



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT MASSON

C2022/6749

s.739 - Application to deal with a dispute

**Construction, Forestry, Maritime, Mining and Energy Union
and
DP World Melbourne Ltd
(C2022/6749)**

DP World Melbourne Enterprise Agreement 2020

Melbourne

10.00 AM, MONDAY, 20 FEBRUARY 2023

Continued from 19/10/2022

PN1

THE ASSOCIATE: Matter C2022/6745, section 729 application between the Construction, Forestry, Maritime, Mining and Energy Union v DP World Melbourne Ltd for hearing.

PN2

THE DEPUTY PRESIDENT: So appearances, please?

PN3

MR P MOHSENI: If it pleases, Commissioner, is Mohseni, initial P, for the applicant union.

PN4

THE DEPUTY PRESIDENT: Thank you, Ms Mohseni?

PN5

MR D PERRY: Yes, if it please the Commission, Perry, initial D, seek permission to appear for the respondent.

PN6

THE DEPUTY PRESIDENT: All right. I've received the written subs, do you wish to say anything in reply to those, Mr Mohseni?

PN7

MR MOHSENI: There's no objection, Deputy President.

PN8

THE DEPUTY PRESIDENT: I grant permission to appear, pursuant to section 596(2)(a). This goes to a matter of statutory construction of the term of the agreement. It's interaction will be (indistinct) the Commission will be assisted by representation being granted. Thank you.

PN9

Mr Mohseni, I've got your written subs. I notice two witness statements from Mr Patchett. Do you wish to make any opening submissions or just call Mr Patchett?

PN10

MR MOHSENI: I'd just like to call Mr Patchett, please.

PN11

THE DEPUTY PRESIDENT: Thank you.

PN12

THE ASSOCIATE: Mr Patchett, please state your full name and address?

PN13

MR PATCHETT: Robert Michael Patchett, (address supplied).

<ROBERT MICHAEL PATCHETT, SWORN

[10.09 AM]

EXAMINATION-IN-CHIEF BY MR MOHSENI

[10.09 AM]

PN14

MR MOHSENI: Mr Patchett, you've prepared two statements for these proceedings?---Yes.

PN15

You've got copies with you?---Yes, I have.

PN16

The first statement has four pages, 21 paragraphs, no annexures?---Yes.

PN17

The second statement has three paragraphs and three annexures?---Yes.

PN18

You've read those statements recently?---Yes.

PN19

Do you want to make any changes?---No.

PN20

The statement is true and accurate, to the best of your knowledge and belief?---Yes.

PN21

I tender those statements, your Honour.

PN22

THE DEPUTY PRESIDENT: I'll mark Mr Patchett's first statement A1 and the second statement A2.

EXHIBIT #A1 WITNESS STATEMENT OF ROBERT PATCHETT

EXHIBIT #A2 ADDITIONAL WITNESS STATEMENT OF ROBERT PATCHETT

PN23

Mr Perry?

CROSS-EXAMINATION BY MR PERRY

[10.10 AM]

PN24

MR PERRY: May it please the Commission.

PN25

*** ROBERT MICHAEL PATCHETT

XN MR MOHSENI

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

Mr Patchett, in your statement you refer to the way in which (indistinct) operations occur, at the DP World (indistinct) and it's right, is it not that those

operations are run either in what's called a continuous manner or a non continuous manner, is that right?---They used to be but then they weren't.

PN26

Well, let's just talk about the 'used to be' for the moment. So operations can be run non continuously, which means that the employees all take a 45 minute break at the same time, is that your understanding?---Yes, that's how the agreement applies.

PN27

No, I'm asking about how the operations occur, if you can just answer the question, please?---Yes.

PN28

So non continuous operations is where the employees all take a 45 minute break, at the same time?---Yes.

PN29

And during that period of 45 minutes no cranes operate?---That's correct.

PN30

Now, when operations are run continuously, what that means is that for the entirety of the shift the cranes are in operation, is that your understanding?---When it was done previously, some, not all.

PN31

Yes, but continuous operations is where operations occur for the entirety of the shift, that's right, isn't it?---Yes, but just to be clear, for your benefit, they don't run them on - - -

PN32

THE DEPUTY PRESIDENT: It's for my benefit, Mr Patchett?---Sorry, Commissioner.

PN33

No, it's Deputy President?---Deputy President, sorry, I correct myself with the title, I apologise. There's a number of cranes and when it has been agreed and applied, it was only some times to a number of cranes not all. That's what I was trying to clarify.

PN34

MR PERRY: But you would accept, would you not, that for the entirety of the shift, when continuous operations are in place, there is work occurring for the whole shift?---Yes.

PN35

And when continuous operations are in place, the crane drivers work for two hours and then they have two hours off, is that right?---No.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN36

I put it to you, Mr Patchett, that when continuous operations are in place, crane drivers work two hours on the crane, two hours out of the crane and then two hours on the crane and two hours out of the crane, you don't accept that?---Well, the intent is yes, but it didn't always apply that way.

PN37

That is the general practice, you accept that?---Well, general practice, yes.

PN38

So that's for the crane drivers. Then the straddle drivers they will have either three 30 minute breaks during their shift or two 30 minute breaks and one 45 minute break, is that right?---That's possibly.

PN39

So when continuous operations are in place the straddle drivers have either 90 or 105 minutes of breaks during their shift?---Yes, and that's - that's possible.

PN40

So you'd accept then that when continuous operations are in place that the employees actually have longer periods of breaks than when non continuous operations are in place?---Sometimes.

PN41

Well, do you accept that 90 minutes is longer than 45 minutes?---Of course.

PN42

Yes. So they have longer breaks when continuous operations are in place?---When it was agreed they did.

PN43

Well, I'll just ask you to focus on not the industrial issues, I'm just asking you some questions about how the operation runs, if you can just focus on those please. So you accept that when continuous operations are in place, the employees have longer periods of breaks?---Yes, I answered that before, 45 compared to 60 or 90.

PN44

In that sense, employees at the DP World terminal have a historically positive view of continuous operations, because they get longer break times?---On the break period, yes.

PN45

Now, until the last couple of years continuous operations was the general mode of operation at the terminal, wasn't it?---Was the - sorry, can you say that - - -

PN46

The general mode of operations. So the terminal operated on a continuous operating basis?---Prior to this new agreement did you say?

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN47

Prior to the last couple of years?---Prior to the previous agreement. Prior to the current agreement.

PN48

Yes. And since the current agreement there have been occasions on which continuous operations have been worked?---Yes, and that's what we're in dispute about.

PN49

Yes. So that - and the way in which the continuous operations have worked, and I'll ask you just to focus on the period before August 2022, were the same as previously?---No, not really.

PN50

Well, I put it to you that they were?---Well, can I explain - - -

PN51

(Indistinct) so I can understand how you say it's different?---What actually happened, Deputy President, was to be clear and to summarise it and simplify it, prior to this agreement we're working under there was manning and definitions of manning and the breaks, if we agreed to do it. Then into this new agreement the company introduced it differently, without agreement, and we put it in dispute and the reason why we continued to do it under this agreement is because we didn't want to get into another dispute as work will work continuous as the disputes procedure and you're refusing to go to work. We didn't want to make another issue within the disputes issue so that's why we've continued to try and make it work best while we're running the dispute without creating another one, if you understand what I'm saying.

PN52

Yes. So if I could just ask you a few questions arising out of what you've just said, Mr Patchett. So what is it that you say is different about the manner in which continuous operations is run?---Well, the difference, Deputy President, was the company - if you go to the clause in the agreement that what constitutes a crane gang, and it's a minimal manning and it defines what your role is. Then you've got, separate to that, you've got the straddle pooling operation. What happened to this - what changed differently was that the company stopped the continuous because we had a dispute with what the multiskiller was defined and also the number of people in the gang when the breaks would be taken. Then, under this new one, the company decided to change what we previously did when it was agreed and three people, the crane driver, the crane foreman and the pin person, that does all the pins, would work six hours without a break. That's the difference, with a totally different operation, totally different.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN53

We'll come back to this, Mr Patchett, but what I'm putting to you is, in fact, that's not the case and the way in which continuous operations is run is the same as it has been run historically, prior to August 2022?---In some shifts it can and others

we still have disagreement on a multiskiller compared to a pin person and the manning. But we do continue to work the continuous operation.

PN54

Now, I'd like to take you to the relevant provisions, in the enterprise agreements over time, and might the witness be shown the statement of Mr Jeffries? If I could just ask you to turn to Annexure SJ3, which starts at - - -?---Sorry, I haven't got my glasses, can you refer to the page number first?

PN55

Yes, page 41 is the start of that?---Page 41, sorry?

PN56

Yes?---Yes.

PN57

So that's Attachment SJ3. If I could ask you to go to the last two pages of that attachment, which starts at page 45? Do you see that that's an extract from the 2008 enterprise agreement?---Which clause, under page 45 are you talking about?

PN58

If you see at the top, it says, '2008 Agreement' and then in the middle of the page there's '1.9 Rest periods', can you see that?---1.9.2 and 1.9.3, which one are you referring to?

PN59

So you have that in front of you?---Yes.

PN60

So this is the provision of the 2008 enterprise agreement that deals with rest periods?---I take it as it is, yes.

PN61

Do you see that it's clause 1.9.1 which deals with standard rest periods?---Yes.

PN62

And then clause 1.9.2 that deals with vessel operation rest periods?---Yes.

PN63

And clause 1.9.3 that deals with the straddle pool operation rest periods?---Yes.

PN64

Then, if you go over the page, do you see there's a clause 1.9.4 that says:

PN65

Each employee shall take rest periods at times to suit operational and maintenance requirements. Changes to rest periods may be advised one hour after the commencement of shift.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN66

?---Sorry, can you repeat that clause again?

PN67

I just read you the clause?---Sorry, I've got a really bad ear. I've got a blockage in my ear at the moment, sorry.

PN68

Anything you don't hear I'm very happy to repeat it. So do you see clause 1.9.4?---Yes.

PN69

It says:

PN70

Each employee shall take rest periods at times to suit operational and maintenance requirements. Changes to rest periods may be advised one hour after the commencement of shift.

PN71

?---Yes.

PN72

That paragraph, clause 1.9.4, does not form part of the clause that deals with vessel operation rest periods, in clause 1.9.2?---It doesn't?

PN73

It doesn't?---No, I believe it's a standalone clause.

PN74

It's a standalone clause. It stands alone from the vessel operations clause, in 1.9.2, yes?---Do you need me to explain what it means?

PN75

No, I'm just asking you - - -?---What it's in there for?

PN76

- - - if it stands alone from clause 1.9.2?---Okay. Yes.

PN77

It stands alone from clause 1.9.3 as well, doesn't it?---Yes.

PN78

So that clause 1.9.4 is a standalone clause that deals with the taking of rest periods?---Do you want me to explain what it means?

PN79

THE DEPUTY PRESIDENT: No - - -

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN80

MR PERRY: Mr Mohseni will have the chance to ask follow up questions?---Follow up question?

PN81

Yes, when he does re-examination?---Okay. So I can't explain, Deputy President?

PN82

If Mr Mohseni wants to ask a follow up question to extract that information, he may, on re-examination?---Okay.

PN83

So you accept it's a standalone clause that deals with the taking of rest periods?---For a purpose, yes.

PN84

It's a standalone clause that deals with the taking of rest periods?---Yes, for a purpose, sorry.

PN85

Could I ask you now to look at page 43? You accept that this is an extract from the 2011 enterprise agreement?---I take it it is.

PN86

If you see, over the page, on page 44, there's a clause 1.9.4, do you see that?---Yes.

PN87

That's the same as the clause 1.9.4 in the 2008 agreement, isn't it?---That's right.

PN88

In fact, the whole of clause 1.9 is identical to the clause in the 2008 agreement, isn't it?---Yes. For reasons, yes, and situations.

PN89

Can I ask you now to look at page 41 and do you see, about - sorry, I withdraw that. You accept that that's an extract from the 2016 enterprise agreement?---I take it that it is.

PN90

Do you see, over the page, at page 42, about halfway down the page, there's a clause 1.9.4 and that's identical to the clause in the - both the 2008 and the 2011 agreements?---Yes, I take it that it is.

PN91

So you accept that in each of the 2008, 2011 and 2016 agreements there is a standalone clause that deals with the taking of rest periods?---Yes, for reason of purpose it is in all those agreements, the same.

PN92

That clause is applicable to vessel operations?

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN93

MR MOHSENI: Deputy President, can I object to that question? I'm not sure it's appropriate to be asking a lay witness about legal conclusions.

PN94

MR PERRY: I'm more asking him about his understanding of it, Deputy President.

PN95

THE DEPUTY PRESIDENT: I'm not in the High Court, Mr Mohseni, I'm going to allow the question. I understand the (indistinct) called.

PN96

MR PERRY: Perhaps I can put this to you, that, as a standalone clause, clause 1.9.4 in those three enterprise agreements applied to all types of rest periods at the terminal?---No.

PN97

Well, I put it to you that you've given evidence to the Commission that it's a standalone clause, it stands on its own right, do you accept that? Therefore it applies, generally applies?---No. I said 'For reason and purpose'.

PN98

I put it to you that as a standalone clause it applies generally?---Not to ships it doesn't.

PN99

I see. Now, there's no wording in the clause, is there, that it doesn't apply to vessel operations?---Deputy President, can I ask you to clarify something?

PN100

THE DEPUTY PRESIDENT: No. I think the question is, it's been put to you that there's nothing in the clause that states that 1.9.4 doesn't apply to vessel operations.

PN101

MR PERRY: Correct?---I'd answer that we've got clauses of what you can do, not what you can't do.

PN102

I see. During the periods in which these three enterprise agreements were in place, continuous operations were (indistinct)?---Yes, by agreement.

PN103

In fact, the union had no objection to that, at those times, did it?---When there was an agreement with conditions around it.

PN104

Yes. The agreement is - when you refer to the agreement, it is the clauses that we've just been looking at, is it no?---No.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN105

No?---No.

PN106

What agreement are you referring to, Mr Patchett?---The agreement was there was continuous operations, Deputy President, when I previously said that the manning, the breaks and the definitions of the functions, as what was constituting a crane gang, how many people were engaged and when the breaks were taken was by agreement.

PN107

Well, none of that is in those enterprise agreements, is it, Mr Patchett?---No, it wasn't because it was something that we agreed with the - - -

PN108

(Indistinct) didn't exist. The agreement was the enterprise agreement, wasn't it?---There was the enterprise agreement and the answer to your question that we worked it previously, outside the agreement, was by agreement outside the agreement.

PN109

Well, Mr Patchett, you'd accept, would you not, that the key feature of running continuous operations is the staggering of employee rest breaks?---No.

PN110

Mr Patchett, you accepted this earlier, when continuous operations are in place, employees take their breaks at different times, do they not?---That's correct.

PN111

That requires those breaks to be staggered?---It was staggered, it was by agreement.

PN112

Yes. You don't have to keep repeating that, I understand your evidence to be, Mr Patchett, that prior to the current agreement continuous operations were worked, you say by agreement, outside of the terms of the agreement, I understand that evidence?---Yes.

PN113

I'm not stupid, I don't have to have that point belaboured?---Sorry, I'm not trying to be difficult, I'm trying - - -

PN114

I know. I understand your evidence quite clearly, thank you. Mr Patchett, the staggering of breaks is to meet an operational requirement of running a continuous operation, isn't it?---To a point, yes.

PN115

That is because when continuous operations is run it's possible to move a greater number of containers in a shift, that's right, isn't it?---Well, yes, it's possible.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN116

That operational requirement is what drives the staggering of employee breaks?---No, not really.

PN117

Well, I put it to you that it is that operational requirement?---Depends when the breaks are taken and how long you get and how many people you've got to take them.

PN118

Yes. Staggering of breaks, for those reasons, is exactly the sort of thing that clause 1.9.4, in those three agreements, is referring to, is it not?---No.

PN119

Well, what is it referring to, Mr Patchett? Is it just irrelevant, is it?---You're talking about 1.9.4?

PN120

Yes?---Well, it has to do with - it mentions maintenance.

PN121

'Maintenance'?---Yes, it says 'maintenance' in there.

PN122

Well, don't you see the words 'operational' in there?---Yes, 'Operational' and - - -

PN123

Does that mean it's not relevant?---No. You've asked me a question and I'm referring to what it reads and it says 'maintenance'. It mentions in regards to - - -

PN124

So your truthful evidence, Mr Patchett, is that that clause is only dealing with maintenance?---No.

PN125

It's also dealing with operational requirements, isn't it?---Could I answer the question?

PN126

Yes, I'd like you to?---Okay. It mentions maintenance because it stands for reason standalone is what you mentioned, standalone, because it comes into play when maintenance are called because of certain things with operations that break down. When maintenance are involved because machinery and cranes break down for reasons and that's why the maintenance is put in there. That's why it's a standalone because it's unforeseen circumstances and mechanical breakdown, that's why maintenance is mentioned in there.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN127

Well, that's just fanciful, isn't it, Mr Patchett? It refers to operational requirements. The company's ability to manage it's operations by staggering

breaks?---No, it's not fanciful because we've got maintenance stipulated in there, under their own terms and it mentions the maintenance - - -

PN128

All right, just so we're clear, your evidence is that this clause is only in the agreement to deal with maintenance issues, is that your evidence?---Well, that's the intention because maintenance - because things happen and cranes break down, straddles break down and that's why we're putting the maintenance in there because they're standalone in the agreement with their own working and we had to bring them into that part of the agreement, what it means, and that's why it is standalone.

