



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT MASSON**

**C2022/5882 AND C2022/5863**

**s.739 - Application to deal with a dispute**

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia AND “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU)**

**v**

**Metro Trains Melbourne  
(C2022/5882 and C2022/5863)**

**Metro Trains Melbourne Rolling Stock Enterprise Agreement 2019**

**Melbourne**

**10.44 AM, MONDAY, 27 MARCH 2023**

**Continued from 15/11/2022**

PN1

THE DEPUTY PRESIDENT: I will take appearances, please.

PN2

MR R WAINWRIGHT: Good morning, Deputy President, Wainwright, initial R, I appear for the AMWU.

PN3

THE DEPUTY PRESIDENT: Thank you.

PN4

MS E McGRATH: Good morning, Deputy President, McGrath, initial E, I appear for the CEPU.

PN5

THE DEPUTY PRESIDENT: Thank you.

PN6

MR C SHAW: If the Commission please, my name is Shaw, initial C, appearing for Metro Trains Melbourne, together with Mr Hilbert, initial P.

PN7

THE DEPUTY PRESIDENT: Thank you. First up, apologies for the delay. It seems the technology hasn't been working too well this morning. I'm not sure why that is. Perhaps it's fallen into disuse over the last three years and I think we are in the process of trying to change some of the technology within the hearing rooms, so, once again, I am sorry for the inconvenience to the parties.

PN8

Mr Wainwright?

PN9

MR WAINWRIGHT: Thank you, Deputy President. It's not my intention to open our case. We rely on the materials that we've filed and served and it's my intention to call Mr Twomey.

PN10

THE DEPUTY PRESIDENT: Thank you. Is Mr Twomey required for cross-examination?

PN11

MR SHAW: Sorry, Deputy President, I missed that.

PN12

THE DEPUTY PRESIDENT: Mr Wainwright has just indicated that Mr Twomey is going to be called to the witness box. Is he required for cross-examination?

PN13

MR SHAW: I haven't seen the witness statement in relation to this matter just recently. There was a witness statement that was submitted as part of the earlier dispute, but, in terms of whether the no extra claims clause prevents Metro from

making any changes to the wash-up time procedure, I haven't seen a witness statement from Mr Twomey.

PN14

MR WAINWRIGHT: Deputy President, we filed and served a witness statement. It is contained at pages 101 to approximately 115 of the court book.

PN15

THE DEPUTY PRESIDENT: Yes.

PN16

MR SHAW: That could be my error, Deputy President. Apologies.

PN17

THE DEPUTY PRESIDENT: It is certainly in the material that's been filed and it's in the court book that we have provided to the parties.

PN18

MR WAINWRIGHT: I withdraw that, Deputy President, page 118 of the court book.

PN19

THE DEPUTY PRESIDENT: Is that right? I've got 101 on mine.

PN20

MR WAINWRIGHT: 101 to 118.

PN21

THE DEPUTY PRESIDENT: Yes, yes, with the attachments.

PN22

MR WAINWRIGHT: Yes.

PN23

THE DEPUTY PRESIDENT: Thank you.

PN24

MR SHAW: I wouldn't seek to cross-examine Mr Twomey.

PN25

THE DEPUTY PRESIDENT: You don't seek to?

PN26

MR SHAW: No.

PN27

THE DEPUTY PRESIDENT: Okay. Mr Wainwright, do you just wish to have Mr Twomey affirm his witness statement? If there's no cross-examination required, I'm prepared to take it in as evidence.

PN28

MR WAINWRIGHT: If you could admit that as evidence and mark it, Deputy President, we will be content with that.

PN29

THE DEPUTY PRESIDENT: Thank you. The witness statement of Mr Twomey will be marked as AMWU 1.

**EXHIBIT #AMWU 1 WITNESS STATEMENT OF MR A TWOMEY**

PN30

The attachments are marked anyway, so if it is necessary for me to refer to the attachments, I will simply refer to it as - I think it's AT 1, and then I think there might be also some documents, rostered on/rostered off. Is that part of AT 1?

PN31

MR WAINWRIGHT: Yes, Deputy President, we included those as a bundle.

PN32

THE DEPUTY PRESIDENT: Yes, all right.

PN33

MR WAINWRIGHT: The payslips with the timesheets attached.

PN34

THE DEPUTY PRESIDENT: Okay. Thank you. I think there might be a number of other documents I need to mark as well.

PN35

MR WAINWRIGHT: Yes, Deputy President. I will come to those through the witnesses.

PN36

THE DEPUTY PRESIDENT: Yes.

PN37

MR WAINWRIGHT: If it pleases the Commission, I don't intend to sum up. I'm hoping that you will give the parties a chance to sum up at the end of the evidence.

PN38

THE DEPUTY PRESIDENT: Yes.

PN39

MR WAINWRIGHT: And so we would hand over to the respondent.

PN40

THE DEPUTY PRESIDENT: So you don't wish to mark up those exhibits at this stage, the ones that have been filed, the various memos from 92, 2012, 2018, 2022?

