

PN1563

Well, you actually attended a series of meetings at the company's - well at the site and spoke in support of the proposed agreement to employees didn't you?

PN1564

MS BURKE: Sorry, I object to the question. Can you identify when those meetings were?

PN1565

MR FERGUSON: I'll withdraw the question. Did you speak at any meetings at the company's site, in support of the agreement to employees?---I spoke at the roll out of the EBA meetings but not in support of the agreement.

PN1566

VICE PRESIDENT WATSON: Was the agreement approved?---The agreement was approved.

PN1567

It's now in place, is it?---It is, yes.

PN1568

MR FERGUSON: Is that agreement titled the Spotless (Alcoa Sites) Enterprise Agreement 2016?---I believe so.

*** BRAD ALLEN GANDY

XXN MR FERGUSON

PN1569

Would you agree with me that the majority of the workforce covered by that agreement are employed on a casual basis?---No.

PN1570

Do you know how many employees covered by that agreement are employed on a casual basis?---I wouldn't know for certain but I could take a guess, based on what the employees tell me the status of their employment is and what HR advise me who they're employing sometimes if they move their status of employment. So it would only be a best guess I guess.

PN1571

I'll just take you to paragraph 14. You say there in the first two sentences:

PN1572

For the Spotless employees, accessing paid leave such as annual leave is difficult to get approved as they work in small teams of around eight on a site. The process of approving annual leave by site management is business oriented, in the sense that annual leave be approved on the basis of efficiency, availability, rather than the reason for the taking of annual leave.

PN1573

Are those views based on discussions you've had with members?---Yes.

PN1574

Thank you. They're the questions.

PN1575

VICE PRESIDENT WATSON: Mr Ward.

CROSS-EXAMINATION BY MR WARD

[10.31 AM]

PN1576

MR WARD: Thank you, your Honour. Mr Gandy, my name is Nigel Ward, I appear for the Australian Chamber of Commerce and Industry, good morning?---Morning.

PN1577

Can I ask firstly as the assistant branch secretary, what role do you play inside the Western Australian Branch of the Australian Workers Union, in relation to enterprise bargaining?---Certainly. On March 18 of this year I was appointed, I guess, to the assistant secretary. For the last six years, I have been looking after Alcoa and all the contractors and any major AWU workforce on those sites which covers (indistinct) Cleaning, Spotless Caterers and Alcoa workforce itself.

PN1578

If I can just put that back to you. So when you were an organiser you were dedicated to Alcoa?---Yes, to be clear, I'm still in that position and still looking after Alcoa and all the contractors on those sites.

*** BRAD ALLEN GANDY

XXN MR WARD

PN1579

Do you have any experience in relation to bargaining outside Alcoa?---I do.

PN1580

What experience would that be?---That would be about 11 years with the SDA, so every major retail brand you can almost think of including Bunnings warehouses, P&O, cold storage, fast food, you'd probably name it I guess.

PN1581

Not with the AWU?---Well AWU doesn't have coverage in those areas in WA.

PN1582

No, so you don't have any bargaining experience outside of Alcoa with the AWU?---No, I guess over the last six years being with the SDA, 11 years before that I certainly played a and had played a mentoring role or a sort of coaching role with our group of team and organisers across the state.

PN1583

Let me ask you some questions and if you don't feel you can answer them just please say so straight away?---Sure.

PN1584

In Western Australia, does the Australian Workers Union actively try and bargain at its sites where it has members?---Yes.

PN1585

Do you know what percentage of your members in Western Australia would be covered by enterprise agreements?---Again, I'd only be guessing and I wouldn't want to sound like a guess, so I wouldn't know, no.

PN1586

So you wouldn't know?---Not across the state. I could tell you more specifically with the areas that I look after, but not across the state.

PN1587

What are the areas you look after?---So again the Alumina industry and the like in WA and, sorry, you were asking for the exact - - -

PN1588

What percentage would be covered by enterprise agreements?---The employees?

PN1589

Our of your members?---So, I'll try and answer the question clearly. So at Alcoa for example, they employ 1700 employees - - -

PN1590

They're all covered by an enterprise agreement?---They're all covered by the enterprise agreement, yes.

*** BRAD ALLEN GANDY

XXN MR WARD

PN1591

Is the Alumina industry which you seem to know about, is that predominantly covered by enterprise agreements?---Yes.