PN129

I'm just curious what the other terms in that clause mean then? It says 'operational' and it doesn't say 'to suit maintenance requirements'?---Well, it - all parties have got a part to play and it's not written properly, because the maintenance can have a break - - -

PN130

It's been there for, as I see it, some 13 or 14 years?---And, Deputy President, sometimes those clauses sit dormant and we know what it means and until today - - -

PN131

THE DEPUTY PRESIDENT: Has your representative led any evidence in relation to the origins of this clause (indistinct) we've established on the objective intent of the agreement?---Sorry, Deputy President.

PN132

I'll put that to Mr Mohseni later. You're on notice on that, Mr Mohseni. Mr Patchett's made an issue of these terms, he says the intent was only maintenance, but I don't see - I put you on notice, I don't see there's anything in the material that goes to the objective intent of that clause, when it was established or when - - -

PN133

MR PERRY: What I'm putting to you, Mr Patchett, is that the clause is there to enable the company to stagger employee rest periods at the terminal, is it not?---No.

PN134

So your truthful evidence today is that the clause is only there for the purposes of maintenance, is that what you're saying?---Well, in the event of maintenance, unforeseen mechanical breakdowns.

PN135

Mr Patchett, you don't say that in your witness statements, do you?---No, I don't.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN136

You're just making it up today because you think it supports your argument, don't you?---I don't make anything up.

PN137

THE DEPUTY PRESIDENT: Perhaps you could move on, Mr Perry, I understand the evidence of Mr Patchett on this point.

PN138

MR PERRY: If it please, Commissioner.

PN139

Now, continuous operations at the DP World terminal were the default mode of operation until about 2020, that's right, isn't it?---I don't know if you'd use the word 'default'.

PN140

Well, they were the - it was very much more often the case than not that the continuous operations occurred?---Prior to this current agreement?

PN141

Prior to about 2020?---Yes, by agreement, yes.

PN142

You don't need to keep telling the Deputy President what the agreement is, Mr Patchett, I'm just asking you - - -?---Sorry, I'm letting you know because you keep asking me the same questions.

PN143

THE DEPUTY PRESIDENT: There's no need to be argumentative, Mr Patchett?---Sorry, Deputy President.

PN144

This will be a lot easier if you just answer the question. If there's any re-examination questions Mr Mohseni can ask them?---Okay.

PN145

MR PERRY: You would accept that continuous operations was a well-established custom and practice at the terminal?---Prior to the disagreement, yes.

PN146

And that under the - in about - I withdraw that. In about 2019 there was a significant reduction in the amount of occasions upon which continuous operations were run?---Yes, that's possibly right.

PN147

And that was because at around about that time there was a reduction in volume at the terminal?---Yes, there was.

PN148

However, there have been occasions on which continuous operations have been run, since then?---Yes.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN149

Now, historically, Mr Patchett, prior to 2022, the union has never asserted that the company's not entitled to run continuous operations, has it?---Could you repeat that question again, with the time, sorry?

PN150

So prior to 2022 the union has never asserted that the company is not entitled to run continuous operations?---Well, we have. We've had numerous discussions in meetings, monthly meetings and issues around that.

PN151

Well, you've never put into dispute the right of the company to run continuous operations, have you?---Well, we have, that's why we're here today.

PN152

No, prior to 2022?---Because the company stopped it.

PN153

Mr Patchett, the company has been running continuous operations at its terminal for decades, has it not?---Yes, it has.

PN154

Yes. And prior to 2022 the union has never disputed its right to do that, has it?---Yes, we have.

PN155

Where do you refer to that in your statement, Mr Patchett?---I didn't put it in the statement.

PN156

No. You don't think that would have been something the Deputy President would have been interested in knowing about?---Well, we had ongoing - of course, for the Deputy President, absolutely, but we did put it in dispute with them and they stopped it themselves, so we didn't have a dispute.

PN157

When are you referring to, Mr Patchett?---Well, it was ongoing like a tap on and off on and off on and off, and we had the company were trying to reintroduce it in different models and we had continuous discussions. While you're having continuous discussions you don't have to follow disputes procedure.

PN158

The fact is, you've never put it in dispute, prior to 2022, have you?---Yes, we have.

PN159

I put it to you, you haven't?---We have in ERC meetings with the delegates and the company.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN160

Yes, but continuous operations were worked, were they not?---Yes, as I - yes, they have been.

PN161

And the employees actually like continuous operations, don't they, because they get more breaks?---On the breaks, yes.

PN162

It's never been an issue, prior to March 2022, has it?---Yes, it has.

PN163

Well, I put it to you, that's just simply not the case, Mr Patchett, and that's false?---It has been a problem.

PN164

A problem?---For the employees.

PN165

I see.

PN166

THE DEPUTY PRESIDENT: All right, perhaps I can ask a question. The issue is not advanced to the point where a dispute was filed in the Commission, prior to clause 22?---Yes.

PN167

MR PERRY: Thank you, Deputy President.

PN168

Now, Mr Patchett, the position the union wishes to advance today is that all employees must take a 45 minute break at the same time, is that right?---That's correct.

PN169

Now, that was a position that was first put to the company in March 2022?---Yes.

PN170

When that position was advanced Mr Crosky, you know who Mr Crosky is?---Yes.

PN171

Mr Crosky developed a new roster which would have involved all employees having one 45 minute break, do you recall that?---No, I've not knowledge of that.

PN172

I see. You don't know about that?---I know of a model with - sorry, it's a 45 minute break, but the difference is, Deputy President, is some were working over six hours before they got their 45 minute break, in that model.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN173

Yes. So you are familiar with that proposal Mr Crosky made, in 2022?---Yes.

PN174

When you referred, in your statement, your first statement, at paragraph 20, to the company experimenting with rest periods, is that what you're referring to?---Yes.

PN175

So it's that one change which is what you're referring to as experimentation?---Yes.

PN176

Do you accept that what Mr Crosky was trying to do was to resolve the dispute which the union had raised in March 2022 about rest periods by moving to 45-minute breaks?---No.

PN177

Well, I'm putting to you that that's what he was endeavouring to do, was to resolve the dispute that you had raised for the first time in 2022?---No, no, I don't believe he was.

PN178

When Mr Crosky proposed that you roster the 45-minute breaks, there was an occasion on which that roster was put in place in about August last year; do you recall that?---Yes, I think, yes, that was the case, yes.

PN179

That led to you, I take it, making a complaint to WorkSafe; do you recall that?---That's correct.

PN180

On 24 August last year, an inspector came on site?---Yes, inspector or inspectors, whatever, yes.

PN181

The recommendation of the inspector was that the parties go back to the original pattern of breaks and do a risk assessment?---Part of it was.

PN182

The company subsequently sought to do a risk assessment?---I believe they started to.

PN183

And the employees refused to participate in that risk assessment?---Well, not the employees, the HSRs. There is a difference.

PN184

The HSRs refused to participate in the risk assessment?---Well, they - - -

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN185

MR MOHSENI: I object to that question, Deputy President. I'm not sure the relevance of the conduct of HSRs in a WorkSafe - - -

PN186

THE DEPUTY PRESIDENT: It tells the story, Mr Mohseni.

PN187

MR MOHSENI: Sorry?

PN188

THE DEPUTY PRESIDENT: It tells the story. Thank you, go on.

PN189

MR PERRY: I might just ask you the question again, Mr Patchett. The HSRs refused to participate in that risk assessment?---They quoted the OH&S Act to have the meeting and the company refused to apply the Act to the meeting.

PN190

I don't think you answered my question. 'Yes' or 'No', did they refuse to participate in the risk assessment? 'Yes' or 'No'?---Based on the OH&S Act, they did.

PN191

So they, having raised a safety issue, refused to participate in an assessment of the risk said to be created by that safety issue? Is that your evidence?---Based on the OH&S Act is how I replied.

PN192

What in the OH&S Act did it mention?---Well, it mentions about assistance, knowledge and experience about being able to have assistance with someone like myself to attend the meeting, as per the Act, and I hold an (indistinct) certificate and the company refused that.

PN193

I take it, Mr Patchett, then that the employees' refusal to participate - I withdraw that. I take it the HSR's refusal to participate was based upon your advice; is that what you're saying?---No.

PN194

But they declined to participate?---They wanted to, but they applied the Act.

PN195

In October last year, the WorkSafe inspectors came back on site for a follow-up inspection; is that right?---I'm not saying they didn't. I haven't seen the report.

PN196

By that stage, the union had filed this dispute in the Commission; that's right, isn't it?---Yes.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN197

When the inspector came on site, they sought to speak to the HSRs about a risk assessment?---I'm not sure. As I said, I haven't seen the report.

PN198

You would accept that none of the HSRs spoke to the inspector, even though they were on site at the time?---Well, I don't know the date. I haven't seen the report. Normally I see an entry report. I don't know what happened with that conversation. I couldn't say.

PN199

So you don't know what happened when the inspector came on site?---No, not on the conversation because I haven't seen the report.

PN200

Around the middle of last year, there were some discussions occurring between the company and the ERC about some site issues; would you accept that?---Yes.

PN201

One of the things that the union was seeking was that there be 32 additional jobs and upgrades at the terminal?---Yes.

PN202

Another thing that the union was seeking was that there be no compelling employees to work on public holidays?---Possibly, possibly, I can't remember.

PN203

Another thing that the union was advancing is that there be no cancellations or idle time at the terminal?

PN204

THE DEPUTY PRESIDENT: Mr Perry, can I just raise an issue here. You may be seeking to extract evidence going to an asserted motivation on the part of the union to make the issue of continuous operations contingent on some other. I'm not sure how ultimately what the industrial motivation was or wasn't assists me properly construe the terms of the agreement.

PN205

MR PERRY: Yes.

PN206

THE DEPUTY PRESIDENT: I know you might ascribe a motive to the CFMMEU over the manner in which it's a process issue, but does that assist me construe the meaning of the term having regard to its context, its history, the objective intent of the parties? I just raise that.

PN207

MR PERRY: Yes, I'll move on shortly from this area.

PN208

THE DEPUTY PRESIDENT: Sure.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN209

MR PERRY: Because I accept, Deputy President, that this case is principally a construction case.

PN210

THE DEPUTY PRESIDENT: Yes.

PN211

MR PERRY: And that when one looks at the iterations of the clause over time and its, you know, heritage, history and custom and practice at the terminal, it's abundantly clear that there's - - -

PN212

THE DEPUTY PRESIDENT: There will be time for submissions.

PN213

MR PERRY: - - - a numbering issue, and we will deal with that when we get to submissions.

PN214

Perhaps I can just put to you, Mr Patchett, that what the union was doing was seeking for the company to make concessions on some site issues in exchange for the union agreeing that continuous operations could occur?---Can you repeat all that again?

PN215

Yes. So there was a number of site issues that we just spoke about, the jobs and upgrades, the compelling on public holidays and the like, so what the union was doing was seeking a concession from the company in relation to those matters in exchange for the union agreeing that continuous operations would occur?---Well, I don't know if it was in that, but there's numerous things we put together to try and get a negotiated outcome. I don't believe the continuous - it mightn't have been in with the 32 jobs - it could or it couldn't have been - but if I refer to what you're saying in regards to continuous operation working, if that was said in a meeting or meetings or outside of meetings, that would have been contentious on an agreement on what it was, not on what the company were trying to introduce.

PN216

I see. I will just ask you one more question before we move on from this topic. What I'm putting to you is that the issues raised in relation to continuous operations were raised in order to seek an agreement from the company on some other issues?---Well, we do - and not just that - we do, at times, put a package together and try and get agreement on all issues.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN217

That was occurring not even 12 months after the Commission approved the enterprise agreement?---We could have possibly - it could have possibly been in the 32 jobs conversation, but it would have been based on an agreement of what the continuous operation would have looked like, how it worked, the manning, the titles and the breaks.

PN218

I see?---I'm not saying it wouldn't have, but it would have been subject to all that.

PN219

So while the ink was still wet, as it were, on the enterprise agreement you had just negotiated, you were raising a whole bunch of new claims and seeking agreement on those?---Sorry, I have got a bad blocked ear through an industrial accident.

PN220

What I was putting to you was that you were raising a range of claims - - -

PN221

MR MOHSENI: Deputy President - - -

PN222

THE DEPUTY PRESIDENT: Yes?

PN223

MR MOHSENI: I can't see the relevance of the union trying to - - -

PN224

MR PERRY: I'll move on.

PN225

THE DEPUTY PRESIDENT: Yes, I've already - - -

PN226

MR PERRY: I think the point has been made.

PN227

THE DEPUTY PRESIDENT: And Mr Patchett has made some concessions about seeking to resolve a number of matters and that the issue of continuous operations and the 32 additional jobs and the upgrades may have been part of that discussion.

PN228

MR PERRY: That's all I was seeking to establish.

PN229

THE DEPUTY PRESIDENT: Yes, that seems to be established.

PN230

MR PERRY: I can move on.

PN231

Mr Patchett, the terminal operates having regard to a vessel schedule, does it not?---Yes, vessel windows.

PN232

It's important that, as far as possible, those vessel windows are adhered to?---Yes.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN233

If they are not, that can create delays?---Yes, of course.

PN234

Which could have impacts on the supply chain if there are delays?---Well, it could have, yes.

PN235

The company can also be subject to penalties from its customers if there are delays?---No, I don't think so.

PN236

I put it to you that they can?---Not on the windows, they can't.

PN237

When continuous operations are in place, it enables a greater number of containers to be moved in a single shift; that's right, isn't it?---Sorry, when a continuous operation is performed, there's an expectation to move more containers on a shift?

PN238

Yes?---Well, that would be the intent because continuous - you would expect to get more because it's continuous.

PN239

That's right, and that would be in the order of about 30 containers for a shift extra?---I couldn't quote - I wouldn't quote a number.

PN240

But you accept that continuous operations enables a greater number of container exchanges to occur on a shift?---Yes, that would be the intent.

PN241

When employees are allocated to shifts at the terminal, they are generally notified the day before; is that right?---Yes, generally, but not always.

PN242

But, generally speaking, that's right?---Yes.

PN243

That provides the company with an amount of labour the following day when you come to work?---Yes.

PN244

Where the company wishes to move more containers with that labour, one thing that can be done is there can be shift extensions?---Yes.

PN245

But shift extensions involve the payment of overtime?---Yes.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN246

So that's an expensive thing for the company to do?---I don't know if it's expensive.

PN247

Well, they have to pay overtime to the employees who are working shift extensions?---But I don't think it's expensive.

PN248

You accept that overtime rates have to be paid for the shift extensions?---Well, they do, but not expensive.

PN249

The shift extension can only occur, of course, where a crane is available?---But the company call the extension.

PN250

Yes, but I'm just asking you to accept this, that if all cranes are in operation, it's not possible to extend the shift because there's another group of employees who come to work and will need to work on the cranes. Do you accept that?---No, it doesn't work like that.

PN251

But shift extensions is one way that the company can increase the number of container movements in a day?---Yes, they do it a lot.

PN252

The other way is for the company to run continuous operations?---Yes.

PN253

Other than shift extensions and continuous operations, the company doesn't have other means by which it can increase the amount of container movements in the terminal on a day, does it?---Yes, it does.

PN254

What are they, Mr Patchett?---Got to do with planning, got to do with allocation
- - -

PN255

No, so - - -

PN256

THE WITNESS: Sorry, Deputy President - - -

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN257

THE DEPUTY PRESIDENT: Yes, go on?---It's got to do with the planning of a vessel, it's got to do with where the ship is placed on the berth in conjunction with the container stacks that are right adjacent to where the ship is berthed, it's got a lot to do with the allocation of discharge and load and where they come off the ship and where they're placed. If they are placed close to the ship, the straddle can

get back quicker and the movement, the distance, is minimal, and that's what we continually - the company continually tries to do. It can be and sometimes it can't.

PN258

MR PERRY: On a given day, there is a fixed amount of labour available at the terminal; that's right, isn't it?---Only a fixed amount if you're on a roster.

PN259

On a given day, employees are told who is allocated for the next day?---Yes.

PN260

Once that occurs, that's the labour which is available to the company on that day?---Yes, once you notify them, yes, that's correct.

PN261

And the only way to get more productivity out of that labour, in other words, get that labour to work more, is to run shift extensions or continuous operations?---And/or call people in.

PN262

Yes, but that would be voluntary for those employees who are called in?---Well, yes.

PN263

It is unusual for employees to volunteer - - -

PN264

THE DEPUTY PRESIDENT: Again, I probably don't need to be convinced that there are certain ways and means that productivity can be increased, one being by extensions, and I think Mr Patchett has conceded that, by continuous operations, one might expect to get more container movements.

PN265

MR PERRY: Yes.

PN266

THE DEPUTY PRESIDENT: So I can see that there are certain levers the employer can pull to increase its productivity.

PN267

MR PERRY: Yes.

PN268

THE DEPUTY PRESIDENT: One of them is that of continuous operations.

PN269

MR PERRY: Yes.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN270

THE DEPUTY PRESIDENT: I think Mr Patchett's evidence also seems, on its face, to have some merit to it, and that is where the logistics and planning are such that people are actually efficiently employed to move containers. That seems to me to be an uncontroversial proposition.

PN271

MR PERRY: Yes, if it please the Commission.

PN272

THE DEPUTY PRESIDENT: Thank you.

PN273

MR PERRY: Mr Patchett, recently the company has started conducting maintenance on one of the berths at the terminal?---Yes.

PN274

That means that that berth is not available currently for vessel operations?---Yes.

PN275

And so that means that the company needs to service its customers with the other berths being fewer in number than what is normally available?---Yes.

PN276

Now if I could ask you, you were involved in the negotiation of the 2020 enterprise agreement?---Yes, I was.