PN41

MR WAINWRIGHT: Attached to our submissions?

PN42

THE DEPUTY PRESIDENT: Yes.

PN43

MR WAINWRIGHT: We would just rely on those as attachments to our submissions.

PN44

THE DEPUTY PRESIDENT: All right.

PN45

MR WAINWRIGHT: There are two documents that I will take the witness to and, beyond that, we're happy that the material has been filed and served and that the Commission can rely on it.

PN46

THE DEPUTY PRESIDENT: All right. Thank you. Mr Shaw, do you want to make your evidentiary case.

PN47

MR SHAW: Yes, Deputy President. We want to tender the witness statement of Mr Hilbert as evidence.

PN48

THE DEPUTY PRESIDENT: Do you wish to ask questions of Mr Hilbert?

PN49

MR WAINWRIGHT: Yes, Deputy President.

PN50

THE DEPUTY PRESIDENT: All right. Mr Hilbert will need to be called to the witness box, thank you.

PN51

THE ASSOCIATE: Please state your full name and address.

PN52

MR HILBERT: Peter Eric Hilbert, (address supplied).

**<PETER ERIC HILBERT, SWORN**

**[10.51 AM]**

**EXAMINATION-IN-CHIEF BY MR SHAW**

**[10.51 AM]**

PN53

If I could present Mr Hilbert with a copy of his witness statement?

PN54

THE DEPUTY PRESIDENT: I think you will have a copy at page 143 of the book in front of you.

\*\*\* PETER ERIC HILBERT

XN MR SHAW

PN55

MR SHAW: Mr Hilbert, if you could read that statement, please, and tell the Commission if it's a true and correct record?---Yes. 'On 17 October' - - -

PN56

THE DEPUTY PRESIDENT: You don't need to read it out, just - - -?---That it's true and correct?

PN57

Yes?--- Yes, it is true and correct.

PN58

Thank you.

PN59

MR SHAW: Deputy President, if we could tender that as the evidence.

PN60

THE DEPUTY PRESIDENT: I will mark the witness statement of Mr Hilbert R1.

**EXHIBIT #R1 WITNESS STATEMENT OF PETER ERIC HILBERT**

PN61

MR SHAW: I have no questions, at this stage, of the witness.

PN62

THE DEPUTY PRESIDENT: Thank you. Mr Wainwright?

**CROSS-EXAMINATION BY MR WAINWRIGHT**

**[10.52 AM]**

PN63

Morning, Mr Hilbert?---Morning, Mr Wainwright.

PN64

Could you tell the Commission, in relation to this dispute, are you seeking to achieve that the workers clock out on time?---What do you mean by 'on time'? At the end of their shift, within five minutes of the hour that they're supposed to end?

PN65

That's what I'm asking you. With the memo of 8 August, what were you setting out to achieve?---That the staff clock out at the fullness of their rostered shift.

PN66

Your staff were working 12-hour shifts?---Correct.

PN67

Day shift generally ends at 7 pm?---Yes.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT

PN68

Is it the case, based on what you've just said to me, that you want staff to clock out at 7 o'clock?---That is correct.

PN69

In terms of seeking to achieve that outcome, is there any productivity motivation from your perspective?---Productivity motivation as in?

PN70

Are you seeking to improve productivity at the workplace?---Not necessarily improve the productivity because the last half an hour of the shift is designed to hand over to the next shift.

PN71

It is the case, isn't it, that the team leaders collect a report from each employee a half hour before the end of their shift?---I believe that is the case.

PN72

What's the purpose of the team leader collecting that report?---They're for the next shift.

PN73

It's a handover mechanism, isn't it?---Correct.

PN74

In terms of the productivity that we achieve by the particular worker in the particular shift, that's very much locked in half an hour before the end of their shift; that's correct, isn't it?---Yes, I believe it is.

PN75

Are you seeking to stop employees opting to wash up at home?---We're not seeking to do any of that.

PN76

You are allowing employees to clock off early at the moment, aren't you?---The business is, yes, the business is.

PN77

I take it that you're representing the business today?---Correct.

PN78

So I might refer to the business as 'you'?---All right.

PN79

At the moment, employees can clock off early, can't they?---That is my understanding, yes.

PN80

What happens to their pay if they clock off early?---It is currently deducted if they clock off early without permission.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT

PN81

Let's drill down into that. So, if they clock off between 15 minutes before the end of their shift and five minutes before the end of their shift, what happens?---They get penalised for not seeking permission to clock off.

PN82

If they clock off between five minutes before the end of their shift and the end of their shift, what happens?---They don't get clocked off - they don't get docked, sorry.

PN83

They get a credit, don't they?---No, they don't get docked.

PN84

They don't get docked?---It's not a credit.

PN85

How would you describe it?---I'd describe it as they're completing their fullness of their shift.

PN86

Fullness of their shift within five minutes?---Correct.

