



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT WATSON

AM2015/1

s.156 - 4 yearly review of modern awards

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

Melbourne

3.01 PM, THURSDAY, 27 OCTOBER 2016

PN1

THE VICE PRESIDENT: Can I have the appearances please, in Melbourne first.

PN2

MS K BURKE: Good afternoon, Vice President, K Burke for the ACTU.

PN3

THE VICE PRESIDENT: Ms Burke, thank you. And in Sydney?

PN4

MR B FERGUSON: If the Commission pleases, B Ferguson for the Ai Group and with me is Ms R Barr.

PN5

THE VICE PRESIDENT: Mr Ferguson, thank you.

PN6

MR J AMDT: J Amdt seeking permission to appear for the Australian Chamber.

PN7

THE VICE PRESIDENT: Mr Amdt, thank you.

PN8

MS B BYRNES: Ms B Byrnes for the Australian Human Rights Commission.

PN9

THE VICE PRESIDENT: Thank you, Ms Byrnes. And in Canberra?

PN10

MS K PEARSALL: If the Commission pleases, K Pearsall for the National Farmers' Federation.

PN11

THE VICE PRESIDENT: It might be convenient to deal with the question of permission to appear, seeing it arises at least today. I think it is appropriate given the subject matter (this matter) that permission is granted to counsel to appear. Permission is granted for all purposes of the proceedings.

PN12

The matter is listed, Ms Burke, today to endeavour to clarify a program or whatever. The witness evidence, there are three weeks of hearings scheduled and the parties have now filed witness statements, what do you propose?

PN13

MS BURKE: There has been some discussion between the parties about the sequence of witnesses. Can I hand a proposed timetable that has been provided to my friends in Sydney and Canberra.

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THE VICE PRESIDENT: In colour?

PN15

MS BURKE: In colour. This proposed timetable will take into account the witnesses that the employer parties have indicated they wish to cross-examine, the ACTU witnesses are in blue. There are a small number of witnesses that are not required for cross-examination and I will come to those in a moment. There is also the witness from PricewaterhouseCoopers allocated there to Thursday morning who I understand is also required for cross-examination and the two witnesses called by the Australian Industry Group who I will cross-examine.

PN16

At this point we haven't been provided with any estimates as to the length of time for cross-examination, so I have allocated an hour per witness just for really to get the ball rolling. But the timing - the particular sequence of each witness takes into account the availability of the witnesses and also matters such as having the experts all heard as far as possible together at once and then some grouping, so for example the union official, Industrial Relations' witnesses will be heard together, followed by the professional witnesses who are experienced in dealing with persons affected by domestic violence and community services and so on.

PN17

So, it is not a completely random timetable. There is some purpose to it. We provided this to the employer parties yesterday, so short notice, to have a response about whether this sequence or the estimates are appropriate and hopefully we can develop that a little further this afternoon.

PN18

THE VICE PRESIDENT: Can I raise one matter initially. Due to other commitments of members of the Bench, the hearings will need to be completed on Tuesday the 15th and Wednesday the 16th by 3 pm. There are other appeals listed involving members of the Bench on both of those days, so it doesn't look like that is an issue for the 15th but there may be a need to have a look at the 16th in that regard.

PN19

MS BURKE: There should be no problem moving Smallwood to Friday morning and, of course, some of these witnesses may not take an hour.

PN20

THE VICE PRESIDENT: Indeed. And to schedule people on the hour, so to speak, may involve some delay in the proceedings. Some of the cross-examination could well be less than an hour in which case the Bench would need to adjourn and come back unless there are arrangements for people to be ready before the appointed time. But I suppose what is missing in the equation is an estimate of the time for cross-examination for each of these witnesses and that is what you would be hoping to receive from the other parties, is that right?

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MS BURKE: That's right.

PN22

THE VICE PRESIDENT: Mr Ferguson, you want to come in here?

PN23

MR FERGUSON: Only to deal with this issue about the scheduling by the hour. We are not today in a position to necessarily speak with certainty about how long we will be with each of the witnesses, though it did strike me that it was quite possible that we wouldn't be a full hour necessarily with each of them and we had come to the same conclusion that it was possibly not an official way to do it to schedule people on the hour, so to speak, in anticipation of the fact that we wouldn't necessarily be an hour with everyone. But I am not in a position to today to say precisely confidently how long we will be with each of the witnesses.

PN24

THE VICE PRESIDENT: Another way to do it is simply to list them in order on particular days on the basis that they will be available when they are reached but nevertheless sometimes these things are a bit difficult to anticipate but to provide an estimate of the approximate time involved in cross-examination. Some might be 10 minutes and some might be three hours, theoretically, although I would hope not in this case.