PN277

One thing that the union was seeking in that negotiation was that breaks be increased from 45 minutes to one hour?---Yes.

PN278

And the union was also seeking that the provisions dealing with vessel operations and straddle operations be merged together?---Part of it, yes, where there was some conversation.

PN279

They were the two claims that the union was making in relation to breaks?---Can you go back to the first part?

PN280

The first was increasing breaks from 45 minutes to one hour?---Yes.

PN281

And the second was the merging of straddle and vessel operations together?---And if I answer the first part about 60 minutes, it's an entitlement under the award for a 60-minute break, not a 45-minute break, and that's the reason why we raised it.

PN282

Yes, but that was the claim you were making?---Well, we didn't say it was a claim, we said it was an entitlement.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN283

Anyway, that was the issue you were raising?---We were raising, yes, absolutely.

PN284

That issue and then the merger of straddle and vessel operations were the two issues you were raising about the breaks clause?---Some of the issues with the breaks, yes.

PN285

They were the only two issues; that's what I'm putting to you?---No, as I previously mentioned, it had to do with the - what constitutes crane gang and what the manning is, what the definition is and what breaks you have.

PN286

Yes, yes?---It's part of all of that.

PN287

But if I could just ask you this: there was no claim made by the union that the company be prohibited from running continuous operations, was there?---Because the company said they didn't want it in the agreement.

PN288

No, that's not the case, Mr Patchett. There was no claim made by the union to add a clause into the agreement that said continuous operations cannot be run?---Because when we spoke about it, the company said, 'We don't want it in the agreement.'

PN289

Well, that's actually not the case, Mr Patchett. If that was the case, do you think you might have put that in your witness statement?---Well, possibly, but because it wasn't put in the agreement, it wasn't going to exist.

PN290

What was put in the agreement, and perhaps I will just hand you a copy of the 2020 enterprise agreement and just ask you to turn to page 67 of that agreement. Do you see clause 1.9 Rest Periods there?---Yes.

PN291

It goes to the bottom of the page and then over the page, ending at clause 1.10 there?---Yes.

PN292

Do you recall I took you earlier in your evidence to the equivalent clauses in the 2008, 2011 and 2016 enterprise agreements? Do you recall that?---Yes.

PN293

In terms of the wording of this clause, you would accept that it's relevantly the same as those clauses?---You're talking about the rest periods first, 1.9, which refers to - - -

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN294

The whole of clause 1.9. It starts with the heading '1.9 Rest Periods' down to clause 1.10 on page 68, but the wording - when I say 'wording', I mean not the numbering, the wording - is the same as the wording in the previous enterprise agreements that I took you to?---Yes.

PN295

You would accept that that is because the parties didn't intend to make changes to the clause?---Possibly, yes.

PN296

So that what occurred was the clause was kind of rolled over from the previous agreements?---Some clauses, yes.

PN297

Could I ask you just to look at the clause which is numbered (e) on page 68?---Is that (d), is it?

PN298

(e) - 'e' for Eric?---Okay.

PN299

If I could just get you to read that out for me?---

PN300

Each employee should take rest periods at times to suit operational or maintenance requirements. Changes to rest periods may be advised up to one hour after commencement of the shift.

PN301

Do you accept that the wording of that paragraph is exactly the same as the wording in clause 1.9.4 of each of the three other agreements I took you to?---Yes.

PN302

The only difference is that it has a different numbering?---Yes.

PN303

That numbering, I'm putting to you, is an error in the agreement?---Why is it? It's an error?

PN304

Yes?---No.

PN305

No? Did the union have a specific claim that the clause be renumbered?---It's not to do with the number, it's where it sits in the agreement.

PN306

You accepted earlier in your evidence that clause 1.9.4 in the other agreements was a standalone clause?---Yes.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN307

And this paragraph (e) is also a standalone clause, isn't it?---In this agreement, it sits in where it sits.

PN308

Yes, but it's a standalone - my question was it's a standalone clause in this agreement?---Well, actually, in the previous ones it did. In this one, it sits in with the rest.

PN309

Yes, and what I'm putting to you is that that's actually a formatting error in the document?---No, I don't believe it is.

PN310

Is your evidence to the Commission that the union made a claim that the clause be numbered differently?---No, I don't believe we put it numbered different.

PN311

No, and so - - -?---We just put clauses in where they fit.

PN312

So how did the numbering of the clause come to change?---They change for various reasons.

PN313

How did this particular clause's numbering come to change?---I don't know about the number, but I know about the clause.

PN314

The intent was that the clause be the same as in the previous agreements?---No.

PN315

How was it intended to be different, Mr Patchett?---It's different because we stipulated straddle pooling operation, 45-minute break and the difference between straddle pooling and crane operation.

PN316

THE DEPUTY PRESIDENT: Mr Patchett, do you recall that change in the agreement being part of the explanation provided to employees as required under section 180(5) of the Act?---Yes.

PN317

So that was part of the explanation, was it?---Yes, yes, we explained everything, yes.

PN318

Down in writing, was it?---I don't know if it was, but it was done verbally.

PN319

Was it part of the employer's explanation, do you recall?---Yes.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN320

I call for the documents going to the explanation of the terms of the agreement when it was put to employees. Given the size of the employer and given the process of agreement approval, I would imagine that we might have access to it in any case, but it might be faster for the respondent to be required to produce it.

PN321

MR PERRY: We will attend to that, Deputy President.

PN322

THE DEPUTY PRESIDENT: Thank you.

PN323

MR PERRY: Mr Patchett, you have accepted that the wording of that paragraph (e) is the same as the wording of clause 1.9.4 from the previous agreements?---Yes, the wording's the same.

PN324

And generally when the same words are used, they are meant to mean the same thing, aren't they?---They mean the same thing, but they can go into a different clause.

PN325

Yes, and I think you have already accepted that the union made no claim for that clause to be renumbered?---I don't recall we did, but I recall the clause itself where it fits.

PN326

The reason that the clause was renumbered was due to a formatting error when the document was generated?---Actually, I don't check formatted numbers, I check the clauses and where they fit. So, in numbering, I've got no idea.

PN327

Just so we are clear on this, Mr Patchett, are you telling the Deputy President today that that clause, that paragraph (e), has a different meaning in the 2020 agreement than the meaning it had in the predecessor agreements?---Well, it has additional meaning. It mentions that there's one 45-minute break.

PN328

No, no, no, I'm asking you about the paragraph numbered (e) towards the top of page 68, just that three lines of text?---Page 68 of the agreement?

PN329

Yes?---Which clause in page 68, sorry?

PN330

Paragraph (e), the third paragraph?---Yes.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN331

I think you've accepted that that's the same wording as was clause 1.9.4 in the previous agreements?---Yes.

PN332

I just want to be clear on this: the union made no claim for the numbering of the clause to change?---I can't recall a numbering; all I can recall is where the clauses fit. The numbering I have no idea with the numbering or claims.

PN333

All right?---I know - to answer your question, the claims are where the wording and the clauses fit, the numbers I have no idea about any clause of where we'd challenge what the numbered are.

PN334

Well, you'd accept, Mr Patchett that where the clause fits is in the same place as in the predecessor agreements, it's just that it's numbered differently, do you accept that?---It is numbered different but it's in a different clause.

PN335

It's in the same place as the last three lines of text in clause 1.9, is it not? Feel free to have a look at the other clauses?---I'm just trying to find it, but doesn't it sit in a different - it sits in a different clause.

PN336

Yes, but what I'm putting - - -?---It doesn't sit in there. I'm sorry. Sorry, Deputy President. Perhaps if I clarify, it sits in this clause for a reason in this new agreement.

PN337

My question to you is that the last - the clause which is numbered (e) in the 2020 Agreement is the last three lines of text in clause 1.9, do you accept that?---Yes. In the current agreement, yes, (e) and 1.9.2.

PN338

And in each of the three predecessor agreements, those three lines are also the last three lines of text in clause 1.9, are they not?---I'm just trying to find it. They sit in 1.9.

PN339

THE DEPUTY PRESIDENT: I think we've already established that it is, okay. We're going round and round in circles here.

PN340

MR PERRY: I've just - well, it speaks for itself.

PN341

THE DEPUTY PRESIDENT: Mr Patchett seems reluctant to concede, and that's his right, that it is other than a movement of that clause where it's previously a standalone clause into a clause dealing only with straddle pools operations for this period, that seems to be the tenor of the evidence.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN342

MR PERRY: That's his evidence and I think I've put a contrary proposition to him which is not accepted.

PN343

THE DEPUTY PRESIDENT: No, I understand that. You can keep trying to get Mr Patchett to concede otherwise, but that's his evidence.

PN344

MR PERRY: Yes.

PN345

THE DEPUTY PRESIDENT: Ultimately it will be my role to discern the truth of it after having heard from all the witnesses in terms of whether there was an objective intention to alter the terms and the effect of the terms of the agreement relating to this period.

PN346

MR PERRY: Yes.

PN347

THE DEPUTY PRESIDENT: Now, I know the employers' submission is that it was the formatting error. Mr Patchett's evidence seems to be it was a conscious decision to confine 1.9.2(e) to the straddle pool operations for this period.

PN348

MR PERRY: Yes. And I'll just ask a couple of questions and then I'll move on, Deputy President.

PN349

THE DEPUTY PRESIDENT: Sure. Yes.

PN350

MR PERRY: Mr Patchett, did you read the witness statements and submissions that DP World filed in this matter?---Yes, I did.

PN351

Yes. And you would have observed from those that the company's contention is that there's a formatting error in the clause?---Yes, that's what they've said, that's their opinion.

PN352

So you saw that?---Yes, yes.

PN353

And you filed a witness statement in reply which was very late on Friday night?---Yes.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN354

Do you recall that? And in that witness statement in reply, you didn't say anything about the suggestion that there's a formatting error in the clause, did you?---No, I didn't because I thought this would be answered here today, Deputy President.

PN355

Well, you didn't think that that was an important matter that you should say something about it?---No, actually I thought everything was important but what was more important to me is I got a call from my sister with my father that I left that and I spoke to Mr Mohseni and went right over everything and I tended to my father's - he's on his own, disabled. And I thought that question would be answered here.

PN356

Now, if I could ask you to go back to the 2020 Agreement at page 68, do you see that towards the top of the page there's a paragraph numbered (d)?---In 1.9.2?

PN357

Yes?---Yes.

PN358

And it says:

PN359

Straddle pool operators will be advised of intended rest period times at the commencement of shift which may be adjusted one hour after the commencement of shift.

PN360

See that?---Yes.

PN361

Now, your evidence, I think, is that at paragraph (e) which follows, is only applicable to straddle pool operators, is that your evidence?---Yes.

PN362

And can I put to you that paragraph (e), if that is correct, is entirely unnecessary because paragraph (d) already deals with that topic, doesn't it?---No, I actually answered before, it's got a purpose in there in regards to - - -

PN363

What I'm putting to you, Mr Patchett, is that the rest period times and the adjustment of those for straddle pool operators is dealt with in paragraph (d), isn't it?---For the straddles in the year, not the ship.

PN364

Well, the clause 1.9 deals with the vessel operations and straddle pool operations, yes. That's right?---In (e).

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN365

The clause generally distinguishes between those two things, vessel operations and straddle pool operations?---Yeah, and then (e) is different again.

PN366

Well, how is it different in (e), Mr Patchett?---What's put in, as I mentioned previously because it includes maintenance and that's why we put the word, 'Maintenance.' We put it always in one clause to stipulate what it means and what the purpose is and that's to do with - in regards to operational maintenance requirements.

PN367

Can I put this to you, Mr Patchett, and can I just ask you to assume a situation where there is a need to conduct maintenance on a crane and that as a result of that, the company needs to adjust rest freights for straddle pool operations?---Yes. Yes.

PN368

Does not paragraph (d) enable the company to make those changes?---No, it's operational and straddle are different. Operational requirements, Deputy President, refers to the ship. Straddle pooling reverts to the straddles that load and unload trucks.

PN369

Yes, and that's because paragraph (e) is intended to deal with things in addition to straddle operators, isn't it?---The clauses in all of it mention vessel operations and straddle pooling. They're totally separate.

PN370

Yes, and when the language in paragraph (d) deals with rest periods for straddle pool operators, paragraph (e) would be unnecessary unless it applied to additional people, wouldn't it?---No, it wouldn't apply just to additional - - -

PN371

Well, it says pretty much the same thing, doesn't it, Mr Patchett?---No, it doesn't.

PN372

Well, it deals with notification of rest period times, both clauses, both (d) and (e), don't they?---For a different purpose.

PN373

I'm just asking you what it says. They both refer to rest period times?---Different purpose because they've got a different clause. Different column.

PN374

And they deal with the company being able to make changes up to one hour after the commencement of the shift. They both say that, don't they?---Straddle pooling, yes, and the other operational maintenance different again.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN375

Yes. And that's because the paragraph (e) is meant to apply to people other than those doing straddle pool operations?---No.

PN376

Well, I'll put it to you that's why it's there?---No.

PN377

And I put it to you that on your interpretation, paragraph (e) has absolutely no meaning whatsoever?---You're saying it doesn't have any meaning?

PN378

THE DEPUTY PRESIDENT: Perhaps you can move on, Mr Perry. I think you've gone about as far on that as you're going to go so, yes.

PN379

MR PERRY: If it please the Commission. Yes, I've got nothing further.

PN380

THE DEPUTY PRESIDENT: I do have a question. Do you have a copy of the agreement there?---Yes, I do, Deputy President.

PN381

Can I take you to clause 7 of the agreement and that's at page 5 I think?---Yes, Deputy President.

PN382

Do you see that employee is defined?---Yes, under the definitions, yes, Deputy President.

PN383

Yes. So it says:

PN384

That it means an employee of the company covered by this agreement.

PN385

?---Yes.

PN386

And where the term employee is used in the agreement, one would have regard to that definition, wouldn't one?---Yes, Deputy President.

PN387

Right. So if I take you back to 1.9.2(e). No, we'll start with (a). You'll see that at (a) it says:

PN388

An employee appointed to straddle pool operations -

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN389

- do you see that? Page 68?---Sorry, Deputy President. Which clause, Deputy President, sorry?

PN390

1.9.2(a)?---Yes.

PN391

It says and it's capitalised:

PN392

An employee -

PN393

- so referring to the definition, that's a person covered by the agreement?---Yes.

PN394

So:

PN395

An employee, as defined appointed to straddle pool operations.

PN396

Do you see that?---Yes.

PN397

And then if you go down to (d) it refers to straddle pool operators, do you see that?---Yes.

PN398

And then at (e) it talks about:

PN399

Each employee.

PN400

?---Yes.

PN401

So does 'Employee', where it appears in 1.9.2 have the meaning as you've agreed is defined in clause 7 of the agreement or does it have a narrower meaning?---Sorry, Deputy President? Sorry, my ear is - today I've - - -

PN402

Yes. Where you see clause (e) at 1.9.2?---Yes.

PN403

You see it says:

PN404

Each employee.

*** ROBERT MICHAEL PATCHETT

XXN MR PERRY

PN405

?---Yes.

PN406

Now, you've already agreed, I think that 'Employee' means an employee of the company covered by this agreement as defined?---Yes. Yes, Deputy President.

PN407

Right. So do you say that the term, 'Employee' where it's in 1.9.2 has a narrower meaning?---Yes.

PN408

Right. Why would it not say at (e) if it was the intention to have a narrower meaning:

PN409

An employee appointed to straddle pool operations shall take rest periods at times -

PN410

- as it says so further up in the clause. I'm curious as to the language. It doesn't confine it to straddle pool employees, does it?---Further experience and knowledge and the point which is great - - -

PN411

No, I'm just asking you a question. It doesn't in (e) refer to straddle pool at all, does it?---No, it doesn't.

PN412

Right. Whereas at (a) it does?---Yes.

PN413

And at (d) it does?---Yes, it does.

PN414

All right. Thank you.

PN415

Mr Mohseni, any questions for re-examination?

RE-EXAMINATION BY MR MOHSENI

[11.27 AM]

PN416

MR MOHSENI: Just a couple, Deputy President. Just one actually.

PN417

Earlier in cross-examination, Mr Perry asked you whether staggering breaks is the key feature of continuous crane operations and you answered, 'No', what are the features?---Key features other than continuous.

*** ROBERT MICHAEL PATCHETT

RXN MR MOHSENI

PN418

Of the key features of continuous operations?---The key features continuous have to do with the agreement, how it applies, the manning when the breaks are taken, buildup from - and by an agreement with all employees how it works.

PN419

So you're saying it's a series of key features not just one key feature?---Yes, it's a series of a number of things.

PN420

Thanks. That's all, Deputy President.

PN421

THE DEPUTY PRESIDENT: Thank you.

PN422

Mr Patchett, you're released. You can remain in the Commission with Mr Mohseni or you can go back to the office, it's a matter for you?---I apologise for my ear but sometimes it's good and sometimes it isn't.

PN423

No, no. I have a bad left ear myself, I understand.

<THE WITNESS WITHDREW

[11.29 AM]

PN424

THE DEPUTY PRESIDENT: Any other evidence, Mr Mohseni?

PN425

MR MOHSENI: None, Deputy President.

PN426

THE DEPUTY PRESIDENT: Thank you.

PN427

Mr Perry?

PN428

MR PERRY: Yes, I call Matthew Azzopardi.

PN429

THE DEPUTY PRESIDENT: Thank you. Is he outside, do you know?

PN430

THE ASSOCIATE: Mr Azzopardi, please state your full name and address.

PN431

MR AZZOPARDI: Yes. Matthew Azzopardi, (address supplied).