PN87

Do the railways run on any form of a timetable?---They do.

PN88

So five minutes is important, isn't it?---Well, we run to a five-minute timetable, yes.

PN89

So they're not clocking off on time, are they, they are able to clock off early?---They're able to clock off within five minutes of the hour, yes.

PN90

When I asked you if this dispute was about them clocking off on time, it's not really about that, is it?---I'm not sure what you're alluding to.

PN91

I'm asking you questions, I'm just seeking that you answer those. I asked you earlier was this dispute about people clocking off on time and you said 'Yes'. We established that people are finishing their shifts at 7 pm and that they're able to clock off at 6.55. So now I'm asking you, this dispute isn't really about people clocking off on time, is it?---It is about clocking off on time.

PN92

You say to this Commission that clocking off on time includes clocking off five minutes early; is that correct?---That is correct.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT

PN93



But, from your perspective, clocking off 15 minutes early and washing up at home is clocking off too early; that's correct, isn't it?---If you put it that way, yes.

PN94

Thank you. Do you know who your predecessors are as depot managers?---I know who my last predecessor was; prior to that, I do not know.

PN95

Who was the last predecessor?---My predecessor was a gentleman by the name of Krishna Vemula.

PN96

Do you know a gentleman by the name of Duncan McLeod?---I know of Duncan McLeod, yes.

PN97

Was Duncan McLeod a depot manager?---Duncan McLeod, I believe, was more of an operations manager. He had a number of depots he was responsible for.

PN98

Was he the depot manager at Epping?---I can't answer that. I don't know exactly what he was responsible for before my time.

PN99

Mr de Bruin, was he depot manager at Epping?---I've got no idea. Never heard the name.

PN100

I put it to you that Duncan McLeod was depot manager at Epping; that's correct, isn't it?---If you say so.

PN101

THE DEPUTY PRESIDENT: Is there any evidence on about that?

PN102

MR WAINWRIGHT: If I can ask you to look at - - -

PN103

THE DEPUTY PRESIDENT: Hang on, sorry. Is there any evidence about who the previous depot managers were?

PN104

MR WAINWRIGHT: I was going to take this witness to page 98 of the court book.

PN105

THE DEPUTY PRESIDENT: Okay.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT

PN106

MR WAINWRIGHT: First, in relation to Krishna Vemula, do you see Krishna Vemula mentioned at the top of this memo?---Yes, I do.

PN107

That's in Krishna's capacity as depot manager, isn't it?---That's right.

PN108

Do you see that the memo is from Duncan McLeod?---Yes, I do.

PN109

Can I ask you to turn to page 97?---Yes.

PN110

Do you see the first of the signatures there is from Mr de Bruin?---Okay, yes.

PN111

Could you explain to the Commission what the SIC is?---I would not have a clue.

PN112

You see that Mr de Bruin is the convenor?---Yes, I understand that he's a convenor, but I don't know what SIC means - - -

PN113

Okay?--- - - - in the terms of this document.

PN114

I put it to you that that denotes that Mr de Bruin is the depot manager at Epping; do you agree with that?---I can't agree to it; I don't know.

PN115

MR SHAW: Deputy President, if I could submit that this is unfair questioning of Mr Hilbert. It's pure conjecture to ask him about things that he has no knowledge of.

PN116

THE DEPUTY PRESIDENT: Well, he's answered the question. He doesn't know.

PN117

MR WAINWRIGHT: Could I ask you to turn - - -

PN118

THE DEPUTY PRESIDENT: It's been put to him and there's no evidence to the contrary, so he doesn't know.

PN119

MR WAINWRIGHT: Could I ask you to turn to page 96 of the court book, please, Mr Hilbert?---I'm there, yes.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT

PN120

Do you see there suggestion 3(a)?---Yes.

PN121

Do you see there the signature of Duncan McLeod?---Yes.

PN122

2012?---Yes.

PN123

That's Mr McLeod signing in the capacity of the Epping depot manager, isn't it?---Again, you have me at a loss; I've got no idea. I wasn't around in 2012 at Epping.

PN124

All right. Well, let's - - -?---Sorry, I can't - I can't give you that answer.

PN125

That's all right.

PN126

THE DEPUTY PRESIDENT: Let's cut to the chase here. It seems to be that it's signed at a time when he also sent the email - - -

PN127

MR WAINWRIGHT: Yes.

PN128

THE DEPUTY PRESIDENT: - - - on 12 December 2012. So, it was probably in that capacity.

PN129

MR WAINWRIGHT: Yes.

PN130

THE DEPUTY PRESIDENT: All right. I don't need to be spoon-fed that stuff.

PN131

MR WAINWRIGHT: Thank you.

PN132

Can I ask you to return to your witness statement on page 143?---Page 100 of the witness book?

PN133

Page 143 of the court book, please?---Okay, 143. We'll come to the other one later. Yes.

PN134

I want you to have a look at paragraph 3?---Mm-hm.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT

PN135

After that journey that we've just been through through the years, do you stand by your statement that employees have taken it upon themselves to leave early?---As far as I was aware, yes.