PN25

MR FERGUSON: That is what I was going to suggest was that if we just identified the witnesses for the particular day and perhaps in order we could still work with the union to try and provide an indication to them how long we would be, but there are multiple parties of course potentially cross-examining some of the witnesses. But that would just allow flexibility for time to be utilised later in the day if some of the cross-examination did take longer as often occurs in some of these cases.

PN26

THE VICE PRESIDENT: It appears that the only parties who have indicated that intention to cross-examine are you, ACCI and the ACTU cross-examining other witnesses - Spotless and the AiG witness.

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MR FERGUSON: Yes.

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THE VICE PRESIDENT: In other respects and as far as you are concerned, Mr Ferguson, does the list of cross-examining the witnesses correspond with the witnesses you do wish to cross-examine?

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MR FERGUSON: Yes, it does, Your Honour.

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THE VICE PRESIDENT: Do you wish to say anything further about the programming? It looks like the evidence will be completed in the first week and the submissions will be made on the final two days that have been set down.

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MR FERGUSON: Only in relation to submissions I make one observation. While I would be hopeful of it being dealt with in two days, it just does strike me,

based on some of the conduct of similar cases, that that may be a little ambitious. I would just be nervous about whether we could get through everyone in those two days, particularly the Friday, whether we could get through all of the employers on that day and deal with the ACTU replies as well.

PN32

It is a little uncertain because there are some other groups, apart from Ai Group and ACCI that have put submissions and I'm not sure how long they are indicating to take, but in some of these other common issue proceedings, because of the number of parties it has inevitably resulted in the submission process taking a little longer than might otherwise be anticipated.

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So, I was just wondering whether it may be prudent to either sit early on the Thursday and Friday or, more conservatively, to list it on the Wednesday, Thursday and Friday and then of course if we don't need the Friday that could be vacated.

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THE VICE PRESIDENT: Or at least the Friday afternoon.

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MR FERGUSON: Yes.

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THE VICE PRESIDENT: Do you have a view about that proposal, Ms Burke?

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MS BURKE: I do. I have a few things to say about the scheduling of the evidence as well as the submissions, so I can perhaps deal with the evidence first because it might feed into the timing of submissions. We are content to continue to have discussions with our friends in Sydney about the timing of the witnesses but having a train of witnesses waiting outside, there are some practical challenges with that. Many of these witnesses are professionals; they have teaching obligations; they have obligations to their clients. It is difficult to ask them to keep a couple of hours free - and we have done that - but to keep a whole day free is - - -

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THE VICE PRESIDENT: But if you were told an estimate of approximate time for cross-examination.

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MS BURKE: It will certainly make my life much much easier and hopefully the life of everyone else involved in this proceeding.

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THE VICE PRESIDENT: Bearing in mind that that might not be precise, so it might be the first two approximately half an hour but they end up being three-quarters of an hour each. Someone will be here earlier but not called on a bit later. So those sort of problems are inevitable.

PN41

MS BURKE: Certainly, accept that. I just think that any estimate from the employer parties will be better than my rough and ready hour allocation, so I think that there is scope to improve on my submission in this regard and hopefully that is the only time I make a submission like that in this proceeding.

PN42

In relation to the cross-examiners from the employer parties, can I just say on the record that I've noted several witnesses are proposed to be cross-examined by multiple employer parties. In my view, if there is any overlap in the subject matter or the topics or the questions asked by AiG that have already been asked by the Australian Chamber that would be inappropriate. It is inefficient to have witnesses cross-examined by multiple parties on the same topics, on the same questions and I do hope that there won't be a need for any objections in relation to that sort of questioning.

PN43

That is all I need to say about the witness order other than there are a small number of witnesses that have not been required for cross-examination and I'm really in your hands to some degree about how to proceed with those witnesses. I would propose that their statements be tendered from the Bar table without the need for an appearance but it may be that members of the Full Bench wish to ask those witnesses some questions, but if we can avoid bringing those witnesses in from interstate and so forth or coming into court at all then I think that would be a good idea.

PN44

THE VICE PRESIDENT: I think it is appropriate to rely on the approach of being able to tender the witness statements from the Bar table when none of the other parties in the proceedings wish to cross-examine.

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MS BURKE: Thank you, I am grateful for that indication, Vice President.

PN46

In relation to the timing of submissions, I accept that the timing is ambitious, perhaps even optimistic, but it does require - or to say more accurately - I require at least a solid week to write final submissions following a week of witnesses called by the ACTU being subject to cross-examination and in order to properly prepare to deliver oral submissions, written submissions would need to be exchanged no later than Monday morning on 28 November.