*** ROBERT MICHAEL PATCHETT

RXN MR MOHSENI

PN432

THE ASSOCIATE: Now, please take the Bible in your right hand and repeat after me.

PN433

MR AZZOPARDI: Sure. Yes.

<MATTHEW AZZOPARDI, SWORN [11.30 AM]

EXAMINATION-IN-CHIEF BY MR PERRY [11.30 AM]

PN434

THE DEPUTY PRESIDENT: Please be seated, Mr Azzopardi.

PN435

Yes.

PN436

MR PERRY: If it please the Commission.

PN437

Mr Azzopardi, what is your position of employment?---Terminal supervisor.

PN438

And you work at the Northern Terminal DP World?---Yes.

PN439

And Mr Azzopardi, have you caused to have prepared a witness statement in these proceedings?---Yes.

PN440

And does it number 22 paragraphs and is it dated 10 February 2023?---Yes.

PN441

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

PN442

Are there any corrections that you would like to make to that statement?---No. So I - well, I did change - but that's been changed, I guess. Sorry.

PN443

So perhaps I could just help you, paragraph 11?---All right. Yes, sorry. I wasn't sure if that was updated, so what I - sorry.

PN444

I think it's just a date and the year in the date?---Yes. So it wasn't 20134, it was July 2019. That stopped smoko.

PN445

THE DEPUTY PRESIDENT: So is that the second sentence in - sorry, what paragraph was it?

*** MATTHEW AZZOPARDI

XN MR PERRY

PN446

MR PERRY: 11.

PN447

THE WITNESS: Number 11, yes.

PN448

THE DEPUTY PRESIDENT: That says:

PN449

In around 2019 or - - -

PN450

?---So it was actually July 14th, 2019, that's the exact date that it was implemented.

PN451

So it was in around mid-2019?---Yes.

PN452

MR PERRY: With that correction made to your statement, Mr Azzopardi, are the contents of the statement true and correct to the best of your knowledge and belief?---Yes.

PN453

I'll tender that.

PN454

THE DEPUTY PRESIDENT: I'll mark the witness statement of Mr Azzopardi, R1.

EXHIBIT #R1 WITNESS STATEMENT OF MR AZZOPARDI

PN455

MR PERRY: If it please the Commission.

PN456

THE DEPUTY PRESIDENT: Thank you.

PN457

Mr Mohseni?

CROSS-EXAMINATION BY MR MOHSENI

[11.32 AM]

PN458

MR MOHSENI: Mr Azzopardi, that was almost the extent of my cross-examination. I just really wanted to clarify that, so you're almost free to go. Could you just also clarify paragraph 12 of your statement? Sorry, paragraph 13 of your statements where you say:

*** MATTHEW AZZOPARDI

XXN MR MOHSENI

PN459

Mr Grevel (indistinct) the time and continuous operation shifts were required on occasion.

PN460

MR PERRY: How long after July 2019 you said he abandoned it?---I don't know exactly, but I would say four to five months after it was implemented because initially when it was brought in, it was strictly stop smoko without continuous but then realised that it was something that we needed so then we were able to implement it as required but I'm not clear on the amount of time but I would say a couple of months in.

PN461

Thank you. And Mr Jeffries replaced Mr Grevel in his position?---No. Mr Grevel was an operations manager. Mr Jeffries was general manager so he was his boss.

PN462

All right. That's all my questions, Deputy President. Thank you.

PN463

THE DEPUTY PRESIDENT: Thank you.

PN464

Well, that's - anything?

RE-EXAMINATION BY MR PERRY

[11.33 AM]

PN465

MR PERRY: I'll just be one thing (indistinct) the Commission for Mr Azzopardi to clarify.

PN466

When you referred to 'Stop smoko', I take it you're referring to an arrangement under which all the employees take a break at the same time?---Yes.

PN467

I just thought it was helpful to clarify that?---Yes.

PN468

Might Mr Azzopardi be excused?

PN469

THE DEPUTY PRESIDENT: Yes, he may.

PN470

Mr Azzopardi, short and sweet and painless?---Thank you.

PN471

You can return to work or you can torture yourself and remain here for the day?---Sure.

*** MATTHEW AZZOPARDI

RXN MR PERRY

PN472

Perhaps you'd like to return to work. Thank you.

<THE WITNESS WITHDREW

[11.34 AM]

PN473

MR PERRY: I call Ben Crosky.

PN474

THE DEPUTY PRESIDENT: Thank you.

PN475

THE ASSOCIATE: Please state your full name and address.

PN476

MR CROSKY: Ben Crosky, Mackenzie Road.

<BEN CROSKY, AFFIRMED

[11.35 AM]

EXAMINATION-IN-CHIEF BY MR PERRY

[11.35 AM]

PN477

Mr Crosky, what is your position of employment?---General manager operations at West Swanson Terminal.

PN478

For the purposes of these proceedings, Mr Crosky, have you had a witness statement prepared?---Yes, I have.

PN479

Does it number 59 paragraphs and is it dated 10 February 2023?---Yes, it does and, yes, it is.

PN480

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

PN481

Are the contents of that statement true and correct to the best of your knowledge and belief?---They are.

PN482

I tender the statement.

PN483

THE DEPUTY PRESIDENT: I will mark Mr Crosky's witness statement R2.

**EXHIBIT #R2 WITNESS STATEMENT OF BEN CROSKY DATED
10/02/2023**

*** BEN CROSKY

XN MR PERRY

PN484

MR PERRY: May it please the Commission.

PN485

THE DEPUTY PRESIDENT: Thank you. Mr Mohseni?

PN486

MR MOHSENI: Thank you, Deputy President.

CROSS-EXAMINATION BY MR MOHSENI

[11.36 AM]

PN487

Mr Crosky, I only have a couple of questions for you. At 49 of your statement, you give evidence that in October last year, the health and safety manager at DP World scheduled a meeting with the HSRs to conduct a risk assessment?---Yes.

PN488

And that the HSRs declined to participate?---Yes.

PN489

Did you allow Mr Patchett or any other official of the union to attend that meeting?---I don't recall having a request for that.

PN490

Does Mr Patchett or any other official of the union usually come to meetings like that?---I'm not sure. We haven't really had a meeting like that where he's been to.

PN491

When did you start at West Swanson Terminal?

PN492

THE DEPUTY PRESIDENT: Sorry, just before you move on, do you recall whether any of the HSRs requested Mr Patchett or any other union official to attend?---Not to me, sir.

PN493

Thank you. Go on.

PN494

MR MOHSENI: Then if I can take you back to paragraph 42, where you say halfway through that paragraph that you created a continuous operations roster that could be utilised in the future, which gave each employee on vessel operations a single 45-minute break, as requested by the union and the ERC, and you can see all the breaks set out at paragraph 31 above. The breaks at paragraph 31 above refer to the stop smokos?---Sorry, are you referring to paragraph 31?

PN495

It's in your statement?---Yes, sorry.

PN496

You came up with a new continuous roster?---In paragraph 42?

*** BEN CROSKY

XXN MR MOHSENI

PN497

Yes?--- Yes.

PN498

That's your evidence, isn't it? And then the union complained about the roster to WorkSafe; is that correct?---Yes.

PN499

And they recommended, as an interim measure, an alternative roster; is that correct?---Correct.

PN500

Because, under your roster, there was a risk that some employees could work up to six hours without a break; is that correct?---Correct.

PN501

THE DEPUTY PRESIDENT: Sorry, I'm not following the evidence and it might be I'm being a bit obtuse. Prior to your putting an alternative roster, under the previous roster, back when you were on continuous operations, can you just explain for my benefit, because maybe I'm not reading your statement very clearly, how meal breaks were taken?---So with the previous roster for continuous, the meal breaks were split, so some employees would have two 30-minute breaks, some would have three 30-minute breaks, some would just have a single 45-minute break, depending on which role they were carrying out.

PN502

Right. So the aggregate of the meal break periods taken by employees was at least 45 minutes and, in some cases, significantly longer?---Yes, sir.

PN503

But some employees did not receive a 45-minute break per se?---As I say, they would receive two 30-minutes or three 30-minutes.

PN504

And so the alternative roster that you - sorry, I'm coming back to Mr Mohseni's question - was it the case under those arrangements that some employees might work up to six hours without a break?---They would take their break early or late in the shift and then their work would be - so, for instance, a crane driver would work two hours in the crane and then two hours potentially be doing (indistinct) and then two hours back in the crane. So, they wouldn't carry out any single role for an extended period of time.

PN505

No, no, that's not my question?---But, yes, they would work six hours without a break.

PN506

The question is whether they could work up to six hours without a break and I think your answer is, yes, they could?---Yes.

*** BEN CROSKY

XXN MR MOHSENI

PN507

That was when you were staggering the meal breaks; is that correct?---Yes, sir.

PN508

So when you changed the roster - sorry, Mr Mohseni, I'm probably being obtuse here - when you changed the roster, how was that 45-minute break for the meal break proposed to be taken?---So with the change in the roster, it was to be taken - each individual would take one 45-minute break throughout the shift, so they'd be rolling breaks, so different - - -

PN509

Just remind me how many crew members were there on a continuous operation on a crane?---There's - sorry, I need to count that - eight who are - sorry, 10 on continuous operations who are assigned to that crane and then one floating employee that would float between two cranes.

PN510

I see. And so, at any given time, how many crew members - team members/crew members - did you need to run the crane operation such that the person can be off work and having their break?---Sorry, I just need to - you need - six would be - sorry, eight would be working at any one time on continuous.

PN511

Does that mean because there was 10, you could stagger it such that two employees could take their meal break at a given time?---There were times when two employees would be on a meal break.

PN512

So, under the revised meal break arrangements, how long could it be after having started a shift before an employee received a meal break?---Sorry, I - - -

PN513

Did it address the fact that some employees might have to wait up to six hours?---The longest would be four and a half hours.

PN514

How long?---Four and a half hours.

PN515

All right. Thanks, Mr Mohseni, that's helped me understand a bit better the difference between the two arrangements, and I'm trying to also clarify it in relation to Mr Patchett's evidence about the six hours, but it seems to have been confirmed. Thank you.

PN516

MR MOHSENI: In that case, I've got no further questions for you, Mr Crosky.

PN517

MR PERRY: Just a few brief matters in reply.

*** BEN CROSKY

XXN MR MOHSENI

PN518

THE DEPUTY PRESIDENT: Sorry, I did have one other question, so perhaps I'll just ask this and then if Mr Mohseni has a follow-up, then I'll go back to him.

PN519

Just so I understand the differences between continuous and a fixed meal break, or a non-continuous, I think your evidence indicates that with a continuous roster, you can get more productivity, basically load more containers or unload more containers; is that correct?---Yes, sir.

PN520

I think there is also evidence that on a non-continuous roster, the costs can be high; is that correct?---The cost is actually higher per box on a continuous, sir.

PN521

On a continuous?---On a continuous, yes.

PN522

Sorry, my apologies. Cost per box is higher, but you can get more boxes, which, from a productivity viewpoint, makes that additional cost worthwhile?---It does at certain times, sir.

PN523

Why do you move between continuous and non-continuous? What's the driver for that?---The reason for using continuous is, for instance, if - I'll try not to be too confusing - but if you have a crane that is going to finish later than the rest of the cranes, so it has more boxes in a single point, so to try to bring that crane up to finish at a similar time to the others to meet a sail time, you might use continuous to get those extra 40 boxes in a shift that you wouldn't otherwise get.

PN524

Are there other ways of achieving productivity in process?---That would be the best one. That's the one which would give you the 40 boxes. You could put an extra straddle on it per se, but depending on what work it's doing, that might not make the difference. It's just that, to be honest, when they have a 45-minute break, the crane basically stops for an hour just because - - -

PN525

Does it follow that - I think in the evidence it comes out that there was a decline in activity through the port from about 2019; is that correct?---Yes, sir.

PN526

So does it follow that if there is a decline in activity, there's less need for continuous operations, or it's not that straightforward?---It's not that straightforward. It comes down to - basically, a lot of it has to do, as I said, with that one point of work might have more - just due to the vessel planning may have an inordinately large amount of containers that need to come off and go back on in that one point and you can only put one crane over it, so to get that crane to finish that point of work within that period of time, that extra hour each shift makes the difference.

*** BEN CROSKY

XXN MR MOHSENI

PN527

I think Mr Patchett gave evidence that there are other ways to increase productivity as well, which includes - I think questions were put to him about an extension, which was basically, I think, working a crane longer than a rostered shift if a crane is available?---Not particularly, sir. If there's work for an extension there, then you could just put a normal crane on there, if you know what I mean. You can still only fit that one crane there and potentially you may not have enough cranes to do an extension. So, if we're running five or six cranes - we've only got seven cranes at the terminal - you don't have equipment to man up a seventh crane, basically.

PN528

What about the planning of ship movements and the logistics of where containers are moved on and off, does that assist productivity?---It does, sir. So some vessels have very high productivity, just based off the size of the vessel, the loads, the stows, taking the same. So if you've got 44 foot containers and you take them off and you put them back on, same thing, then it assists productivity. We don't plan the vessels. That's the - the shipping lines do that, and that will be based off their - basically what they need to cover on their route.

PN529

But one important lead that you have in terms of productivity is whether you use continuous or not - versus non-continuous?---Yes, sir. It basically gives you that extra hour of work per shift on a crane.

PN530

Thank you. Sorry, Mr Mohseni, I am done now, if there's any follow up questions from you.

PN531

MR MOHSENI: No. Thank you. I think it's your evidence, isn't it, Mr Crosky, that running a continuous shift ups the box rate for the shift by 30, is that correct?---That's correct, Mr Mohseni.

PN532

Do you know off the top of your head how many boxes come off a ship in a non-continuous shift on average?---Approximately 190 on a non-continuous shift.

PN533

190?---On average.

PN534

So crunching numbers, eight-hour shift, so 190 divide by eight, that's about 23 boxes an hour, isn't it?---Correct.

*** BEN CROSKY

XXN MR MOHSENI

PN535

So if you get an extra 30 boxes off a shift if you run it continuously, and the box rate is on average about 23/24 an hour, you could get the same result as you would from a continuous shift by simply extending the shift by an hour and a half, if it was a non-continuous shift? The maths adds up, doesn't it?---Not really, no.

PN536

Why not?---The maths adds up, yes, correct, but placing an extension there, there may not be the equipment, or that crane might be being utilised by the next shift. It's not the same.

PN537

But you employ clerks, equipment controllers, planners and the like, don't you?---Correct.

PN538

And it's their job to predict this sort of thing, isn't it, if there's a ship that might need a bit more work on it, or might need its box rate up; they're usually aware of this in advance of the shift, aren't they?---The supervisor, yes, is aware.

PN539

So it's possible, isn't it, to plan for that possibility in advance of the shift without using continuous operations?---I don't understand your question.

PN540

Well, if you know in advance of the shift that you're going to need to get more boxes off, you've got a choice as between which method you use, is that correct, on extensions or - - -?---Not necessarily, no.

PN541

That's all my questions for you, Mr Crosky.

PN542

THE DEPUTY PRESIDENT: Mr Perry?

PN543

MR PERRY: Yes, if it please the Commission.

RE-EXAMINATION BY MR PERRY

[11.50 AM]

PN544

MR PERRY: Mr Crosky, in recent years have vessel arrival and departure times become more or less predictable?---Less predictable.

PN545

And by what sort of margin?---In the past around 30 per cent of vessels were off window, and now it's – the last 12 months has been between 80 and 90 per cent off window.

*** BEN CROSKY

RXN MR PERRY

PN546

What challenges does that present to you in terms of (indistinct) allocation?---It's just the basic planning of it. So the way the windows is set out is so we have an equal amount of box movements throughout the week as far as possible. When the vessels are off window you get something called bunching, which means that you'll have more work on certain days than other days, which means that you need to I guess boost productivity or increase on certain days, and then it drops off on

the next few days, rather than being a uniform. It's never perfectly uniform, but it's as close as we can get with our window schedule, and you don't have that anymore. So with the vessel bunching, it requires certain peaking factors to be built into how you work.

PN547

So when you have that vessel bunching, as you say, is that a period in which you would seek to potentially run continuous operations?---Yes. We try to sail the vessels. We have something called I guess performer schedule, so we have an agreement with the shipping line that we'll move a certain amount of containers in a certain amount of shifts, and that fits into our schedule. If they're bunching, there's other vessels waiting offshore to come in, so we often try to turn the vessels out sooner to clear the wharf to then bring more vessels in to keep it moving.

PN548

You were asked some questions about paragraph 42 of your statement and the new roster that you proposed?---Yes.

PN549

Why was it that you proposed that new roster?---I proposed that new roster so as to fit with the MUA and the ERC's direction that we run only one 45-minute break per person.

PN550

And the roster itself is attachment BC4 to your statement, is that - - -?---Yes.

PN551

Perhaps if I could just take you to that. I'm just conscious of the questions the Deputy President asked earlier just to assist in understanding. So that's at page 20 of your statement. If I can just ask you to just explain the different abbreviations. So, 'QCD' is a quay crane driver?---Correct.

PN552

'Pin' is a pin person?---Pin person.

PN553

'FM1' and 'FMS' is a foreman?---Yes, foreman.

PN554

'Strad' is straddle?---Correct.

PN555

And then if I can just ask you to look at the top of the document, the blue shaded periods with 'D', that stands for driving I take it - - -?---Yes.

PN556

- - - because they're talking about crane drivers, you're actually up in the crane operating it. The red shading with 'B' is break?---Yes.