PN136

You are now aware, aren't you, that there was an agreement in 1992?---Yes.

PN137

You are aware that Mr McLeod signed it off again in 2012?---Correct.

PN138

And you are aware that the RTBU were included in the agreement in 2018, aren't you?---Yes, from this email on 142.

PN139

I put it to you that employees have not taken it upon themselves, that they have worked in accordance with the agreement; that's correct, isn't it?---The agreement, as far as I was aware, was about them having the wash-up time, not about leaving the site early.

PN140

Yes, and we have discussed that you have no problems with people washing up at home?---I have - I don't object to people washing up anywhere, apart from - if they want to wash up at home or at the depot, that's fine, but it doesn't allow them to leave early.

PN141

As the Deputy President says, let's get to the issue?---Okay.

PN142

It's your position then that if people choose to wash up at home, which you have no difficulty with, they can sit and wait for 10 minutes; is that correct?---No, they can - they can clean up and hand over things to the team leader, who can then document them and hand them over to the next shift. That's what they're there for.

PN143

So we have established that that happens between 6.30 and 6.45 of the day shift, haven't we?---That happens - that happens between 6.30 and 7.

PN144

Can you point to any instance of any employee leaving a task undone?---I haven't got that information with me. I can't prove it here, if that's what you're asking.

PN145

That is what I'm asking?---I can't prove it right here and now.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT

PN146

You say in paragraph 5 that you never sought to abolish wash-up time. That's not correct, is it?---I've never sought to abolish the staff washing up. I've sought to

remove the facility for staff to leave the site 15 minutes prior to the end of their shift.

PN147

Yes, because it's important to you that they don't leave 15 minutes prior to the end of their shift, but it's not important to you if they leave five minutes prior to the end of their shift; that's correct, isn't it?---That is the way the clock card system works, yes.

PN148

You issued a memo on 8 August?---That's - you're going back to which document, please?

PN149

Page 129?---Yes, that's my signature.

PN150

Whose decision was it to issue that memo?---That was my decision, or the business's decision. I take it - you've already established that I'm representing the business, so, therefore, it is the business decision.

PN151

Did the AMWU approve this change to the existing agreement?---Did I need to seek approval?

PN152

I'm just asking you questions?---I don't know. I don't believe they did.

PN153

So, before you issued this memo, you did not have the agreement of any representative of the AMWU?---I had no agreement from any member of the unions at that site, correct.

PN154

Deputy President, I believe there's a document in the cover of the folder. It's a document that I distributed last Friday, being a memo from Metro dated the 24th of the 6th.

PN155

THE DEPUTY PRESIDENT: Yes.

PN156

MR WAINWRIGHT: Can I take the witness to that document.

PN157

THE WITNESS: That's the document you're referring to, Mr Wainwright?

PN158

MR WAINWRIGHT: Yes. Did you issue that memo?---Yes, I did.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT

PN159

Deputy President, I seek to have that memo marked and admitted into evidence.

PN160

THE DEPUTY PRESIDENT: I haven't marked all of them because - we haven't marked any of the memos and I do want to mark all of them, so we will do that at that point.

PN161

MR WAINWRIGHT: Yes, thank you, Deputy President.

PN162

On what basis did you suspend the 15-minute wash-up time for two weeks?---On what basis? I arrived early on the 16th, as I stated there, sat in my car for approximately five to six minutes from that time and I observed a number of people within three minutes of my arrival basically lining their cars up at the front gate.

PN163

Leaving before the 15-minute period before the end of their shift?---Correct.

PN164

And so the action you took was to suspend the wash-up time agreement for two weeks; that's correct, isn't it?---Correct.

PN165

What gave you the authority to do that?---I believe the previous agreement.

PN166

You were relying on the agreement itself - - -?---Yes.

PN167

- - - to suspend the agreement for two weeks?---That was the only mechanism I had, yes.

PN168

So you recognised there was an agreement in place, didn't you?---I recognised that, as of January 22, there was an agreement in place, after I was made aware.

PN169

Then you decided to unilaterally cancel the agreement, didn't you?---I - the business has made that decision, yes.

PN170

You made that decision because you wanted to bring the processes of the Epping depot in line with the other Metro depots, didn't you?---Correct.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT

PN171

When a staff member clocks off under the current regime five minutes before the end of the shift, are they able to leave site?---They're free to leave site, or my

thing with that would be that they'd be walking to their cars in that last five minutes and starting their engines and getting ready to leave, yes.

PN172

What do you mean 'getting ready to leave'?---Well, they'd be putting their equipment or their own personal belongings in the car and starting the engines.

PN173

You mention there's a queue to leave site quite often?---Sorry?

PN174

There's a queue to leave site quite often, you mentioned?---A queue?

PN175

A queue of cars, a line of cars?---I observed it once, yes.