PN1592

Does the Australian Workers Union in Western Australia have any particular approach to how it starts bargaining with employers?---Yes, we have a standard approach that's I guess undertaken by the branch industrial team and then rolled out through the organisers.

PN1593

What is that standard approach?---In regards to - I'm trying to answer the question clearly but there's quite a wide range of modern, fresh professional approach we take to bargaining and there's a whole set of systems we set up with forming a log of claims and how we do that, so - - -

PN1594

Let's just concentrate on - - -?---Sure.

PN1595

Let's concentrate on that. Do you formulate logs of claims company by company?---Sure, there's certainly company by company log of claims or items on that log of claims, yes.

PN1596

I take it when you do it company by company you're putting onto the log of claims those things your members want?---Our members want a lot of things and if we put every item that they seek to want on the log of claims, it would probably be a long, long list. So we try to moderate that and have meetings and work out what's important to them and be professional about that, and be I guess realistic with our items of our log of claims.

PN1597

Usually, how many claims would you make on a log of claims?---It really does vary from company to company. I can again give you examples about the - - -

PN1598

Please give me an example?---Sure. So from the differences from the last Alcoa agreement to the last Spotless agreement to the last Alcoa agreement we had not hundreds, but just under maybe, items on that log of claims. With the Spotless agreement we maybe had 10.

PN1599

Am I right in saying that those logs of claims are ambit logs?---No.

PN1600

So you actually expect the employer to agree to everything on the log, do you?---We don't expect the employer to agree to everything on the log but certainly my approach and the AWU's approach is to spend a lot of time pre-bargaining, working out a realistic log of claims and items on it.

*** BRAD ALLEN GANDY

XXN MR WARD

PN1601

So they have less ambit in them?---That is certainly our approach when - certainly when I bargain on behalf of our members, yes.

PN1602

Do you normally reach agreement with an employer on the new enterprise agreement?---I think in the 17 years of bargaining, I think I've been pretty successful when representing members and we've not gone to - I was going to use the word war then, I'm not too sure whether it's appropriate but - - -

PN1603

You can use that word, sir, it's fine?---Sure, that's a word sometimes the company uses with us. But we haven't gone to war on any agreements at all, I don't think in my time.

PN1604

Your actual bargaining process, it's the usual industrial argy bargy backwards and forwards?---No.

PN1605

No?---No. Not my approach, no.

PN1606

Not your approach?---No.

PN1607

So what, you just say this is it, take it or leave it?---No, that's not my approach either.

PN1608

Right, well what is your approach?---Sure. So most times companies like to reach out before bargaining and tell us how they're going financially, where they're going as a business, much in line with what happened with Spotless. They ask us to be realistic in bargaining. I listen when they talk about that, I seek to work out whether they are being completely transparent about where they're at financially as a company, and then we might talk about how we're going to bargain when we meet, how we meet, how we'll report back. I almost have a pre-bargaining document which I'm actually working on now with Alcoa, and then once that's agreed upon then I tend to go into bargaining then with the group of committee or bargaining reps that we have at the table.

PN1609

So your particular approach to bargaining in Western Australia when you enter the bargaining table, is less of a gap between you and the employers' position?---Yes. So again, to be clear, so my approach because everyone has individual approaches.

*** BRAD ALLEN GANDY

XXN MR WARD

PN1610

I understand that?---Sure. My approach is to try and be modern and professional and realistic about it certainly.

PN1611

To date, if you wanted to bargain for domestic violence you've been free to bargain for it?---I'm not too sure what you mean by free.

PN1612

You've never been - nobody restrains you from bargaining for it?---No, I don't think so, no.

PN1613

Have you ever had to resort to protective industrial action to win your claims?---I personally haven't, no.

PN1614

Thank you. No further questions?---Thanks.

PN1615

VICE PRESIDENT WATSON: Ms Burke.

PN1616

MS BURKE: No re-examination.

PN1617

VICE PRESIDENT WATSON: Thank you for your evidence, Mr Gandy. You can step down?---Thank you.

<THE WITNESS WITHDREW

[10.39 AM]

PN1618

MS BURKE: The next two witnesses were to be Ms Bignold and Ms McCormack and they're no longer required for cross-examination. We have done our best to bring Ms Smallwood forward but she's not able to be here until 11.15 I'm afraid. She works for Victoria Legal Aid now and things are challenging.