*** BEN CROSKY

RXN MR PERRY

PN557

So that on this particular roster the two quay crane drivers will have a break, in the worst case starting two hours after they commence duty, is that right?---An hour and a half, so for quay crane two.

PN558

Yes, but the quay crane driver 1 works two hours double - - -?---He'll work two hours, yes.

PN559

So they have a break within the first two hours of their shift?---Yes.

PN560

What does 'P' stand for?---Pins.

PN561

And what's involved in pins?---So the pin people – so the vessels use a securing device twist lock, so any container that's placed above deck has twist locks or pins placed in it to secure it to the box below and above. So that's their role, is to put the pins in or take the pins out while they're doing that.

PN562

And is that work always necessarily needing to be done?---No. It's only for the containers placed above deck. Anything below deck generally doesn't require pins.

PN563

So in the periods that are marked 'P' in the roster, how often would the driver actually be operating pins?---It's obviously dependent on the load and discharge, but certainly not the full shift. Anytime, say, if you – it's not a set rule, but generally 50 per cent of the cargo is below deck and 50 per cent above deck, so whenever anything's going below deck or when the crane's moving or lids are being done, then they're not required at the pinning station.

PN564

If I could then just take you to the bottom of the document. That's the roster as it applies to the straddle driver, is that right?---Yes.

PN565

And the text shaded yellow with the 'M', what does the M stand for?---That's multiskill that can be utilised for the break instead of the red Bs, so either either can be the break in that.

PN566

And so then for the straddle drivers, the longest any of them have to drive the straddle before they have a break is three hours? Am I reading that right?---Yes. The maximum any straddle driver drives is three hours.

PN567

There's nothing further, Deputy President. Might Mr Crosky be excused?

*** BEN CROSKY

RXN MR PERRY

PN568

THE DEPUTY PRESIDENT: Thank you. Mr Crosky, you're free to go?---Thank you, sir.

<THE WITNESS WITHDREW

[11.57 AM]

PN569

MR PERRY: I now propose to call Sean Jeffries. He's our witness who will be giving his evidence through remote technology.

PN570

THE DEPUTY PRESIDENT: Yes.

PN571

MR PERRY: So we might just have him join the link.

PN572

THE DEPUTY PRESIDENT: I wonder if we might adjourn for five minutes while we try and get Mr Jeffries on the line.

PN573

MR PERRY: Yes.

PN574

THE DEPUTY PRESIDENT: Sometimes these things can take a little bit longer. Thank you.

SHORT ADJOURNMENT

[11.59 AM]

RESUMED

[12.09 PM]

PN575

THE DEPUTY PRESIDENT: Can you please affirm Mr Jeffries.

<SEAN BRUCE JEFFRIES, AFFIRMED

[12.11 PM]

EXAMINATION-IN-CHIEF BY MR PERRY

[12.11 PM]

PN576

MR PERRY: Mr Jeffries, what is your position of employment?---Currently the general manager of operations for DP Fremantle terminal.

PN577

Now, for the purpose of these proceedings, Mr Jeffries, have you had a statement prepared?---I do. I have.

PN578

And is it dated 10 February 2023 and have sworn 600 paragraphs?---(Indistinct) it is. It is.

*** SEAN BRUCE JEFFRIES

XN MR PERRY

PN579

Are there any corrections you would like to make to that statement?---Yes. I did want to change – adjust paragraph 9, line 4. It talks about mid-2020. That should read mid – sorry. It reads mid-2020. That should read mid-2019.

PN580

Thank you. And with that correction, are the contents of your statement true and correct to the best of your knowledge and belief?---Yes, it is.

PN581

I tender the statement.

EXHIBIT #R3 MR JEFFRIES' WITNESS STATEMENT

PN582

If it please the Commission.

PN583

THE DEPUTY PRESIDENT: Mr Mohseni.

CROSS-EXAMINATION BY MR MOHSENI

[12.13 PM]

PN584

MR McQUILLAN: (Indistinct) Mr Jeffries. I've just got a few questions (indistinct).

PN585

THE DEPUTY PRESIDENT: Sorry. Just before – can you hear okay, Mr Jeffries?---Pedram's a little bit quiet. I'm just struggling a little bit. If he would speak up a little bit, please.

PN586

Yes. Mr Pedram – Mr Mohseni distinguishes himself (indistinct) Mr Mohseni is pleasingly quietly spoken.

PN587

MR MOHSENI: I won't take it personally, Deputy President. Mr Jeffries, if you can't hear me, just tell me to speak up (indistinct). Can I please take you to paragraph 14 of your statement, and you say that continuous (indistinct) was not a key issue and not a subject of significant discussion during negotiations. So, it's Mr Patchett's evidence that (indistinct) for the 2020 agreement commenced in 2018 which was some months prior to the nominal expiry date of the 2016 agreement. Is that correct?---The negotiations did start 2018. Yes, that's right.

PN588

And it's your evidence, isn't it, that you were in negotiations for part B of the agreement which - - -?---That's right.

PN589

- - - contains rates clauses from April 2019 to January 2021?---Yes.

*** SEAN BRUCE JEFFRIES

XXN MR MOHSENI

PN590

So, that's over a year and a half?---Yes.

PN591

And it's also your evidence at paragraph 8 of your statement that 95 per cent of the shifts were run continuously when you started with the terminal lounge, was it (indistinct)?---What paragraph, you say? What paragraph did you say?

PN592

Paragraph 8, 'At the time of joining DP World Melbourne, approximately 95 per cent of all shifts were running continuously which I believe had been the case since the early 90s'?---That's right.

PN593

And then you largely ceased that practice in around mid-2019, you say, July 2019?---That's right.

PN594

Adjusted your evidence. That's quite some time after negotiations for the 2020 agreement commenced, isn't it?---Yes.

PN595

So, that might explain why topic might not appear in our logged claims at the outset, wouldn't it?---Well, it was never – it wasn't on the log of claims from the commencement of the agreement that I became involved in those negotiations.

PN596

But it's a simple yes or no question. If negotiations started before continuous operations ceased, then that would explain why it didn't come up at the outset, at least, yes?---It didn't come up after the – that date either.

PN597

Well, we're getting to that, Mr Jeffries. You would have attended countless bargaining meetings over – just for part B, for example, you would have attended countless bargaining meetings in the year and a half you were bargaining, yes?---Yes.

PN598

Do you remember how many people were on DP World's negotiating team?---Sorry. Can you repeat that, please?

PN599

Do you remember how many people were on DP World's negotiating team, roughly?---Are you talking part A or part B?

PN600

Part B?---Part B.

PN601

Yes?---Involved maybe four people.

*** SEAN BRUCE JEFFRIES

XXN MR MOHSENI

PN602

And (indistinct) union side on?---The employee representative committee and normally Mr Patchett and Mr Stevens which would account for 12 to 14 people.

PN603

All right. Now, you've attached some minutes to the – one of those bargaining meetings to your statement, and that was at an ERC meeting. Is that correct?---I think that was a part B meeting.

PN604

(Indistinct) page 7 of the compilation of your statement, and it's titled 'DP World Melbourne Employee Representative Committee Meeting Minutes'?---Okay.

PN605

So, sometimes negotiations took place at ERC meetings and sometimes at dedicated bargaining meetings, correct?---On the basis that the – you know, a lot of that – those minutes talk about claims that are being made. I would suggest that it's predominantly an ERC – sorry, a part B meeting.

PN606

Okay. But it was – maybe that was (indistinct) but it was constituted, wasn't it, as a regular ERC meeting (indistinct) bargaining department (indistinct)?---No. I would say that it wouldn't have been. That's not what the heading of the minute says, says it's ERC, but the content of the minutes would refer it to an – as an ERC – sorry, as a part B meeting.

PN607

Did you prepare these minutes, Mr Jeffries?---Put what in minutes?

PN608

These minutes that you've attached to your statement, did you prepare them?---Did I put what in?

PN609

I said did – were you the one to write the minutes? Did you write them?---No.

PN610

Do you remember who did?---Claire Cutajar, I think it would have been.

PN611

Okay. And Ms Cutajar isn't participating (indistinct)?---Sorry. Can you say that -
- -

PN612

(Indistinct)?---Sorry. Can you repeat that again, Mr - - -

PN613

Ms Cutajar isn't giving evidence in this proceeding, is she?---No, not that I'm aware of.

*** SEAN BRUCE JEFFRIES

XXN MR MOHSENI

PN614

Did she take all the minutes for - - -?---Yes.

PN615

Bargaining minutes?---Of every meeting or this meeting?

PN616

Every meeting?---No, not of every meeting.

PN617

Okay. So, just going a bit back further up in your statement, Mr Jeffries, to paragraph 10 where you say that you recall the decisions were reduced to continuous operations as a matter of some discontent from employees and that there was some debate about this. You'd agree, wouldn't you, that the two considerations which made the continuous operations are staffing numbers and the configuration with the employee's breaks. Is that correct?---The configuration of -
- -

PN618

The employee's breaks, the manner in which they take their breaks. You need more staff, and you need staggered breaks to be able (indistinct words)?---Yes, to operate continuous. Yes, that's right.

PN619

Okay. And in the minutes we've provided, you point out that there was discussion of one of those considerations, and that's crane gains manager. Is that correct?---Yes.

PN620

That seems to be the only mention of crane gains in those minutes. Is that correct?---In those minutes, yes.

PN621

And if I could take you to the second annexure to your statement, so, straight to page 19?---Yes.

PN622

That table, item 7, reports in the sort of request by the union that the two rest periods clauses (indistinct) straddle pool ops causes (indistinct). Is that correct?---Yes.

PN623

That request doesn't refer to anywhere in the minutes you've attached?---No.

PN624

So, it must have come up in another minute?---Possibly, yes, the rest periods, yes.

PN625

So, when you say it wasn't subject to a significant discussion - - -?---Continuous operations wasn't?

PN626

Yes. Is that something you'd like to qualify on that? It did come up, didn't it?---(Indistinct) say it wasn't significant. Earlier on, I said it didn't refer to continuous operations.

PN627

But the topic did come up more than once?---I'm sure it did, but it wasn't part of significant negotiations in the course of an enterprise agreement because quite frankly, it was a long-established process that had been in place for a number of years and was still used.

PN628

You're currently the officer manager at (indistinct) manager at DP World Fremantle; is that correct?---General manager of operations, yes.

PN629

So, you're aware, aren't you, that by the current Fremantle agreement (indistinct) replaced the 2015 agreement, I believe it is, are both fairly restrictive when it comes to continuous operations, aren't they?---The 2020 agreement is more prescriptive than the 2015 agreement in Fremantle.

PN630

The 2015 at least enabled it – expressly enabled it and then the - - -?---No. It's – the 2015 agreement enabled – it's subject to the agreement with the ERC.

PN631

Okay. And then the 2020 agreement sets out prescribed wait times and says that they can only be altered to enable continuous operations?

PN632

MR PERRY: Objection. I object, Deputy President. I can't see the relevance of – I can't see the relevance of what an agreement in Fremantle says about the matters at the port - - -

PN633

THE DEPUTY PRESIDENT: I think the point will be made that if the parties intended to facilitate that, then they could have done so by reference to the agreement in Fremantle. I understand that to be the submission. I'll allow the question.

*** SEAN BRUCE JEFFRIES

XXN MR MOHSENI

PN634

MR MOHSENI: Thank you, Deputy President. And the 2020 agreement in Fremantle requires a continuity roster to be provided to the ERC, and that roster's quite prescriptive - again, that's the manning levels and break periods - so as to enable continuous operations, is that correct?---Actually the current arrangement is that (indistinct) is the intent. The application of that is less than operationally sustainable, because it places so many restrictions on the operation, and the current manning in that Fremantle arrangement requires, you know, in round figures about 38 people to actually man up the continuity roster. I can man three crane gangs with a (indistinct) of 38 people over here, so the benefits of continuity

in that arrangement aren't all that beneficial, and they don't serve the needs of the business, and have been the result of - - -

PN635

All right. Thank you?--- - - - (indistinct) negotiations.

PN636

THE DEPUTY PRESIDENT: Mr Jeffries, if I could ask you to confine your answer to the question. If your representative wants to ask a question to bring additional information out, they can do so in re-examination. Thank you?---Certainly.

PN637

MR MOHSENI: So the question of manning came up in Fremantle Part B as well, didn't it?---I don't know. I wasn't involved in the Fremantle Part B.

PN638

Sorry. No, you're right. I withdraw that. It's plausible, isn't it, that if reconfiguring the clause came up during the Part B Melbourne negotiations, so adjusting the manning numbers came up in Part B Melbourne negotiations, then it's plausible, isn't it, that the reason an express clause like the one in Fremantle didn't make it into the Melbourne agreement is because you couldn't reach agreement on breaks or on manning numbers?---Absolutely not. The Part B's in each port and negotiated as separate instruments. Each terminal has their own log of claims.

PN639

Yes. So are you saying that to run a crane continuously in Fremantle, there are different considerations? It doesn't have anything to do with breaks – break patterns or manning numbers, or staffing numbers, sorry?

PN640

THE DEPUTY PRESIDENT: Mr Mohseni, I know where you're going with this, but I'm not sure it aids me. I mean it seems to me the whole point of having Part B is to allow the parties to deal with issues at their local level. I mean, if that were not the case why wouldn't there be one consistent agreement with all the terms and conditions identical?

PN641

MR MOHSENI: I mean, I would say that the overarching considerations are the same, but the local input's - - -

PN642

THE DEPUTY PRESIDENT: That may be so, and you know, perhaps you'll take my attention to the statement intention of the agreement in your closing submissions. It seems to make clear what the parties intend by these documents. But I'm just struggling to see why what happened in Fremantle is relevant to Melbourne, which might have a very different history to arrangements in those ports.

*** SEAN BRUCE JEFFRIES

XXN MR MOHSENI

PN643

MR MOHSENI: It just goes to a submission that they were able to reach agreement on those considerations.

PN644

THE DEPUTY PRESIDENT: Maybe they didn't need to in Melbourne, I don't know. Each of the ports have different histories in terms of the industrial arrangements. These are the Part B, going back sometime I believe. I'm just not – even if the concession's made, how does that help me construe Part B of the agreement?

PN645

MR MOHSENI: It would ultimately go to whether the decision to know if the clauses were deliberate.

PN646

THE DEPUTY PRESIDENT: What would help me more is documents that record the log of claims that was raised in Melbourne, and documents that supported the contention about the issue having been raised. That would help me more.

PN647

MR MOHSENI: I sought those documents and I couldn't get my hands on them, so the best I can do is - - -

PN648

THE DEPUTY PRESIDENT: It could be they don't exist.

PN649

MR MOHSENI: It could be.

PN650

THE DEPUTY PRESIDENT: Yes.

PN651

MR MOHSENI: But the best I can do is cross-examine Mr Jeffries on the documents he's provided.

PN652

THE DEPUTY PRESIDENT: I understand that, and you can continue doing that, but I'm just telling you I'm not sure how this is going to assist me, that's all.

PN653

MR MOHSENI: Okay. Well, I'll just put the latter half of the question one last time. It came up in negotiations, staffing numbers at least, yes?---Staffing numbers?

*** SEAN BRUCE JEFFRIES

XXN MR MOHSENI

PN654

Yes, for crane manners?---Crane manning staffing numbers came up too at the same time we were retrenching (indistinct) of people, so staffing numbers absolutely came up.

PN655

Sorry, when I say 'staffing numbers', I'm just trying to use a gender neutral tone. We'll say crane gang manning, if you prefer that. I'm putting to you that the reason it didn't get into the agreement is because you couldn't reach agreement on what a continuous crane crew should look like?---Absolutely not.

PN656

Can I take you to the copy of the draft EA which you've attached to your statement? Yes, we're still on SJ2. If we go to – so the rest periods clause in this draft starts at page 27, and there's some mark up to it, but the clause doesn't actually substantially change from 2016 to 2020, does it?---No.

PN657

Then subclause (e) at 1.9.2 is highlighted and you've left a comment in the margin, haven't you? I'm assuming you're SJ, Sean Jeffries. So the comments have been left from your computer, and the comment in the margin says, 'DP World Melbourne agreed change not substantial'?---It has very little wording the numbering.

PN658

Has the wording changed?---The wording has changed from the previous agreement.

PN659

I'll just take a look. In the 2016 agreement it says, 'Each employee shall take rest periods at times to suit operational and maintenance requirements', and the draft you've provided says, 'Each employee shall take rest periods at times to suit operational and maintenance requirements'?---There's two sentences to the 2015 agreement, aren't there?

PN660

And then we're going to the second one: 'Changes to rest periods may be advised up to one hour after the commencement of shift'?---That's in the current agreement.

PN661

So you're saying that your margin comment only refers to the words, 'up to', and nothing else?---Change in word in this?

PN662

It says, 'Change not substantial.' Is that your evidence, Mr Jeffries, that all you were referring to was those two words?---(Indistinct reply)

*** SEAN BRUCE JEFFRIES

XXN MR MOHSENI

PN663

That's not what your margin comment says. It says, 'Change not substantial.' You are referring to the wording?---No. No, I agree that's not what the wording says,

but the 'Change' - not substantial change was in reference to the change in the working (indistinct).

PN664

Mr Jeffries, does anyone from your side go through the agreement with a fine-tooth comb before it gets sent to the Commission for approval?---I would believe that people would it.

PN665

I mean you employ a number of lawyers, don't you, famous for attention to detail?---I don't - I don't actually employ them.

PN666

Your company does?---Yes, that's right.

PN667

Retain external lawyers as well?---We do.

PN668

And they're often involved in the making of an enterprise agreement?---(Indistinct reply)

PN669

Sorry, you just cut off there, Mr Jeffries, can you repeat your answer?---They are, but whether or not they read the final drafts of agreements I couldn't tell you.