PN47

THE VICE PRESIDENT: Of course you can start to write the submissions based on the evidence-in-chief and modified by reference to any cross-examination.

PN48

MR FERGUSON: If I may raise - I apologise, Your Honour. I wasn't sure that there was a proposal for a further round of written submissions, I just seek clarity if that is what the ACTU is seeking.

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MS BURKE: Certainly that there would be need for further written submissions following the close of evidence and I understand that just the ordinary way of these things we would be seeking leave to file written submissions following the close of evidence if leave is necessary,

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THE VICE PRESIDENT: There is no difficulty if anybody wishes to file them, but are you saying there should be a direction that the parties are required to file further outlines prior to speaking to those outlines later that week, is that what you are proposing?

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MS BURKE: In order to be able to understand, for example, what my friends say about the witnesses that they have cross-examined, in order to be able to address the Full Bench about those matters I would need some notice of that.

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THE VICE PRESIDENT: You will have the reply after hearing oral submissions. You want to see the written submissions in advance, address them in your oral submissions and then have a further reply at the end?

PN53

MS BURKE: Yes.

PN54

THE VICE PRESIDENT: That is a variation to the directions, I think. Are you saying you are opposed to that, Mr Ferguson?

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MR FERGUSON: I am just not confident of our capacity to prepare written submissions by Monday the 28th. I would need to have regard to what other matters we have on and I'm not in the position to confirm that today. It just seemed to me that - well, I had anticipated, based on what was circulated by the ACTU, that we would just proceed into oral submissions on the Thursday, to Ai Group making all the employer parties responding on the Friday and the Friday afternoon the ACTU responding to that. That seemed adequate given that there has been significant material advanced already. But my concern is just that I'm not in a position at the moment to confirm whether or not we would be able to file material on the 28th if that is what is being sought by the ACTU.

PN56

MS BURKE: Perhaps I can indicate that if the Full Bench is minded to order written submissions following the close of evidence I am not wedded to oral submissions being made on those last two days, I just thought it was a useful way to use the time that has been set aside. I appreciate that in an ordinary sort of hearing it is really optimistic to have written and oral final submissions 10 or so days after the close of a week of evidence.

PN57

THE VICE PRESIDENT: I haven't opened these proposals to the floor generally. Are there any other parties wishing to be heard about the proposed timetable?

PN58

MR AMDT: Amdt from the Australian Chamber. I think we would share the same reservations as the Ai Group and Mr Ferguson has expressed. I would note that it would seem out of the ordinary to - at least in the terms of the Modern Award Review - to be filing written submissions prior to oral submissions at the conclusion of a hearing. Occasionally in cases such as these there may be a need - a particular need might arise for further written submissions to be filed following the oral hearing. Until we get to the oral hearing I don't think we are in a position to say whether that would be necessary or not. But I certainly have concerns about a course which would require the preparation of what would be a significant written submission prior to oral submissions on the final days.

PN59

THE VICE PRESIDENT: I guess what really is involved is that the matter is primarily advanced by written submissions - the written outlines that have been filed. The evidence which is substantially the evidence-in-chief; the cross-examination of each of the witnesses doesn't look as if it is expected to be lengthy although there might be a number of witnesses cross-examined and what is proposed I think by Ms Burke is that the parties would essentially rely on written submissions prepared in between the evidence and the conclusion of the case and speak to those written submissions briefly on the final days proposed., so that most of the submissions really will be in writing.

PN60

Are you saying that that is inappropriate given that the week in between is set down at this stage but won't be required for hearings by the look of it?

PN61

MR AMDT: I don't think I would say it is inappropriate. I think it would be unusual. It would also seem to impose a very hard deadline on the filing of written submissions which appears not to be necessary. I would assume that oral submissions could be made on the basis of the evidence very soon after the conclusion of the oral evidence and if the case were to be run substantially on the basis of written submissions that those submissions could be filed at a date which wasn't necessarily required by the end of the listed period.

PN62

It is difficult to understand the scope of the written submissions at this point given we obviously haven't heard any evidence yet, or at least any cross-examination.

PN63

MS BURKE: Can I just add one comment.

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THE VICE PRESIDENT: Just before you do. Are there any other comments from any other parties in any other states?

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MR FERGUSON: Sorry, Your Honour, Mr Ferguson again if I may.

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THE VICE PRESIDENT: Yes, Mr Ferguson? We will come back to you, Ms Pearsall.