PN176

It's not easy to leave the site, is it?---It's quite straightforward once the gate's open. It takes a minute and a-half or so for the gate to open, if that's what we're talking about.

PN177

Can I ask you to look at page 101 of the court book, please?---Yes.

PN178

Do you see that evidence there at paragraph 14?---Yes, okay, yes, I see it.

PN179

To your knowledge, is that evidence correct?---Previous to this current dispute, yes, probably.

PN180

Why were two employees treated differently?---That was under the advice of the IR people within Metro Trains at the time. Are you talking about Mr - Vince and Andrew?

PN181

Yes?---Is that what you're talking about?

PN182

That's what I'm talking about?---Right. That was - - -

PN183

You accept they were treated differently when they clocked off at the same time?---Yes, I do.

PN184

Yes?---Under advice.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT

PN185

Who gave you that advice?---I received that advice from the IR team.

PN186

What was the advice?---That because the RTBU is not party to the discussion at this time, that that was what was to happen.

PN187

So, because the - - -?---And that later changed, by the way.

PN188

Because the RTBU was not in dispute with you - - -?---Correct.

PN189

- - - you weren't docking the RTBU members' pay?---That's absolutely correct. And, by the way, that changed later.

PN190

What caused that to change later?---It was decided by the IR team that we should be treating all the employees exactly the same, and that's been my standpoint from the very beginning.

PN191

Except for those times when you didn't?---Well, I have to take the advice of the experts that are given to me at the time. If things change, I change.

PN192

You have agreed with me that there's no productivity goal in changing the clock-off credit from 15 minutes to five minutes; that's correct, isn't it?---No, that's not correct.

PN193

Well, tell me what - - -?---I've just said to you that the staff, within that 15 minutes, should be washing up, should be putting away tools, should be doing everything to prepare for the next shift, and I expect that to be done from the last half an hour of the end of the shift, so that they can then clock off at five minutes to the hour.

PN194

I'm trying to get you to be clear. The team leader comes around half an hour before the end of the shift; that's correct, isn't it?---Yes.

PN195

And takes a record of where the worker will get to with their tasks by 15 minutes before the end of their shift; that's correct, isn't it?---They are expected to be finishing their tasks and doing the said paperwork for that period of time.

PN196

It would interrupt the handover if that information given to the team leader half an hour before the end of the shift wasn't accurate, wouldn't it?---Not to - it wouldn't disrupt the site, I don't believe.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT



PN197

Your main objection is about the optics of people leaving work 15 minutes before the end of the shift, isn't it?---No, it's not about the optics.

PN198

Well, tell us what it's about?---It's about completing tasks and doing all the paperwork and putting tools away and cleaning up to the end of their shift. That's what it's about.

PN199

I put it to you that employees are to complete their tasks, do the paperwork and put their tools away by 15 minutes before the end of their shift; that's correct, isn't it?---No.

PN200

And that employees have 15 minutes for wash-up; that's correct, isn't it?---They have 15 minutes to wash up, not to leave site.

PN201

I just want to get this clear because you're not being very clear?---I'm not being very clear? What's - - -

PN202

Putting tools away?---Yes.

PN203

Do you put tools away after you've washed up or before you've washed up?---I'd suggest you'd probably do that before.

PN204

So, isn't it the case that employees are to finish their tasks, complete their paperwork, put their tools away by 15 minutes before the end of their shift?

PN205

THE DEPUTY PRESIDENT: Can I just observe, Mr Wainwright, that I'm not going to be determining whether the logic or motivation of the employer of changing the practice is or isn't valid. Right? So, whether there's a productivity gain or not, frankly, I think is irrelevant. The issue is whether the change is permitted under the terms of the agreement. So, you can persist with this line of questioning, but I don't know how it assists me because, ultimately, the no extra claim clause either permits the change or it doesn't, regardless of the motivation.

PN206

MR WAINWRIGHT: And this witness has already answered questions on that.

PN207

THE DEPUTY PRESIDENT: Yes.

\*\*\* PETER ERIC HILBERT

XXN MR WAINWRIGHT

PN208

MR WAINWRIGHT: So if it doesn't assist you, Deputy President, those are all the questions I have to put. Thank you.

PN209

THE DEPUTY PRESIDENT: Thank you.

PN210

I have a few questions?---Yes, certainly, Deputy President.

PN211

MS McGRATH: Pardon me, Deputy President - - -

PN212

THE DEPUTY PRESIDENT: Sorry, my apologies.

PN213

MS McGRATH: Just a single question.

PN214

THE DEPUTY PRESIDENT: Yes, thank you.

**CROSS-EXAMINATION BY MS McGRATH**

**[11.14 AM]**

PN215

Can I please take you to page 134 of the court book?---134? Certainly.

PN216

Yes. These are the submissions that Metro Trains put in?---Yes.

PN217

THE DEPUTY PRESIDENT: What page is it?

PN218

MS McGRATH: Page 134 of the court book.

PN219

THE DEPUTY PRESIDENT: Yes, sorry, thank you.