PN1619

VICE PRESIDENT WATSON: So we shall adjourn until 11.15.

PN1620

MS BURKE: Thank you.

PN1621

VICE PRESIDENT WATSON: We'll do so.

SHORT ADJOURNMENT

[10.40 AM]

RESUMED

[11.20 AM]

PN1622

VICE PRESIDENT WATSON: Ms Burke.

*** BRAD ALLEN GANDY

XXN MR WARD

PN1623

MS BURKE: Thank you for the time members of the Full Bench. My learned friend wishes to say something.

PN1624

MR WARD: Sorry, your Honour, I undertook to indicate to the Bench this morning whether or not we needed to recall Dr Peta Cox. We don't, and I've conveyed that to the other side.

PN1625

VICE PRESIDENT WATSON: Thank you.

PN1626

MS BURKE: The next witness to be called is Ms Smallwood and before I formally call her to give evidence, there's a few matters that I need to bring to the attention of the Full Bench that arise out of the objections that have been filed to her statement. The first is an agreed position and correction to make to paragraph 3. The last sentence of paragraph 3 of Ms Smallwood's statement currently reads:

PN1627

I refer to and adopt the Stepping Stones Report in this statement.

PN1628

And by agreement that paragraph will now read:

PN1629

I refer to the Stepping Stones Report in this statement, which is attached and marked with ES-A.

PN1630

There are copies of that report for members of the Full Bench.

PN1631

VICE PRESIDENT WATSON: Thank you.

PN1632

MS BURKE: In addition to the annexure of the Stepping Stones Report, there were a number of objections made by both the Australian Industry Group and the Australian Chamber to what can be described as the case study evidence in Ms Smallwood's statement, and those - so particularly those objections are made to the inclusion and the reference to Annexures EM1, EM2 and EM3, and they are referred to at paragraphs 23, 27, 29 and 54 of her statement. What those references are, are to case studies of - recorded by Ms Smallwood and by lawyers at the Women's Legal Service Victoria of their clients and women's experiences generally that have brought them to see that service.

PN1633

Similar objections are made to the use of case studies in many other witness statements, including - and I'll just list them because hopefully it's convenient to deal with this issue now; Ms Bignold, Ms Stott, Ms Willis, Ms Dann - D-a-n-n, Ms Parker and Ms Kun - K-u-n. All of those witnesses except for Ms Dann and

Ms Kun are not required for cross-examination. So it's convenient if I just briefly address this issue now about why the ACTU presses the inclusion of this material.

PN1634

The use of case study evidence is evidence of what those witnesses have been told and what they've observed in their work with persons affected by domestic violence. In our submission, it's highly relevant to this matter because first, it explains the basis for the opinions that they express in their statements and second, it provides the Full Bench with real life examples of why a workplace response is necessary to this problem. As is appropriate when any professional talks about their clients, and particularly here where there may be real safety concerns, those case studies have been de-identified.

PN1635

Now the employers could have - - -

PN1636

VICE PRESIDENT WATSON: They're not put as evidence of the events in relation to those individuals.

PN1637

MS BURKE: No.

PN1638

VICE PRESIDENT WATSON: They're put as what the witnesses have been told and the basis for the opinions they've formed.

PN1639

MS BURKE: That's right and - which of course as matter of submissions goes to the relative strength or otherwise of that evidence. Now the basis of the objection is on that first ground of hearsay, and perhaps I've addressed that in my response just then explaining the basis on which this evidence is sought to be used by the ACTU. There's also an objection on the basis that it prejudices the employer's case because they're unable to test that evidence.

PN1640

In response to that, I'd just like to point out that the employers could have at any time in the last five and a half months sought to alleviate their concerns by seeking information about those witnesses. There was a confidentiality regime put in place in May to deal with confidential witnesses and that might have provided some good guidance about how that could have been achieved. The complaint really is, as I said, as to prejudice, they're concerned they can't test that evidence but had these objections been received earlier the ACTU may well have sought to tender significantly more evidence from individual witnesses about their experiences with the interaction between domestic violence and the workplace.

PN1641

I point out that we've only sought to tender three witness statements from witnesses in that category, none have been required for cross-examination and so the prejudice that is complained of is something, in my submission, that was

entirely within the employers' power to cure. So in those circumstances we do maintain or we do press the inclusion of that material in those witness statements.