PN670

I mean you'd hope they would, because it's an instrument that costs your company millions of dollars and severely curtails your work practices compared to what you could do on an award. Are you saying that the document isn't rigorously checked before it goes to the Commission and imposes binding obligations on you?---Say that again, sorry?

PN671

Are you saying it's not put through a rigorous checking process before it goes off to the Commission and imposes binding obligations on you?

PN672

MR PERRY: I object, Deputy President. I think he's answered that question.

PN673

THE DEPUTY PRESIDENT: No. He was asked the question, that's fine.

PN674

THE WITNESS: No. I mean what checking goes beyond where it leaves the terminal I couldn't tell you.

*** SEAN BRUCE JEFFRIES

XXN MR MOHSENI

PN675

MR MOHSENI: Okay. So it's possible, isn't it, Mr Jeffries, that it's not necessarily a typo, but what seemed to be a minor change, the consequences of

which weren't anticipated; it could have been a mistake of sorts, but not necessarily a typographical one?

PN676

MR PERRY: I think in fairness to the witness my learned friend should identify what the mistake he's referring to is.

PN677

MR MOHSENI: The mistake that you've identified at 19 of your statement?---No, not on the basis that I've - you know, we've agreed in multiple cases that we don't agree with the other changes to this clause, the merging of the clause, you know, the intent of this and it was to be a separate clause. You know, it's a continuation of the current agreement, or the previous agreement I should say.

PN678

But you didn't agree to the straddle ops clause and the vessel ops clause being merged?---Any of the clauses.

PN679

Let's go back to the start of this annexure

PN680

DP World Melbourne requires that the clauses remain separated to differentiate between the two operations.

PN681

You're referring that the two operations remain instinct. That was your rationale in keeping them separate; yes?---Yes.

PN682

And there was debate about manning for crane gangs that wasn't resolved; yes?---There was a debate in relation to the crane gangs and as per the minutes it talks about two pin men to be allocated when working continuous, or work through I think the wording is in the minutes.

PN683

So it's possible, isn't it, that the ERC anticipated the risk, for example staggered breaks causing people to work for too long without a shift and not wanting a bar of it. That's possible, isn't it?---Could you repeat that, please.

PN684

It's possible, isn't it, that the ERC anticipated that staggering shifts, given the changed circumstances, the terminal used continuous ops for years and years without interruption, and then in the lead up to the negotiation of this agreement things changed, didn't they; volume went down and the pandemic hit the country, or the world rather, and so these considerations changed. They wanted assurances on manning, which they don't seem to have gotten.

*** SEAN BRUCE JEFFRIES

XXN MR MOHSENI

PN685

MR PERRY: I'm not sure what the question is being asked.

PN686

MR MOHSENI: So the question then was that the ERC might have anticipated that you'd need to go for too long without a break if you stagger the breaks, and that would be a reason for subsuming subclause (e) into the straddle pool clause, so it wouldn't effect the vessel operations?---I'm not sure how that would be the case, because, you know, up until that time and after that time we continued operating continuous in the same form that we had done for many years. Equally it wasn't - as I've said it wasn't a significant point of negotiation throughout the EA period that I was involved.

PN687

It's Mr Crosky's evidence that from 2019 onwards continuous operations have only been utilised on an as needs basis which equates to approximately 5 per cent of the time. So it's hardly a huge issue?---Hardly a huge issue. Exactly. And that would be right. It did continue to be operated. Yes.

PN688

And that might explain why it's been relegated to a footnote of the minutes?---Sorry?

PN689

That might explain why it was relegated to a footnote in the minutes or the discussion at large might explain why the union didn't (indistinct) about it until later on in the life of the agreement?---Possibly.

PN690

Thank you, Mr Jeffries. That's all my questions for you.

PN691

THE DEPUTY PRESIDENT: Thank you, Mr Perry.

RE-EXAMINATION BY MR PERRY

[12.41 PM]

PN692

MR PERRY: Just a few things arising. It was put to you that the union made a claim to the effect that the company not be able to run continuous operations, and I think in answering those questions the Deputy President made comment about whether documents may exist that may or may not demonstrate that claim. Just in that context I take it that in preparing your statement you reviewed the records that the company had about the negotiation of the agreement?---I have. I did.

PN693

And in reviewing those records did you identify any document that was supportive of the union having made that claim?---Not at all.

PN694

So to the best of your knowledge no such document exists?---No.

*** SEAN BRUCE JEFFRIES

RXN MR PERRY

PN695

Now, can I ask you, Mr Jeffries, the company has terminals in Brisbane and Sydney. Does the company have a practice of running continuous operations at either or both of those terminals?---Yes, we do.

PN696

And do the Part Bs of the enterprise agreements for those terminals have any provisions like the Fremantle Part B?---I believe that is covered in those Part Bs, they're Part Bs.

PN697

But they're different to the Fremantle one?---Yes. Yes.

PN698

And different to the Melbourne Part B?---Yes.

PN699

So they're each specific to the relevant terminal?---That's right.

PN700

There was nothing further, Deputy President. Might Mr Jeffries be excused?

PN701

THE DEPUTY PRESIDENT: Yes, thank you. Mr Jeffries, you're released from giving evidence. Thanks for making yourself available today. You can now disconnect?---My pleasure. Thank you.

PN702

Thank you.

<THE WITNESS WITHDREW

[12.44 PM]

PN703

THE DEPUTY PRESIDENT: Sorry, we have not quite finished your evidentiary case. Thank you.

PN704

MR PERRY: Yes, subject to one matter. There was a call made by the Commission for the explanatory document provided to employees in relation to this agreement, and a soft copy of that document has been provided to your associate, and if I could just draw - - -

PN705

THE DEPUTY PRESIDENT: No, I have already looked at it. I have seen the document. It's been provided to me in hard copy. Are you going to draw my attention to 1.9?

PN706

MR PERRY: In page 11.

*** SEAN BRUCE JEFFRIES

RXN MR PERRY

PN707

THE DEPUTY PRESIDENT: Yes.

PN708

MR PERRY: That seems to be the only relevant reference. I tender that document.

EXHIBIT #4 EXPLANATORY DOCUMENT PROVIDED TO EMPLOYEES

PN709

And that's the evidentiary case for the respondent if it please the Commission.

PN710

THE DEPUTY PRESIDENT: Thank you. All right. It's quarter to 1. I will just check with the parties how long they might need for closing submissions. Mr Mohseni?

PN711

MR MOHSENI: Not long, maybe five minutes, 10 minutes tops.

PN712

THE DEPUTY PRESIDENT: Mr Perry?

PN713

MR PERRY: I regrettably might be a little longer than that, maybe half an hour or so.

PN714

THE DEPUTY PRESIDENT: All right. I am going to break then. I will come back at 1.30 and I will hear oral submissions at that point. Thank you.

LUNCHEON ADJOURNMENT [12.45 PM]

RESUMED [1.34 PM]

PN715

MR MOHSENI: Deputy President, there are a couple of matters you raised with Mr Patchett which I will address throughout the course of my closing, and just a couple of comments I want to make about the document that the respondent has kindly provided - - -

PN716

THE DEPUTY PRESIDENT: Yes.

PN717

MR MOHSENI: - - - in the past hour or so. And our submission on that is quite simple. It's quite a scant document. It's only a small part of the presentation process. Employees would have been asking questions; it would have been expanded on, and so forth. So it's our submission that it shouldn't be given much weight in your Honour's determination of question whether clause 1.9.2(e) is indeed a typographical error.

PN718

And actually, I might also say at the outset that we - and this might make your job a lot easier, but we concede that if that clause - if the Commission finds that that clause is meant to stand alone, and interprets the agreement as such, then our case falls apart, which might go some way to addressing questions put to Mr Patchett about the meaning of the words 'operational' and 'maintenance' in that subclause. Otherwise - - -

PN719

THE DEPUTY PRESIDENT: So - - -

PN720

MR MOHSENI: Sorry.

PN721

THE DEPUTY PRESIDENT: - - - can you repeat that?

PN722

MR MOHSENI: So we - - -

PN723

THE DEPUTY PRESIDENT: So the - yes, go on.

PN724

MR MOHSENI: We concede that if the agreement is to be read as though that subclause stands alone - - -

PN725

THE DEPUTY PRESIDENT: Yes.

PN726

MR MOHSENI: - - - then our case goes nowhere, because it's a clear enabling provision - - -

PN727

THE DEPUTY PRESIDENT: Yes.

PN728

MR MOHSENI: - - - of - - -

PN729

THE DEPUTY PRESIDENT: So, really, the focus is on whether the clause does or doesn't stand alone.

PN730

MR MOHSENI: Yes. And that addresses the questions put to Mr Patchett about the meaning of certain words in that clause, 'operational' and - - -

PN731

THE DEPUTY PRESIDENT: Yes, I see.

PN732

MR MOHSENI: Otherwise, having gotten that out of the way, the respondent's case traverses a lot of material about things like our motives for pursuing this interpretation of the agreement.

PN733

THE DEPUTY PRESIDENT: Much of the evidence, if I can say, while interesting background - - -

PN734

MR MOHSENI: Is largely irrelevant to the constructional task before - - -

PN735

THE DEPUTY PRESIDENT: And that's often the case - - -

PN736

MR MOHSENI: Yes.

PN737

THE DEPUTY PRESIDENT: - - - in matters going to construction of clauses, unless the evidence does bear upon - - -

PN738

MR MOHSENI: Yes.

PN739

THE DEPUTY PRESIDENT: - - - the objective intent of the parties. Yes.

PN740

MR MOHSENI: So I don't propose to address any of it. And for us, the respondent's case is a simple appeal to managerial prerogative: so the concept that essentially allows an employer to run their business as they please, unless there's a statute or an industrial instrument which expressly restrains them from doing so. And it's our case that there is such an instrument which so restrains them, and that's the Stevedoring Award. But, obviously, there's the preliminary question of whether clause 15 - - -

PN741

THE DEPUTY PRESIDENT: I should have - sorry; I don't want to - - -

PN742

MR MOHSENI: No, of course.

PN743

THE DEPUTY PRESIDENT: - - - throw you off your - - -

PN744

MR MOHSENI: Of course.

PN745

THE DEPUTY PRESIDENT: - - - track - because I did want to just test with the parties, before they start the submissions - my apologies - whether I correctly - can correctly describe what I believe to be the questions that I'm being asked to

answer. All right? So I understand there to be two questions: firstly, does the agreement permit the respondent to operate its cranes continuously, by staggering its employees breaks, in the absence of agreement of the CFMMEU? Is that the - that's the first question.

PN746

MR MOHSENI: Yes.

PN747

THE DEPUTY PRESIDENT: The second question, as I understand it - and, Mr Perry, if you're not quick enough to write this down, I think I will be able to recall it; I've written it down. The second question is, does the agreement require the respondent to provide all employees in a crane gang a 45-minute - a single 45-minute break together, at the - sorry - at the same time, unless otherwise agreed by the CFMMEU?

PN748

MR MOHSENI: Yes.

PN749

THE DEPUTY PRESIDENT: Does that accurately capture the questions to be answered from your perspective, Mr Mohseni?

PN750

MR MOHSENI: From our part, yes, your Honour.

PN751

THE DEPUTY PRESIDENT: Yes. Mr Perry? That was certainly as I understood the applicant's material as it was initially - - -

PN752

MR PERRY: Yes, they - they would appear to be the questions - - -

PN753

THE DEPUTY PRESIDENT: Yes, all right.

PN754

MR PERRY: - - - that arise for determination.

PN755

THE DEPUTY PRESIDENT: I realised, in hindsight, that I missed out an important step in this process when I was advised by Mr Mohseni that things hadn't resolved. Ordinarily, I would say, 'Right. Tell me what the question is.' And when I went back and looked at the material filed, I realised I had failed to do that. But I think the case was well captured in the applicant's material as filed, which the respondent was able to respond to.

PN756

MR PERRY: Yes, we don't feel under any disadvantage in - - -

PN757

THE DEPUTY PRESIDENT: All right. Thank you.

PN758

MR PERRY: - - - dealing with the matter, and just while I'm on my feet, if the two questions are answered adversely to my client, then there's an additional consideration as to whether this is an appropriate case in which the Commission would exercise its power under section 218A to correct an error in the agreement.

PN759

THE DEPUTY PRESIDENT: Well, I do - I have considered that in the lead-up to these proceedings. But I think, if an application were made to vary the agreement - and whether it was on the Commission's initiative or on the initiative of the parties - I think the parties would also need to be given an opportunity to make submissions and file evidence in support of or in opposition to such an application.

PN760

MR PERRY: Yes, just so our position on my side is clear on that, we would simply rely upon the material that is before the Commission in this matter in support of any such application. Well, I mean, our primary position, of course, is that an order under 218A is not necessary, because the agreement - - -

PN761

THE DEPUTY PRESIDENT: No, I understand that.

PN762

MR PERRY: - - - should be construed in a particular way, but I just foreshadow - - -

PN763

THE DEPUTY PRESIDENT: Thank you.

PN764

MR PERRY: - - - that potential third question.

PN765

THE DEPUTY PRESIDENT: All right. Sorry, Mr Mohseni.

PN766

MR MOHSENI: Not at all, your Honour. So the first question is whether clause 15 of the award applies. And the respondent argues, it doesn't, because it's inconsistent with the agreement. And they rightly submit that the enterprise agreement prevails to the extent of any inconsistency with the award. But we say that they are wrong about whether there is an inconsistency. And so their case relies on the premise that subclause (e), as I will refer to it, is beset by a typographical error, and they invite the Commission to read the agreement as though subclause (e) is a standalone clause of general application.

PN767

THE DEPUTY PRESIDENT: So, just so I understand your argument on - - -

PN768

MR MOHSENI: Yes.

PN769

THE DEPUTY PRESIDENT: - - - (indistinct) I understand the submission of the applicant to be that subclause (e) forms part of 1.9.2 - - -

PN770

MR MOHSENI: Yes.

PN771

THE DEPUTY PRESIDENT: - - - and narrowly applies.

PN772

MR MOHSENI: Yes.

PN773

THE DEPUTY PRESIDENT: And as a consequence, 1.9.1 is stripped of the operation of that provision that existed in previous agreements. There is therefore no - there is therefore nothing in the agreement that goes to the timing, the manner in which meal breaks are taken, and therefore, on your submission, one must then refer to the award - - -

PN774

MR MOHSENI: That's correct.

PN775

THE DEPUTY PRESIDENT: - - - which deals with meal breaks being agreed. And I know that the respondent has another submission - - -

PN776

MR MOHSENI: Yes.

PN777

THE DEPUTY PRESIDENT: - - - to make about that, but is that the sort of - the general thrust of the - - -

PN778

MR MOHSENI: That's exactly our argument, Deputy President.

PN779

THE DEPUTY PRESIDENT: All right. Have I saved you the effort, or do you need to - - -

PN780

MR MOHSENI: Well, I would just like to substantiate why we say it should stand alone - - -

PN781

THE DEPUTY PRESIDENT: I'm not interested in - - -

PN782

MR MOHSENI: - - - on first instance.

PN783

THE DEPUTY PRESIDENT: - - - getting you off your feet. I might be with - - -

PN784

MR MOHSENI: I wouldn't - - -

PN785

THE DEPUTY PRESIDENT: - - - Mr Perry, but - - -

PN786

MR MOHSENI: So we submit that it's not open to the Commission to read it as a standalone clause, for three reasons. The first is that we just don't think there's sufficient evidence to suggest that it was a typo. The second is that, we say, the clause as apparently drafted doesn't reveal sufficient illogicality or ambiguity to warrant a rereading. And the third point might be, to some extent, vitiated by what Mr Perry has just flagged about section 208A of the Act, but our submission would have been that it's not legally open to the Commission to rewrite the agreement just through an interpretative process.

PN787

So, looking at each of those in turn, a very brief summary of the evidence, we would say, is that, in the first instance, Mr Jeffries says that he can't really remember the topic of continuity of operations coming up in negotiations. And they were negotiations that started in September 2018, at least for part A. The agreements were approved by the Commission in March 21. That's a period of around two and a half years. So, over that length of bargaining, of course, Mr Jeffries can't remember every detail. We think that that takes the respondent's case nowhere.

PN788

And all three of the respondent's witnesses speak of a long history of continuous operations at West Swanson Terminal. We don't deny that to be the case, but we emphasise that circumstances change, and clearly they changed when the respondent chose to cease using continuous operations. And it's common knowledge why that was. The respondent put in evidence that there was a downturn in volume. We were all, obviously, affected by the mayhem of the pandemic, and so on and so forth. And we say that the - those circumstances, and then the ensuing backlash, created the conditions for an amendment to the clause, which may have otherwise enabled continuous operations. And if Your Honour accepts that, then we would think that that would render that long history irrelevant to the Commission's constructional task.

PN789

And then you've got Mr Jeffries providing some documents which show the clause actually was the subject of some discussion. And the evidence, we say, suggests that the employees sought some certainty as to the configuration of continuous operations, much like what we saw in the Fremantle agreements, and indeed, as Mr Jeffries said under re-examination, in the Sydney agreement and the Brisbane agreement. So, in this respect, the Melbourne agreement is unique.

PN790

And so it would make sense that when no such certainty was forthcoming in negotiations, the employees might have sought to remove the respondent's ability to use continuous operations, because the agreement gives crane gangs one break and the straddle pool two breaks, and this would mean that staggering crane gang breaks could, if configured incorrectly - we're not saying it's necessarily the case, but it could lead to unsafe outcomes: for example, certain employees working for four or five or six hours - however long - without a break.