PN220

MS McGRATH: This is talking about the history of this entitlement?---Yes.

PN221

So:

\*\*\* PETER ERIC HILBERT

XXN MS McGRATH

PN222

*The original agreement made in 1992 by the Site Implementation Committee on behalf of the Public Transport Corp was a predecessor operator of the Melbourne network. Suggestion 3(a) allowed 15 minutes at the end of a day for staff to clean up. The document made it clear that the system would be policed by supervisors and staff by way of random checks of the locker room*

*and shower areas. Metro Trains contends that this stipulation was to make it clear that affected employees were to use the wash-up time only in accordance with the terms of exhibit A and not in any other way, i.e. to wash up on site using the on-site facilities as provided by the employer. The exhibit also makes it clear in the final paragraph that any suggestion will be changed if detrimental.*

PN223

Can I take you now to the exhibit at page 96?---Yes, page 96, yes.

PN224

If we have a look at suggestion (a), now it says:

PN225

*Allow 15 minutes at the end of the day for staff clean-up. 15 minutes before the end of the shift, the staff member can clock out, but the clock will give a 15-minute credit. It must be borne in mind that this entitlement is not to affect shop productivity. If a staff member can complete a task within the 15 minutes, then they are expected to do so. In addition, this entitlement is for shop staff only. Staff required to work in the field are to continue working their full shift to ensure docks are covered. This system will be policed by the supervisors and staff by way of random checks of the locker room and shower area. If staff abuse the entitlement by cleaning up before 15 minutes' credit or leaving work which could have been finished in the 15 minutes without a valid reason, the whole shop will lose the credit for a period of two weeks.*

PN226

?---Okay.

PN227

My question to you: isn't it correct that the policing to be done by the supervisors is whether people were cleaning up before 15 minutes or whether they were leaving work which could have been finished within the 15 minutes?---I'm not sure where you're going. I don't understand what - - -

PN228

But this is the question: isn't that what they are saying the policing is? That's what is being policed?---Look - - -

PN229

What's being policed - - -?---Apart from the - yes, okay, yes.

PN230

Yes? What's being policed is whether - - -?---If that's what it says in there, yes.

PN231

Yes?---Okay.

\*\*\* PETER ERIC HILBERT

XXN MS MCGRATH

PN232

Is whether they've gone off before 15 minutes, so you police that, or whether they had a task they were doing which could have been completed within the 15 minutes that they didn't complete; yes? So that's what's being - isn't that document saying this, what's being policed?---I believe it is saying that, yes.

PN233

If we go back to the Metro Trains' submissions?---Page 134?

PN234

134. Metro Trains at paragraph 9, they're saying:

PN235

*The document made it clear that the system would be policed by supervisors and staff.*

PN236

Yes, it does make it clear it will be policed by way of random checks?---It says that there in the History, yes.

PN237

Yes:

PN238

*Metro Trains contends this stipulation was to make it clear that affected employees were to use the wash-up time only in accordance with the terms of the exhibit and not in any other way, i.e. to wash up on site using the facilities.*

PN239

Yes? But that's not what the document said, was it? It wasn't saying you were policing whether they were washing up on site, the document says what's to be policed is whether you left before 15 minutes or whether you didn't finish a task that you could have completed within 15 minutes?---Okay.

PN240

Do you agree with that?

PN241

MR SHAW: Deputy President, the - - -

PN242

THE WITNESS: I don't necessarily agree with that, but, anyway.

PN243

MR SHAW: Ms McGrath is referring to Metro's submissions, not to Mr Hilbert's witness statement. It is Metro's contention that what we say in our submissions is correct. It's not a part of Mr Hilbert's statement. He may have no knowledge of that.

\*\*\* PETER ERIC HILBERT

XXN MS MCGRATH

PN244

THE DEPUTY PRESIDENT: He can be asked for a view on it. If he doesn't know the answer, that's fine.

PN245

MS McGRATH: I'll put it in a different way.

PN246

Do Metro Trains police whether people are leaving more than 15 minutes beforehand?---Yes.

PN247

Yes? Do they police whether people could have finished a task within the 15 minutes?---The supervisor does, yes.

PN248

They can police that?---I believe so.

PN249

Prior to the memo that came out, were they policed for clocking off 15 minutes early?---Yes, they were, it was all being - - -

PN250

Prior to the memos that were put out?---No, it wasn't policed, as far as I'm aware.

PN251

Okay, thank you?---I mean you've got to understand that I took over in December 21 and it came to my attention then.

PN252

But prior to your takeover - - -?---I can't - - -

PN253

You don't know?---I've got no knowledge of what happened - - -

PN254

Yes, but since your takeover, the policing - - -?---Since mine, I've policed it.

PN255

Yes?---Prior to - what my predecessors did, I've got no comment on one way or the other.

PN256

Sure, absolutely?---Right?

PN257

No problem with that. But, since you've been in, the policing of that clock-off is only after it's been drawn to everyone's attention?---I've started policing it is all I can tell you.