PN1642

VICE PRESIDENT WATSON: Mr Ferguson.

PN1643

MR FERGUSON: I must first confess I'm taken a little bit by surprised that we're dealing with objections in relation to the witnesses other than Ms Smallwood, but certainly firstly in relation to Ms Smallwood, our view is that in light of the submissions that have been put by the ACTU, we don't press our objections but we do propose to make submissions potentially as to the weight that should be afforded to that material.

PN1644

VICE PRESIDENT WATSON: Yes.

PN1645

MR FERGUSON: Now I will consider the other material in light of the matters the ACTU has raised, but I would seek the opportunity to do that and respond at a later point.

PN1646

VICE PRESIDENT WATSON: Yes. Yes, that's noted, thank you Mr Ferguson.

PN1647

MR WARD: Your Honour, the Australian Chambers' position is similar, particularly in light of the way that your Honour has framed that evidence, the case study evidence. It not being evidence of the actual events occurring but it being evidence of that someone had told someone something. The Australian Chamber has objections on for that hearsay style evidence, we don't press that evidence in the light of how that evidence is now framed but obviously we'll be making submissions as to weight. Particularly having regard to the ability of the Australian Chamber to respond to that type of evidence.

PN1648

VICE PRESIDENT WATSON: Thank you.

PN1649

MS BURKE: Certainly, I apologise if there was any confusion, there's no opposition on my part to my friends considering how this argument might apply to the broader - the other witnesses that I've identified where similar objections are made.

PN1650

VICE PRESIDENT WATSON: Thank you. You now call Ms Smallwood?

PN1651

MS BURKE: Yes, call Emma Smallwood.

PN1652

THE ASSOCIATE: Please state your full name and address.

PN1653

MS SMALLWOOD: Emma Smallwood, (address supplied).

PN1654

THE ASSOCIATE: Do you wish to give an oath or affirmation?

PN1655

MS SMALLWOOD: An affirmation.

<EMMA SMALLWOOD, AFFIRMED

[11.28 AM]

EXAMINATION-IN-CHIEF BY MS BURKE

[11.28 AM]

PN1656

VICE PRESIDENT WATSON: Thank you, Ms Smallwood. Please be seated.
Ms Burke.

PN1657

MS BURKE: Ms Smallwood, could you please repeat your full name for the
Commission?---Emma Smallwood.

PN1658

Your address?---(Address supplied)

PN1659

Your occupation?---I'm a lawyer and I'm currently acting family violence program
manager at Victoria Legal Aid.

PN1660

Thank you. Ms Smallwood, have you prepared a written statement for use in this
proceeding?---Yes, I have.

PN1661

If I could just ask you to look at the folder in front of you there. Is that a
document headed "Witness statement of Emma Smallwood"?---Yes, it is.

PN1662

It is - excuse me - 58 paragraphs?---Yes, it is.

PN1663

Attached to that document behind the yellow divider in your folder there are three
pages headed Annexure EM1, EM2 and EM3?---Yes.

PN1664

Then behind the next coloured paper in that folder there is a report titled
"Stepping Stones, Legal Barriers to Economic Equality after Family
Violence"?---Yes.

*** EMMA SMALLWOOD

XN MS BURKE

PN1665

Can I just ask you to look at paragraph 3, please, of your statement. In the last line of that paragraph it currently starts:

PN1666

I refer to and adopt -

PN1667

?---Yes.

PN1668

Could I ask you please to - there's a pen with you there in the witness box - to cross out the words "and adopt", and after the end of the sentence, if you could just convert that full-stop into a comma and add the words:

PN1669

which is marked and attached -

PN1670

Sorry -

PN1671

which is attached to my statement and marked ES-A.

PN1672

I understand you also wish to make one correction to your statement?---Yes, that statement has my former occupation. I was a lawyer employed by Women's Legal Service and now I am a lawyer and family violence program manager employed by Victoria Legal Aid.

PN1673

Thank you. With those corrections, is this statement and the four annexures your evidence - form your evidence to this Commission?---Yes.

PN1674

Thank you. I seek to tender the statement and the annexures.

PN1675

VICE PRESIDENT WATSON: Exhibit B11.

**EXHIBIT #B11 WITNESS STATEMENT OF EMMA SMALLWOOD
TOGETHER WITH FOUR ANNEXURES**

PN1676

MS BURKE: Ms Smallwood, please just wait there, there'll be some questions?---Thank you.