PN791

So this kind of feeds into the next point, that the clause isn't necessarily ambiguous or illogical the way it's currently drafted. So not only is there a clear rationale for subsuming the clause, at least from the employees' perspective; we say, it also makes grammatical and linguistic sense.

PN792

So your Honour took Mr Patchett to the definitions clause in the agreement, and questioned Mr Patchett on whether the words 'each employee' were to be used consistently with the Definitions clause or if it was an aberration. We say there are other examples throughout the EA where a reference to 'employees' at large, including using the words 'each employee' clearly doesn't refer to employees at large. For example, in part A clause 16.8 - - -

PN793

THE DEPUTY PRESIDENT: Hang on. 16.8? Yes.

PN794

MR MOHSENI: In that clause, 'each employee' clearly doesn't apply to casuals and supplementary employees who aren't entitled - - -

PN795

THE DEPUTY PRESIDENT: You see, that word is not capitalised.

PN796

MR MOHSENI: Okay.

PN797

THE DEPUTY PRESIDENT: And that was the issue I drew to Mr Patchett's attention, that 'Employee' was capitalised in the definition. That was the particular issue I was interested in.

PN798

MR MOHSENI: I will accept that clause doesn't prove our point, but there's at least one other example.

PN799

THE DEPUTY PRESIDENT: I guess the other point I was raising with Mr Patchett was that clause 1.9.2, where it referred to 'Employees' covered by that clause, it also seemed to use a description that they were part of the straddle crew, whereas (e) was drafted differently. You might recall I took Mr Patchett to subclause (a) and subclause (d).

PN800

MR MOHSENI: Yes. That is something I was going to address separately just on the question of whether (e) would then be otiose, but just one more example, in Part B, 1.5.4, here 'Employee' is capitalised under a heading that clearly only applies to the general maintenance roster. So, 1.5 on page 63 of the agreement:

PN801

Each Employee will be responsible for confirming when they are required to work, including all dayshifts falling in week 9.

PN802

Of course, there are submissions you could make about the decision of the High Court in Amcor, specifically Kirby J's judgment, which talks about these instruments not being drafted by lawyers, but we think that would support the case that, even though it's a defined word, it might not necessarily be used as such throughout the agreement because these mistakes happen.

PN803

As for whether subclause (e) becomes otiose if read as part of 1.9.2, the only submission I can make is (d) and (e) are similar. That's undeniable. But, 1(d) speaks of an intention whereas (e) is much more resolute and, again to rely on the Amcor submission, it could just be a clumsy way of stripping 1.9.1 of the effect of (e). It's not uncommon in instruments of this sort for clauses to be rewritten or moved around without regard for, you know, potential consequences or inconsistencies that might arise from that. That's the only submission I can make in that respect.

PN804

Finally, I guess what you might call the legal considerations, which I accept might be vitiated by an application by the respondent to vary the agreement, but, at least until today, none of the respondent's written submissions at least made any reference to anything like the slip rule or the possibility of applying to vary the agreement or, to the extent it was relevant, an application under section 602 of the Act to correct an obvious error, although we reject that there's an obvious error, or any error at all.

PN805

THE DEPUTY PRESIDENT: I don't think 602 can be used (indistinct) the agreement.

PN806

MR MOHSENI: The next thing I was going to say was to refer to one of your Honour's decisions, namely, Advantaged Care.

PN807

THE DEPUTY PRESIDENT: Yes.

PN808

MR MOHSENI: Which has subsequently - - -

PN809

THE DEPUTY PRESIDENT: Which I was appealed.

PN810

MR MOHSENI: Appealed and upheld.

PN811

THE DEPUTY PRESIDENT: Surprisingly.

PN812

MR MOHSENI: Yes.

PN813

THE DEPUTY PRESIDENT: No surprise to me anyway, given the Bench that upheld it, but, anyway, that's another matter.

PN814

MR MOHSENI: I mean the judge I worked for never got upheld, so there's that.

PN815

But, yes, in that case, the omission of the word 'casual' from one of the clauses of the agreement that were under consideration meant that the loading which was to be intended only for casuals - - -

PN816

THE DEPUTY PRESIDENT: Yes, you might note that I found in favour of the union before me on that one, Mr Mohseni.

PN817

MR MOHSENI: Yes.

PN818

THE DEPUTY PRESIDENT: At quite a significant cost to the employer.

PN819

MR MOHSENI: Exactly, your Honour, which is why my eyes lit up this morning when I found the case, and, yes, so your Honour - - -

PN820

THE DEPUTY PRESIDENT: But isn't 218A - I mean in my view, the amendment addresses, as the Full Bench found, the inability of 602 to be used to address an error in an agreement. 218A, as I read the amendments, is the equivalent of the slip rule of 602 in the drafting of agreements.

PN821

MR MOHSENI: As a carve-out to what your Honour found in 602?

PN822

THE DEPUTY PRESIDENT: Yes.

PN823

MR MOHSENI: The agreement was not made by the Commission, it was unable to - - -

PN824

THE DEPUTY PRESIDENT: That's right.

PN825

MR MOHSENI: Yes, I mean the submission wasn't that it was determinative, but just that it was hard for us to see why an equivalent amendment to what the employer sought in the Managed Care could just be made through an interpretative process. Then, moving on from that - - -

PN826

THE DEPUTY PRESIDENT: But just while we're talking about the respondent foreshadowed it would make an application pursuant to 218A, if it were to do that as part of these proceedings, what opportunity would the union seek to respond to that?

PN827

MR MOHSENI: I confess, your Honour, I'm not across the procedural - - -

PN828

THE DEPUTY PRESIDENT: I will give you my own view because I have dealt with some 218A since - I think I had one two days after the legislation came - and so it was made as a separate application, just as if it were a 217, and that would be the way one would address uncertainty and ambiguity, and I know you will say there's no uncertainty or ambiguity here - put that to one side - but, just as with the 217, the application was made, the opportunity was afforded to the unions that were covered by the agreement to file any material in support of or in opposition to that, and then I decided it. So, it's not a complex process, but if it's contested, then more might be required.

PN829

MR MOHSENI: I mean it certainly would be contested, given the opportunity, but, yes, well, we're not in a position to be able to respond to it now because we didn't anticipate that such an application would be made.

PN830

THE DEPUTY PRESIDENT: Yes.

PN831

MR MOHSENI: Or weren't sure if it could be done on the fly in this proceeding.

PN832

THE DEPUTY PRESIDENT: Okay.

PN833

MR MOHSENI: But, supposing the clause is not meant to stand alone, the respondent would still argue that they can still win on the construction of the award and, in that regard, they refer to various pre-modern awards which specify, without more, that breaks in those industries could be staggered, as though to suggest that the 2020 award doesn't require agreement for the staggering of breaks, and we would submit in response to that that this is using contextual

considerations to rewrite the clause in a way that the critical passage in Berri says is impermissible.

PN834

It is ultimately a different clause. The respondent's submission is that it's bipartite and there's two sections to it but it's all in one sentence, and so it's our submission that, from a plain English perspective, the award requires agreement for breaks to be staggered and the framers of the award would have made it much clearer if that was their intention that staggering breaks was within an employer's discretion.

PN835

There are some other comments we could make about the interpretation of that clause, for example, it might be thought odd that the clause only specifies staggering breaks as a topic for agreement, but we say that this is likely because there are only really three things you can do with agreement on breaks, and that's either to have your breaks in common or to stagger your breaks or to truncate or completely waive them, and you plainly can't waive them because that would be unsafe, so that only leaves the potential to agree on staggering breaks, where common breaks are plainly the default.

PN836

We would further submit that the fact that meal breaks are to be taken at times agreed between the employer and the employee would actually suggest that priority is to be given to the employee's preferences rather than to the employer's because, again, the principle of managerial prerogative would mean that if the award was silent, then the employer would have complete discretion to decide when the breaks were, and so introducing the concept of agreement into the award clause would surely mean that the ball is meant to be in the employees' court.

PN837

Unless your Honour has any further questions, that's all I propose - - -

PN838

THE DEPUTY PRESIDENT: No, no, I think I've asked a few along the way, Mr Mohseni, to assist my approach. Thank you. Mr Perry?

PN839

MR PERRY: Yes, if it please the Commission, we contend that this is a fundamentally misconceived application and opportunistic application that seeks to exploit a formatting error in a document in order to extract concessions in relation to a bunch of unrelated issues. I don't need to go into the merits of that, other than just to make the point at the outset that that appears to be the context in which this issue has been raised.

PN840

The position advanced by the applicant in this matter really flies in the face of decades of accepted, well-accepted custom and practice at the terminal and it seeks to case aside a work practice which has existed for, as I said, literally decades, which, on the evidence, has been uncontroversial and - - -

PN841

THE DEPUTY PRESIDENT: But custom and practice can be overturned by changes in the terms reflected in the agreement.

PN842

MR PERRY: Yes, it can.

PN843

THE DEPUTY PRESIDENT: In settlement of the bargaining.

PN844

MR PERRY: Yes, it can, and I will come to what the authorities say about the approach that the Commission ought take to interpreting the clause. One obviously starts with the words that are used, but, as the authorities make it clear, those words are not divorced from the industrial reality and practice that underpins them and, in this particular matter, that prior practice, long-established prior practice, is instructive and relevant for reasons that I will advance.

PN845

It is a practice which historically has been mutually beneficial to the parties. The employer gets additional productivity - I think Mr Crosky said in the order of 30 container movements extra per shift - and the employees get longer periods of breaks, and the evidence from Mr Crosky to the extent or to the effect that continuous operations is actually liked by the employees and that the employees, when it ceased, were actually dissatisfied with that wasn't tested and should be accepted.

PN846

THE DEPUTY PRESIDENT: Maybe they got used to having their lunch together now and they quite like it.

PN847

MR PERRY: Maybe that's so.

PN848

THE DEPUTY PRESIDENT: Well, I mean, I'm just reminded that, for many years, you couldn't get anybody to agree to 12-hour shifts. Try and take it off them now.

PN849

MR PERRY: Yes.

PN850

THE DEPUTY PRESIDENT: So people get used to what they have got generally
- - -

PN851

MR PERRY: Yes.

PN852

THE DEPUTY PRESIDENT: - - - and that might explain it.

PN853

MR PERRY: Yes. Well, that may be a consideration but one thing that I think the evidence clearly shows is that, until about the middle of 2019, continuous operations was the kind of 'default pattern of work', for want of a better expression. And that since that time, it has been enacted in a more ad hoc kind of manner, to deal with the specific operational requirement that exists in the terminal. So it's not a practise that simply was in place and then ceased. It has continued. And, in fact, when the negotiations for this agreement commenced in 2018, continuous operations was still, at that time, the overwhelmingly common practise at the terminal. And subsequent to the agreement being made in 2020, the practise had continued to be utilised by the company on occasions. It wasn't for about 12 months after the new agreement was approved that the union actually stood up and said, 'Well, actually, no, you can't do this'.

PN854

THE DEPUTY PRESIDENT: But as I understand the chronology, negotiations commenced in 2018. In mid-2019, I think it was, Mr Jeffries was the general manager at the time.

PN855

MR PERRY: Yes.

PN856

THE DEPUTY PRESIDENT: And either decided himself, or in consultation with others, that he'd move away from that being the default operational arrangement because of a range of things, including reduced demand et cetera.

PN857

MR PERRY: Yes.

PN858

THE DEPUTY PRESIDENT: And so, rates were then taken, as I understand it, on a non-continuous basis more often than had been previously been the case.

PN859

MR PERRY: Yes.

PN860

THE DEPUTY PRESIDENT: In that circumstance – I know there's probably not great evidence on this, but in those circumstances that might cease to then be at the forefront of employees minds - the continuous operations arrangements.

PN861

MR PERRY: That may be the case but what the evidence does establish, and this is really all I need to get – to make the submission I want to make - is that the practise continued, and it continued as it had, prior to 2019, with the staggering breaks, and the longer break periods and so forth.

PN862

The correct construction of clause 1.9 of part (b) of the agreement, we say, effectively involves reading 1.9.2(e) as if it were a 1.9.3. And in annexure 3 of Mr Jeffries statement, and I took Mr Patchett to this; that is, in fact, how the

clause was numbered in the three predecessor agreements. And the wording of the provision has been really much the same, other than addition of the two words that Mr Jeffries was asked - - -

PN863

THE DEPUTY PRESIDENT: So, it's really a lack of attention to detail, on your submission, as to the drafting of the agreement.

PN864

MR PERRY: Correct. It's just a formatting error. And if there had been a claim to require the cessation of a practise which is important to the company, in terms of how it runs its operation, one would have thought that might have been something that was very explicitly raised, and as Mr Jeffries said in his evidence, he went through all the records relating to the negotiation, and he couldn't find anything that referred to a claim that the practise cease. And that, in our submission, is because no such claim was made. What ultimately happened was that the prior provisions were effectively rolled over from agreement to agreement. And the Commission would interpret them consistent with each other. In the absence of there being some intervening claim.

PN865

If I can just make a few observations about the evidence. As I said, it establishes that there's a very longstanding practise at the terminal, of employees working continuous operations. That was a practise, in our submission, that was uncontroversial until March 2022. And, in fact, a mutually beneficial practise. And on the evidence, in our submission, continued without issue for 12 months after the current enterprise agreement was made.

PN866

As I said a moment ago, Deputy President, there are a series of enterprise agreements that have been made under the current legislation. And the relevant clauses are from those, is in attachment 3 to Mr Jeffries' statement. And really, what is now paragraph (e), has through those predecessor agreements, been a stand-alone, independent provision, which has general application to the breaks of all employees at the terminal, be they engaged in vessel operations or straddle operations. And the evidence is that is, in fact, how the provisions have been applied, consistent with that practise.

PN867

When we come to the negotiations that led to the 2020 agreement - the current agreement - the only claims of any relevance were, first of all, a claim that the subclause is dealing with straddle operations and vessel operations be merged together. And a claim that the 45-minute break requirement be increased to one hour. There's no evidence, whatsoever, of any claim having been made to the effect that the company was unable to run continuous operations. Or that the company require the consent of the union or the employees to make changes to break times. There's nothing in the material where the Commission will find anything that even goes close to that. And in our submission, that's because the claim was never made. And as Mr Jeffries said, having gone through all the records of the company, there's no fingerprints, at all, of that.

PN868

With that history in mind, and I don't need to repeat what's in the submissions about the way the dispute came about; the way the position was escalated to WorkSafe and then where that led us to, it's in the material, and it's contextual. All I ask the Commission to take from that is that it provides an understanding as to why this dispute has now arisen. In that it's become bound up in disputation about other unrelated issues, and that's what really brings us here today.

PN869

Can I turn now to the questions of the construction, and in our outline of submissions, at paragraph 12, we refer to the *James Cook University* decision. And set out, there, some key principles that were identified by the Full Court in relation to the interpretation of an enterprise agreement. And if I can just draw the Commission's attention to (i). This is on page 3 of the written outline. Where the court said the starting point is the ordinary meaning of the words, 'read as a whole and in context'. And Their Honours refer some authorities.

PN870

At point 2:

PN871

A purposive approach is preferred to a narrow or pedantic approach.

PN872

And there's a reference to a *CSR* case. Then if I can skip over the page to – well, there's actually two (iv). The second of those: 'Recourse may be had to the history of a particular clause.' And we say that's particularly submitted in this matter. And then the final point at (vi):

PN873

Words are not to be interpreted in a vacuum divorced from industrial realities, but in the light of the customs and working conditions of the particular industry.

PN874

And there's a wealth of evidence which is before the Commission as to that particular point. And that is, how that evidence becomes relevant to the task of construction.

PN875

So the Commission should be guided by the following considerations, in our respectful submission. The first is that what is now paragraph (e), has, through a series of enterprise agreements, always been a stand-alone clause. And it has been largely unchanged over 15 or so years, and through the four different enterprise agreements. That's the first matter.

PN876

The second matter is the well-established custom and practise for the way in which continuous operations are worked at the terminal. And Mr Crosky sets that out at some length in his evidence.

PN877

The third matter is that when the 2020 agreement was negotiated, and I've said this, there was no relevant claim to depart from that custom and practise. There's just no evidence of that whatsoever. And so, from all of that, the Commission can infer that there was a clear common understanding of the parties. There was a clause which had been in place for some time; a practise which had been in place for some time; and the fact that there was no discussion of either of those things, simply is a powerful support to the proposition that the parties just didn't intend to change it. And the only issues raised were the specific issues that Mr Jeffries refers to in his evidence, which are really irrelevant to the dispute which is before the Commission today.

PN878

So, as to the proper construction, there's two further issues that I wish to raise. The first is that by reading paragraph (e) as being limited to straddle pool operations, one ends up with a fairly absurd outcome in the sense that there's really nothing that paragraph (e) adds to paragraph (d) if it's read that way.

PN879

So paragraph (d), which is clearly expressed to apply to straddle pool operators, refers to advice being given of rest periods at the commencement of shift; and that adjustments can be made to that one hour after the shift. And if paragraph (e) is intended to be limited to those straddle pool operators, it's really a redundant or orphaned clause. Adds no meaning.

PN880

And the appropriate construction that the Commission would adopt, would be to give meaning to words that have been included by the parties, because they were put there for a reason. And in our submission, the applicants contended meaning of paragraph (e) really gives it no work to do. Because paragraph (d) already does that work. So that's the first additional matter I wish to raise.