\*\*\* PETER ERIC HILBERT

XXN MS McGRATH

PN258

Yes, but prior to it being drawn to everybody's attention, whether they clocked off 15 minutes early wasn't policed?---I can't tell you. I don't know. I only state what I know and that is, after January 21 - sorry, in January 21 - or 22 - I started policing it - - -

PN259

Yes, you started policing - - -?--- - - - after it was brought to my attention.

PN260

- - - whether people were wanting to wash up off site? You started policing whether they were leaving without washing up?---I was policing the time, not what people were doing with washing up.

PN261

Yes, but isn't that what we're here for? They've got to wash up in that time, they can't go, even though the agreement was that they were clocking off?---They can wash up, they can clean up, they can clean tools, they can do everything they need to do within the last 30 minutes of their shift.

PN262

Yes?---That's all I can say.

PN263

But they must be on site to do that?---Of course they must be on site.

PN264

That's what I'm saying was not part of the original policing, whether they washed up on site or not, but I understand, from what you're saying, it started to be policed after you put out the memo that they had to be on site to clean up?---Correct.

PN265

Yes, thank you.

PN266

THE DEPUTY PRESIDENT: Can I just ask some questions about the process. Could you go to page 43 of the court book. I just want to understand the hours of work provisions of the agreement?---43?

PN267

Clause 54?---Clause 54.

PN268

It refers to the ordinary hours of work?---Yes.

PN269

I just want to understand how hours are worked on site, the notional hours, I should say?---Yes.

\*\*\* PETER ERIC HILBERT

XXN MS MCGRATH

PN270

I think in answer to a question put by Mr Wainwright, you have confirmed that employees worked 12-hour shifts?---Correct.

PN271

Employees are rostered over what period of time?---Rostered in - - -

PN272

What's the roster of an employee working 12-hour shifts?---As in the pattern or - - -

PN273

Yes, the pattern?---Well, the pattern varies, but it goes around threes and twos and those sorts of things, so they can work day and night shift.

PN274

Are they rostered to work an average of 38 hours per week?---Yes.

PN275

Is that rostered over a three-week period, a four-week period, or you're not sure of the particular roster arrangements?---I'm not sure of the particular rostering. I know the patterns, but there is - they get a 76-hour fortnight, is what I do know.

PN276

In order to work a 38-hour week on average, employees would be required to work from 7 am to 7 pm; is that correct?---Yes.

PN277

Were you involved in the negotiation of this agreement?---No.

PN278

Have you ever been involved in the negotiation of the terms of this agreement?---Not in this - in terms of this agreement, no.

PN279

You have inherited the terms of this agreement?---I've inherited everything that's in it, yes.

PN280

So you are unable to shed any light on what parties understood by the meaning of particular provisions in the agreement? For example, if you could go to page 24 of the court book?---Page 24, yes.

PN281

This is the clause which the dispute is essentially over?---Clause 13, yes.

PN282

You were not involved in the negotiation of this particular provision?---No.

\*\*\* PETER ERIC HILBERT

XXN MS MCGRATH

PN283

You don't know what the parties meant by the terms used in that clause?---No, I don't.

PN284

Can I also take you to page 16 and clause 3.1. Can I just get you to focus on the last sentence of that paragraph where it says:

PN285

*For the avoidance of doubt, the agreement operates to the exclusion of all prior agreements, formal and informal.*

PN286

You see that?---Yes.

PN287

You don't know what the meaning or effect of that clause was intended, do you?---No, I don't.

PN288

Can I just ask you questions about the clocking-off process?---Yes.

PN289

I understood you to say employees clock off, and is there a car park inside the boundaries of the workshop?---There is a car park inside the boundaries of the depot, yes.

PN290

Is the process that employees would ordinarily clock off, go to their car and then exit the site?---Yes, that's the way it would work.

PN291

Well, whether they do it 15 minutes, five minutes, or - - -?---That's the way - that's the way it happens. They walk from the clock card out through the door to the car park.

PN292

Right?---Just for clarity.

PN293

And then there's a gate on the site; is that correct?---Correct, an automated gate, correct.

PN294

I just wanted to clarify that. Thank you. Mr Shaw, do you have any questions?

PN295

MR SHAW: Thank you, Deputy President.

**RE-EXAMINATION BY MR SHAW**

**[11.26 AM]**

\*\*\* PETER ERIC HILBERT

RXN MR SHAW



PN296

Mr Hilbert, can you tell the Commission what your understanding is of the purpose of the binding wash-up time to employees at your depot?---The purpose was to basically ensure that they were as clean as possible before they went home. That was basically it.

PN297

You say in your witness statement that you have never given agreement and, to the best of your knowledge, no other depot manager has, for employees to choose an alternative - - -

PN298

MR WAINWRIGHT: Deputy President, I object to that on two bases: firstly, he's being led; secondly, I object that he's being asked as to what other depot managers may or may not know.