PN1677

VICE PRESIDENT WATSON: Ms Bhatt.

CROSS-EXAMINATION BY MS BHATT

[11.31 AM]

*** EMMA SMALLWOOD

XXN MS BHATT

PN1678

MS BHATT: Thank you, your Honour. Good morning, Ms Smallwood?---Good morning.

PN1679

My name is Ms Bhatt, I appear in these proceedings on behalf of the Australian Industry Group. Ai Group opposes the ACTU's claim in support of which you've given evidence. I have a very small number of questions for you this morning. In Victoria, the police can make an application for a family violence intervention order on behalf of a victim of domestic violence, can't they?---Yes.

PN1680

Where they do so, they will appear on behalf of the victim in any court proceedings in relation to that application, to do the advocacy if you will?---So the Victoria Police do appear. The victim herself is a party to the proceedings and is entitled to appear and have representation, that was a large amount of the work that we did at Women's Legal Service. A large amount of the women that I saw on the duty service there we would act as their representative, even though the police were acting in the matter. Quite often a victim will have either slightly or very different views to the police about the application, so it's not always the case that the police will be the advocate on behalf of the victim, if you like. The police advocate are the advocate on behalf of Victoria Police.

PN1681

Yes. You accept though that there are some circumstances in which the police will appear and advocate for the application?---Yes.

PN1682

Yes. In such circumstances the police will also prepare any written material that's necessary for the proceedings. For example, witness statements?---Yes, they will prepare witness statements. In some circumstances even where the victim's view aligns with the police's view and they're advocating on behalf of what the victim wants, the victim will still need to prepare some material herself. So a respondent might, for instance, seek further and better particulars and the court might order that the victim herself have to prepare those further and better particulars. The police don't as a matter of routine prepare those for her and because there's no form in - there's no sort of prescribe form and there's no guidance in the legislation about how to prepare those further and better particulars, that can be quite challenging for a victim, and onerous. So certainly the victim - the police will prepare witness statements but the victim may also in some cases have to prepare documents too.

PN1683

I have no further questions, your Honour. Thank you, Ms Smallwood.

PN1684

VICE PRESIDENT WATSON: Ms Burke.

*** EMMA SMALLWOOD

XXN MS BHATT

PN1685

MS BURKE: I'm just looking to see if Mr Ward has no questions and I will assume that he does not.

PN1686

MR WARD: Sorry, I shook my head no. Sorry.

PN1687

MS BURKE: Beg your pardon. Thank you, that is the evidence of Ms Smallwood, could she be excused?

PN1688

VICE PRESIDENT WATSON: Thank you for your evidence, Ms Smallwood, you can step down?---Thank you.

<THE WITNESS WITHDREW

[11.34 AM]

PN1689

MS BURKE: That concludes the evidence scheduled to be heard today and we are making strong efforts to ensure a very efficient proceeding tomorrow and Friday. I think I can - - -

PN1690

VICE PRESIDENT WATSON: Yes, is a 10 o'clock commencement appropriate tomorrow, or should we be earlier or later?

PN1691

MS BURKE: I understand the - - -

PN1692

VICE PRESIDENT WATSON: No. We should be 10 o'clock.

PN1693

MS BURKE: Right. Good, thank you. I can also convey that, for what it's worth, we all at the Bar table think the chances of finishing by lunch time by Friday very good, and we'll be able to give you updated estimates of our confidence with that as soon as we can

PN1694

VICE PRESIDENT WATSON: Very well. I think there's some video - evidence by video tomorrow.

PN1695

MS BURKE: Friday morning.

PN1696

VICE PRESIDENT WATSON: Friday morning. Yes, very well.

*** EMMA SMALLWOOD

XXN MS BHATT

PN1697

MS BURKE: Actually I understand - am I right in saying that Ms Dann is no longer required for cross-examination by both employer parties? Yes, all right.

Well then Ms Dann is off the list and therefore the video request is no longer necessary.

PN1698

VICE PRESIDENT WATSON: Thank you.

PN1699

MS BURKE: Thank you.

PN1700

VICE PRESIDENT WATSON: We will adjourn until 10 am tomorrow morning.

ADJOURNED UNTIL THURSDAY, 17 NOVEMBER 2016 [11.36 AM]

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