PN881

And the second is the question that the Commission raised with Mr Patchett. Which is the use of the defined term. Capital 'E', Employee. Now, there are occasions throughout the agreement where that defined term is used. And there are occasions where 'employee' with a small 'e' is used. And given that it is 'E', 'Employees', a specifically defined term, the proper approach is to accept that there may have been an intended difference between the two. So that when the capitalised defined term is used, it is being intentionally used. So we say that's an important matter.

PN882

And it also goes to demonstrate the error in the numbering of the clause. Because if that was a conscious and deliberate decision, that the parties had made to cease to have a free-standing, stand-alone clause, but make it part of the straddle operations, one would have thought that the prefatory words, 'Each employee',

would have been amended to say, 'Each employee appointed to straddle pool operations', in the way that, for example, paragraph (a), of course, 1.9.2 does. Or to use the wording 'Straddle pool operators' which is used in paragraph (d).

PN883

So, not only does the use of the defined term itself make it clear that it is not limited to straddle pool operators, it's also a demonstration of, really, what is just an administrative error in the numbering of the clause. Because the parties surely would have done more if such a radical departure from previous practise had been intended.

PN884

THE DEPUTY PRESIDENT: I'm sure the parties should provide things in certain ways to remove doubt. It's not always the case that the parties draft perfectly.

PN885

MR PERRY: No, and there are occasions on which matters come before the Commission where, of course, that is the case.

PN886

THE DEPUTY PRESIDENT: Sometimes there is significant cost to parties, as Mr Mohseni pointed out, with - - -

PN887

MR PERRY: Yes, yes. But it won't surprise you to hear me say, this is simply not one of those cases. There's no evidence whatsoever before the Commission that there was any claim to make a substantive change to the clause. No evidence, none at all. Mr Jeffries went looking for any evidence, couldn't find any, and it's because there isn't any - didn't happen. Simple as that.

PN888

So we say that paragraph (e) should be read as a standalone clause, which is equally applicable to vessel operations and straddle operations. Mr Patchett did accept, in his evidence, that in the previous agreements, it was a standalone clause, and so one would only be able to find in favour of the applicant if there was something that happened in the negotiation of the 2020 agreement that shows the parties had a different intent, and there is no evidence of that. And, in fact, the evidence all goes the other way.

PN889

Can I move on, now, to deal with what is said about the award. Now, partly, the agreement deals with the taking of rest periods, how long they are to be, how they are to be advised, how they can be changed, and really, the proper conclusion that one reaches is that they deal with rest periods in a comprehensive way. That being the case - - -

PN890

THE DEPUTY PRESIDENT: But I think - correct me if I'm wrong here; I'm sure you will, Mr Mohseni - but I think Mr Mohseni and the CFMMEU concedes that if I find that (e) should be read as a standalone clause, then it will permit continuous operations and staggered shifts; is that - yes.

PN891

MR PERRY: Yes.

PN892

THE DEPUTY PRESIDENT: So, if I find that it is a standalone clause, and should be interpreted accordingly, then your construction is - - -

PN893

MR PERRY: Yes.

PN894

THE DEPUTY PRESIDENT: - - - correct.

PN895

MR PERRY: Yes.

PN896

THE DEPUTY PRESIDENT: If I find it's not, and it be read as narrowly, applying only to straddle operators, then the award clause comes into play.

PN897

MR PERRY: That is - on that - on that construction, yes. Yes, so if I can then go to the award clause.

PN898

THE DEPUTY PRESIDENT: And - sorry - just for the sake of completeness, the reason why it would come into play is if (e) only applies to straddle operations, and there doesn't appear to be anything else in the agreement that would deal with vessel operators as far as the timing - - -

PN899

MR PERRY: Yes.

PN900

THE DEPUTY PRESIDENT: - - - and manner - - -

PN901

MR PERRY: That - - -

PN902

THE DEPUTY PRESIDENT: - - - of taking of a meal break.

PN903

MR PERRY: That's so. So the - the aggregation of the provisions that would apply on that construction - we certainly don't urge that construction - would - - -

PN904

THE DEPUTY PRESIDENT: No, no.

PN905

MR PERRY: - - - be the text from the start of clause 1.9 to the end of 1.9.1.

PN906

THE DEPUTY PRESIDENT: Yes.

PN907

MR PERRY: And then the rest would not be relevant, and then one could conceivably then say, 'Oh, well, there's a lacuna, which the award then comes in and fills.'

PN908

THE DEPUTY PRESIDENT: Yes, I understand you putting the award construction as an alternative argument - - -

PN909

MR PERRY: Yes.

PN910

THE DEPUTY PRESIDENT: - - - to the primary submission that (e) covers the field.

PN911

MR PERRY: It does, yes. And that's our primary contention, and the alternative contention we set out starting at about - starting at paragraph 20 in the written submissions, where we refer to the relevant clause in the agreement that deals with the interaction between the award and the agreement. And then, about paragraph 21, we set out the relevant award clause, which says:

PN912

Meal and rest breaks will be taken at a time and manner agreed between the employer and the employee, and may be staggered.

PN913

And we say that that that has in it two concepts. The first is breaks being taken at a time and manner agreed; that's whether agreement is relevant. And then secondly, a concept that breaks may be staggered, so that we say that the award, on its proper construction, does not require agreement to staggering; the agreement is more as to - - -

PN914

THE DEPUTY PRESIDENT: But how can the staggering rule, taking of meal breaks, not be part of the 'time and manner' that requires agreement? I mean, what does - I mean, I understand 'time'. (Indistinct) might say, for example, meal breaks are to be taken within five and a half hours of the commencement of the shift. But 'manner' seems to have some work to do, doesn't it?

PN915

MR PERRY: It does, and - but the submission we make is that the inclusion of the words 'and may be staggered' was a deliberate place marker, and we set out in the submissions the earlier award clauses from which this provision derives, where it's fairly clear, in my submission, that staggering was something which was within the remit of the employer. And so that, while there's a general concept

of agreement, staggering is a - is an exception to that. And that's how we say clause 15.2(c) should be read.

PN916

THE DEPUTY PRESIDENT: I don't know that the work of the Full Benches in award modernisations can be described as perfect in all respects, and I've already come across, perhaps, oversights in drafting clauses, but I'm just still trying to understand what this (indistinct) clause - putting aside the history of the clause - couldn't the agreement that might be reached with employees, 'time and manner' for the taking of breaks, be simply overtaken by a decision of the employer then to stagger the breaks?

PN917

MR PERRY: Well, that may be one - one conclusion.

PN918

THE DEPUTY PRESIDENT: Well, it's hard to see how it couldn't be, because if, for example, it's agreed by employers and their employees that there will be a common meal break, let's say, to be taken no later than five hours after the commencement of a shift, and let's say, for the sake of the example, the timing of that, subject to those conditions, will be communicated to employees at the start of each shift, all right? Now, that could be completely displaced by a decision the employer might then make to stagger the breaks over two to three hours.

PN919

MR PERRY: Well, there's two things I would say about that.

PN920

THE DEPUTY PRESIDENT: Yes?

PN921

MR PERRY: The first is that, when one looks at the history of the provision, and - and, as you correctly point out, sometimes, through an award modernisation process, these - sometimes these things aren't given laser attention, because no one is standing before the Commission raising an issue about them.

PN922

THE DEPUTY PRESIDENT: Well, sometimes they are, but it's not like the traditional - - -

PN923

MR PERRY: Yes, yes.

PN924

THE DEPUTY PRESIDENT: - - - award arguments, no.

PN925

MR PERRY: And so the history of the provisions in that context is particularly informative, because it shows how the parties have got to a position over time. And in the footnote at the bottom of page 8 of our submissions, we refer to a predecessor award, which makes it quite clear, in our submission, that

staggering was something that was a right that employers under that award had. Now - so that's the first thing - - -

PN926

THE DEPUTY PRESIDENT: I'm just wondering - I won't push it any further. I'm just wondering, really, what work the balance of the clause has to do - what work it has to do if the employer can make a unilateral decision to stagger the meal breaks.

PN927

MR PERRY: Well, that's what I was coming to, which was the second thing I wanted to raise, which is, there would be things that would require agreement: for example, the duration of the break; whether the break includes - - -

PN928

THE DEPUTY PRESIDENT: But the award - doesn't the award - we're not talking about the agreement - the award fixes the minimum breaks: 45 minutes up to seven hours, and - - -

PN929

MR PERRY: Yes.

PN930

THE DEPUTY PRESIDENT: - - - an hour - - -

PN931

MR PERRY: Yes.

PN932

THE DEPUTY PRESIDENT: - - - over eight hours.

PN933

MR PERRY: And therefore, to change that, agreement would be necessary.

PN934

THE DEPUTY PRESIDENT: Well, you couldn't agree to do it for - to take a lesser break, because that - - -

PN935

MR PERRY: No, but it could be longer.

PN936

THE DEPUTY PRESIDENT: Well, yes.

PN937

MR PERRY: Or it could be taken in components. It could include time for - - -

PN938

THE DEPUTY PRESIDENT: And remain consistent with the terms of the award obligation?

PN939

MR PERRY: And the time at which the break is taken would be something that would require agreement.

PN940

THE DEPUTY PRESIDENT: I see, but again, I mean, I'm challenging the proposition that the staggering of breaks is to be read as a right that resides solely with the employer, and I'm just sort of challenging, does that leave much work for the agreement reached?

PN941

MR PERRY: Yes, well, obviously, our primary position is, the agreement deals with this comprehensively, and you find your answer there - - -

PN942

THE DEPUTY PRESIDENT: Yes.

PN943

MR PERRY: - - - so we don't need to descend into this. But then, as to the award itself, when one looks at the history of that provision, the staggering of breaks has been permitted, but that doesn't mean that the time, or the duration - whether there's wash time or transport time - all of those things are matters that might be subject to agreement.

PN944

THE DEPUTY PRESIDENT: I understand the submission. Thank you.

PN945

MR PERRY: The other matter - and we refer to this in the submissions, relying upon some observations made by Allsop CJ, in paragraph 28 and 29 of the written outline, about the intent of the agreement. And when one looks at clause 3, and 3.4 and 3.8 in particular - and also the references in clause 3.2 about 'optimal use of resources' and 'world's best practice' - one - one finds that there is a mutual intention of the parties to this agreement to ensure what I might describe as operational excellence, efficiency, and the like. And that's an important matter to take into account when construing the particular words that come before the Commission in this case, and the construction which is urged on the Commission by the applicants is very difficult to reconcile with what is an uncontroversial stated intent of the parties at clause 3. That's all I need to say about that.

PN946

Can I make some observations as to the potential for power to be exercised under section 218A. The - that's obviously a provision that has very recently come into the statute, and the Commission as presently constituted has had to consider it on a couple of occasions. If the Commission were to find that the misnumbering, or the number - well, I should be neutral about that - the way in which the provision is numbered creates an outcome which is consistent with the submission made by my learned friend, this is exactly the sort of case in which it would be appropriate to exercise the power the Commission has. The Commission can, of course, exercise that power of its own initiative, and doesn't need an application.

PN947

And we say that the evidence before the Commission demonstrates that if that was the correct legal interpretation, it's not one that was the common intent of the parties, objectively distilled from - from the evidence, and it's exactly the sort of case where an order would be made. I don't need to - all of the evidence that we would lead is before the Commission, on that point. And if my learned friend needed an opportunity to consider whether he might want to put anything further on, well, we wouldn't have any objection to that course being followed. But I would simply just wish to observe that the material we have before the Commission is what we - - -

PN948

THE DEPUTY PRESIDENT: Yes.

PN949

MR PERRY: - - - would rely upon for that purpose.

PN950

THE DEPUTY PRESIDENT: All right. I'm grateful for that. Thank you.

PN951

MR PERRY: And we think it's desirable that there be a final conclusion to this dispute without the need, potentially, for further proceedings to be filed and programmed and heard.

PN952

So we contend that clause 1.9 is a comprehensive provision, that deals with breaks, to the exclusion of the award; and that there is a misnumbering in paragraph (e), but the history, and all the other contextual markers, point clearly to the provision being a standalone provision, that applies to all operations, and not limited to straddle operations; and we think that that is the overwhelmingly compelling construction of the provision, and the construction that we advance before the Commission today.

PN953

So, unless, Deputy President, you have any questions - - -

PN954

THE DEPUTY PRESIDENT: No, I don't. I don't leave much unasked as parties go through their submissions, as you might have noticed. Otherwise, I forget. Thank you. Mr Mohseni, is there anything else you wanted to say in reply?

PN955

MR MOHSENI: Just very briefly, Your Honour. In response to Mr Perry's insistent of the – respondent, sorry, insistence that you can be certain that a claim to merge subclause (e) was never made, we urge some caution or scepticism about that.

PN956

THE DEPUTY PRESIDENT: I don't think – sorry, to be clear – I think it's uncontroversial that the claim was made to merge the two clauses.

PN957

MR MOHSENI: Sorry, Deputy President, the claim that there's a record of is to merge the clauses entirely.

PN958

THE DEPUTY PRESIDENT: Yes.

PN959

MR MOHSENI: So the straddle pool operations and the vessel operations clauses. I was under the impression that Mr Perry was referring to a claim in respect of subsuming subclause (e) into one.

PN960

THE DEPUTY PRESIDENT: Yes. That's as I understand it.

PN961

MR MOHSENI: And so, when Mr Perry says that there's no evidence that the unions sought that outcome, we say that – I mean, there's just a paucity of evidence at large. Essentially what the respondent is asking the Commission to do is to look at custom and practise leading up to say, 2019. And then, really, the minutes of a single meeting, and a single draft version of the enterprise agreement, to prove that no such claim was made. That relies on an assumption that Mr Jeffries meticulously inspected all the records within his reach. And that all those records were a comprehensive record of the negotiations. And that none of them disclose the request to say, merge or subsume subclause (e) into 1.9.2.

PN962

THE DEPUTY PRESIDENT: But if I dismiss or discount Mr Jeffries evidence, then I'd similarly discount the evidence of Mr Patchett, and rely on what's in front of me, couldn't I?

PN963

MR MOHSENI: Well, all that's in front of you Deputy President, is the text of the clause.

PN964

THE DEPUTY PRESIDENT: No, well, there's no evidence – there's no documented evidence that indicates an objective intention of the parties to alter the meaning and effect of 1.9.2.

PN965

MR MOHSENI: I confess it's a bit cute on my part, but there's also no evidence that we didn't make it. But there is one thing I draw Your Honour's attention to which is that the - - -

PN966

THE DEPUTY PRESIDENT: I like it when etiquettes break those kinds of concessions.

PN967

MR MOHSENI: But the thing I draw Your Honour's attention to is that our request to merge the clauses entirely, the only documentary evidence of that is at the very tail end of the process, when Mr Jeffries emailed Mr Stevens to say, 'Well, here's the draft. We've tried to clean it up'. Which I think is a (indistinct). Which would then suggest that the respondent's minutes of the bargaining meetings don't reveal that request to have been made, when in fact, it must have been made at one of those meetings.

PN968

THE DEPUTY PRESIDENT: What inference should I draw from the fact that this matter's been now before me for some months. I issued the directions pre-Christmas. I made it clear at the time I couldn't hear it until the end of February. So there's been a lot of time available to the parties to trawl through the minutes, to go back over their own notes, to call witnesses who are party to the negotiations, bring forward documentation, and all I've got is one set of minutes.

PN969

MR MOHSENI: You're correct to be disappointed, Deputy President. But I can say we've searched. We don't, I mean - - -

PN970

THE DEPUTY PRESIDENT: But surely all of your officials and your delegates get copies of the minutes. Because if you didn't, I'd imagine you'd be screaming 'blue murder'.

PN971

MR MOHSENI: I mean, maybe it was remiss of me not to put on an application for orders to produce the rest of their minutes so we could satisfy ourselves. But we would think that before Your Honour would make any determination pursuant to 2.1.8(a), that we might be given an opportunity to do that.

PN972

THE DEPUTY PRESIDENT: You can be assured that – and Mr Perry's conceded – and if you wish to be heard on that, if I'm minded, and if I need to, I should add, because the application's been made orally at this stage, I will certainly forward you an opportunity to file material as you saw fit.

PN973

MR MOHSENI: Thank you, Deputy President. But that's all I have to say.

PN974

THE DEPUTY PRESIDENT: All right.

PN975

MR MOHSENI: Sorry, one – it might be a bit unorthodox, but also request if, respectfully, the transcript of this proceeding could be made available. Because I'm no longer in the employ of the MUI from Wednesday.

PN976

THE DEPUTY PRESIDENT: Sorry, you're no longer what?

PN977

MR MOHSENI: In the employ of the MUI from Wednesday. So I - - -

PN978

THE DEPUTY PRESIDENT: Okay. I'm sorry to hear that. You going to bigger and better things, Mr Mohseni?

PN979

MR MOHSENI: That's subjective. But - - -

PN980

THE DEPUTY PRESIDENT: Am I likely to see you again in this tribunal?

PN981

MR MOHSENI: Not for the next couple of years.

PN982

THE DEPUTY PRESIDENT: All right. Well, good luck with your move.

PN983

MR MOHSENI: Thank you. But, yes, for handover purposes, if we have to respond to such an application, the transcript would be useful.

PN984

THE DEPUTY PRESIDENT: Yes. Tara, could you just make a note, please. Thank you. All right. Well, thank you to the parties. I'm grateful for the evidence that's been led, and the submissions that's been made. I think the way in which the case was put made clear, the contest. It's a reasonably narrow contest, I accept that. I hopefully will get a decision out fairly quickly. I do have a large number of matters coming up, and so I'm endeavouring to get my decisions out as quickly as I can to (indistinct) of them. So I'll try and do that with this one. Thank you.

ADJOURNED INDEFINITELY

[2.41 PM]

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