PN67

MR FERGUSON: There is a clarification. I think we would have - and I'm thinking through the proposal sort of as we go - but I think we would probably not have any difficulty with written submissions being advanced in advance of the hearing if they were confined to dealing with the evidentiary case. That may be what the ACTU is actually proposing, I'm not sure. But if all that the parties were directed to do was to prepare written submissions dealing with the evidence rather than to have an attempt at mounting broader submissions there might be some value in that and we could accommodate that by the Monday if it would assist but I'm not sure if that is what the ACTU are proposing or if they are intending to make broader submissions.

PN68

THE VICE PRESIDENT: The parties have been directed to and have agreed on a process - the earlier directions were comprehensive written submissions, not outlines and they no doubt would address the issues of principle, it is simply a matter of the extent to which the evidence might modify the submissions that have already been made. If that could be done by a supplementary submission or an annotated submission or expanded submission, but it wouldn't be starting from scratch, as I would see it, because the full comprehensive written submissions have already been filed.

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Ms Pearsall, I interrupted you.

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MS PEARSALL: Sorry, Your Honour, I was just indicating that we had nothing to add.

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THE VICE PRESIDENT: Thank you for that.

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THE VICE PRESIDENT: Ms Burke?

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MS BURKE: Just two comments: my friend, I think Mr Amdt, I can't see quite clearly on the video link, indicated that any written submissions prepared would be significant. That is perhaps the reason why I think it is appropriate that written submissions be filed before short oral submissions made directly to the Full Bench. If significant matters are going to be put in submissions then notice I think is necessary and will add to the efficiency of oral submissions.

PN74

The second point was Mr Ferguson's suggestion about limited submissions on evidence. I don't think it is appropriate to limit the subject matter of final submissions but nor is it intended for the purposes of clarity to rewrite submissions that have already been addressed - or that have already been filed before the Commission. But certainly the outcome of the evidence on cross-examination should be addressed and that of course may change the approach taken in the submissions filed before that evidence has been heard. So, in that sense I don't think it is appropriate to limit the topic about which the submissions do cover.

PN75

THE VICE PRESIDENT: You might have some parties who have filed submissions, including submissions in reply, that really don't want to say much about the evidence; they have parties other than the named parties I guess.

PN76

MS BURKE: Certainly. I'm sorry, I should have indicated this earlier, but I have spoken to representatives from Pricewaterhouse this morning who indicated that they only wanted to participate in final submissions just in a very short confined way and I understand the Human Rights Commission were taking a similar approach.

PN77

THE VICE PRESIDENT: Yes, thank you. Anything further anyone wishes to say about these matters?

PN78

I commend the parties for the efforts they have made in endeavouring to program the hearing of evidence, cross-examination and submissions. I think it is appropriate that any party that wishes to cross-examine a witness not only give that notice - as has been done - but to indicate to the party calling that witness the expected time involved in cross-examination and I think it is appropriate that with the benefit of that material the witnesses be programmed sequentially on the days that are involved, that obviously is a matter of common sense.

PN79

We will factor in the luncheon adjournments, so if there are rough estimates in cross-examination during the morning that are likely to take most of the morning then to have the next witness available after the luncheon adjournment is a sort of sensible arrangement that will arise from that. The Bench would expect that the witnesses will be generally available at the end of the cross-examination for each of the witnesses as a result of that exchange of material.

PN80

It appears clear on current estimates that the evidence will be completed in the first week and I repeat, as I said earlier, that the Bench will need to adjourn shortly before 3 o'clock on Tuesday the 15th and Wednesday the 16th. It would be then appropriate for the hearing schedule for the week of 21 November to be vacated.

PN81

In terms of the submissions I note the existing directions that require comprehensive written submissions to be made. I do think it is appropriate that given the time between the evidence being completed and the final submissions that further written submissions be filed, supplementing the submissions that have already been made, and I anticipate that that will be essentially any modifications in the submissions arising from the cross-examine in the week of 14 November.

PN82

I don't propose to make any formal directions about that, but I believe the parties should aim to exchange submissions in relation to that evidence on Monday the 28th. Given that there will be comprehensive written submissions, full evidence-in-chief available some time, quite limited cross-examination of the witnesses and further supplementary submissions, I expect that the oral submissions that will be made will not repeat material that has been filed but it will be more an opportunity for the parties to emphasise key points in material that has already been filed.

PN83

In that respect I consider that two days should be sufficient for that purpose and I wouldn't expect, for example, that the ACTU's supplementary oral submissions would need to take, for example, an entire morning, given that material has already been filed in writing.

PN84

I don't propose to formalise those views or directions other than to indicate an expectation but I would expect that the parties would use their best endeavours to be concise in relation to the oral submissions and be ready to follow in an appropriate order those in support of the application and those against on the two days for final oral submissions on Thursday 1 and Friday 2 December.

PN85

Are there any questions or clarifications required by what I have said?

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MS BURKE: A few administrative matters to raise, additional administrative matters but nothing arising out of what you have just said, thank you, Vice President.

PN87

THE VICE PRESIDENT: So what are the administrative matters?

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MS BURKE: One of them is a request for same day transcript, so that I can write submissions each night, hopefully, it would be very helpful.

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THE VICE PRESIDENT: The Commission will order the transcript that it requires. If the parties wish to order additional transcript it is a matter for them.

PN90

MS BURKE: Certainly.

PN91

THE VICE PRESIDENT: The Commission will be requiring a transcript of the cross-examination, I can foreshadow that.

PN92

MS BURKE: Thank you. Finally, perhaps we can speak to Your Honour's associate about just what hard copy material the members of the Full Bench have already and what is required for the hearing so we can ensure that appropriate materials are provided.

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THE VICE PRESIDENT: I am happy for you to talk to my associates about that.

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MS BURKE: Thank you.

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THE VICE PRESIDENT: Nothing further?

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MS BURKE: Nothing further.

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THE VICE PRESIDENT: Anything further from any of the other parties?

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MR FERGUSON: Nothing further, thank you.

PN99

MS BYRNES: I just have one small point. I just wanted to confirm that there was going to be a video conferencing available in Sydney so that the Commission could observe the evidence from Sydney.

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THE VICE PRESIDENT: I believe the answer to that question is yes.

PN101

MS BYRNES: Thank you.

PN102

THE VICE PRESIDENT: It hasn't been requested today but you are making that request?

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MS BYRNES: Yes, please.

PN104

THE VICE PRESIDENT: You have not foreshadowed cross-examining any of the witnesses?

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MS BYRNES: No, I don't think we will be doing that.

PN106

THE VICE PRESIDENT: The other parties are proposing to be in Melbourne for the hearings?

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MR FERGUSON: Yes.

PN108

MS PEARSALL: Your Honour, we will confirm whether we will be in Canberra or Sydney but we will let your chambers know.

PN109

THE VICE PRESIDENT: It is not usual that video conferencing be available for people who are simply observing, not being involved in the cross-examination itself. Obviously, for the purpose of making a submission - - -

PN110

MS BYRNES: That's right, Vice President.

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THE VICE PRESIDENT: That is what you are seeking, Ms Byrnes?

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MS BYRNES: That's right, we would like to be able to observe the evidence at the hearing in the event that we make a final submission.

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THE VICE PRESIDENT: And you don't wish to do that from Melbourne?

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MS BYRNES: It is possible that we will be able to make those oral submissions in Melbourne but our resources probably don't stretch to us attending the hearing for the whole week in Melbourne.

PN115

THE VICE PRESIDENT: Are you saying you want to observe them from Sydney in the first week? In other words, to provide video link for you to observe the witness evidence.

PN116

MS BYRNES: That's right.

PN117

THE VICE PRESIDENT: Another alternative is you read the transcript or have someone monitor them from Melbourne.

PN118

MS BYRNES: That is an alternative but I think it would be preferable if we could see the witnesses being cross-examined and observe the witnesses giving their evidence.

PN119

THE VICE PRESIDENT: I think you might be the only one making that request, so I think you should - - -

PN120

MR AMDT: Can I just indicate, Your Honour - apologies. It hasn't been finalised. The position of the Australian Chamber hasn't been finalised as yet, but there is a prospect that the Australian Chamber may wish to avail itself of a similar arrangement, at least for one of its representatives.

PN121

THE VICE PRESIDENT: You will be cross-examining from Melbourne or cross-examining from Sydney?

PN122

MR AMDT: I don't have final instructions on that yet. All I can indicate is that there is a prospect of a representative of the Australian Chamber being in attendance in Sydney if a video link is made available and I think it is probably likely that an application would be made for a video link to be made available or at least in support of the application just made.

PN123

THE VICE PRESIDENT: If there is a request for a video link to any other state I think that should be put in writing together with the reasons, having in mind to the arrangements that have been organised today, which include a program of limited cross-examination in the week of the 14th, delayed before final submissions are made and the likelihood that transcript will be available in advance of the final submissions. If those applications can be made and they can be directed to my chambers I will consider them at that stage.

PN124

Thank you very much. We will adjourn on that basis until Monday 14 November at 10 am.

ADJOURNED UNTIL MONDAY, 14 NOVEMBER 2016

[10.00 AM]