PN299

THE DEPUTY PRESIDENT: Well, the witness statement - what page is the witness statement at again, sorry, Mr Shaw?

PN300

MR SHAW: It's exhibit R1.

PN301

THE DEPUTY PRESIDENT: It's at 143.

PN302

MR SHAW: Yes. Mr Hilbert does state in his witness statement, which has been tendered as evidence, that he has never agreed.

PN303

THE DEPUTY PRESIDENT: Well, he's already said that.

PN304

MR SHAW: Yes, correct.

PN305

THE DEPUTY PRESIDENT: So getting him to confirm what he's already said in his witness statement is unnecessary.

PN306

MR SHAW: All right.

PN307

Your intention would be to actually get employees to use the wash-up time? You're not seeking to abolish it completely?---I'm not seeking to abolish the wash-up time. What I'm seeking to do is to prevent employees from leaving early, use it for what it was intended, which means washing their hands, cleaning up to their best as they can and then leaving site.

\*\*\* PETER ERIC HILBERT

RXN MR SHAW

PN308

No further questions, Deputy President.

PN309

THE DEPUTY PRESIDENT: Thank you. Mr Hilbert, you are free to leave the witness box, thank you?---Thank you, Deputy President.

<THE WITNESS WITHDREW

[11.28 AM]

PN310

THE DEPUTY PRESIDENT: Thank you, Mr Wainwright?

PN311

MR WAINWRIGHT: Thank you, Deputy President. Just to square the circle in relation to some of the questions that you asked, Deputy President, I am instructed that the employees work on a four-week roster and it is a 36-hour week, on average, across those four weeks - it is a 38-hour week, on average, across those four weeks, I am instructed.

PN312

THE DEPUTY PRESIDENT: Okay.

PN313

MR WAINWRIGHT: Deputy President, you made a decision in [2022] FWC 2974. We think that it's instructive to recall what you said at paragraph 24:

PN314

*Does Metro Trains' instruction to eligible staff at the Epping depot regarding wash-up time arrangements constitute an extra claim, such that clause 13 would prohibit such a claim?*

PN315

In terms of other parts of your decision, Deputy President, the background and evidence of the matter, we feel, are very well described in paragraphs 8 to 10, and so we would adopt those.

PN316

THE DEPUTY PRESIDENT: Are you talking about the summary of the relevant facts in that decision?

PN317

MR WAINWRIGHT: Yes.

PN318

THE DEPUTY PRESIDENT: Okay, yes.

PN319

MR WAINWRIGHT: Yes, Deputy President, so all of the matters contained in paragraphs 8 to 10 we endorse and adopt.

\*\*\* PETER ERIC HILBERT

RXN MR SHAW

PN320

Deputy President, we say that what is happening here is we're examining whether or not the 8 August instruction by Metro to staff at the Epping depot regarding wash-up times constitutes an extra claim, and we say it is an extra claim and we say that it's prohibited by clause 13.

PN321

We think that it's important to concentrate on the practicalities of the matter. The practicalities, from our perspective, are these: firstly, there is no productivity gain or loss in contest here, so this is not about working better, working longer, working harder; it's got nothing to do with productivity at all. The evidence on that has been crystal clear.

PN322

It's not about whether or not employees need to wash up. In Mr Twomey's witness statement, he gives evidence about the state that employees finish up in after 12 hours under a suburban train. The wash-up is obviously necessary. What is not in contest here is that employees should have time within their 12-hour shift to wash up.

PN323

This is not a walking to or from issue, it's not a wash-up after you've knocked off issue, it's about we have 15 minutes dedicated to wash up at the end of the 12-hour shift. How is that 15 minutes to be utilised, policed, judged, if you like, because there is a bit of judgment, there's a bit of school yard judgment going on here, in our view, Deputy President.

PN324

There is no contest that there's no productivity differential between the post 8 August regime and the 1992 to 2022 regime. So, the question that we have been asking all the way through is, 'Why are we here? Why are we here if, as Mr Twomey gave evidence, it's his preference to do his wash-up at home? Why are we here about that?'

PN325

THE DEPUTY PRESIDENT: I understand, and I am prepared to accept that whether a person washes up at the depot or washes up at home may have no productivity impact whatsoever. I am prepared to accept that for the sake of the discussion. That doesn't mean it's okay to leave the site and that's why I need to look at the text of the agreement and whether the change that's been introduced is permitted by the no extra claims clause of the agreement. So, while you might wish to focus on the practicality, I must - I am compelled to look at whether the change is or isn't permitted under the terms of the agreement.

PN326

MR WAINWRIGHT: Yes. And then you are compelled to ask, 'Well, what is the change?' So, is the change between you can leave site between 15 minutes before the end of your shift - - -

PN327

THE DEPUTY PRESIDENT: No, no, no, the first inquiry will be: what does the original agreement permit?

PN328

MR WAINWRIGHT: Yes.

PN329

THE DEPUTY PRESIDENT: Right? And I have got precious little evidence on that.

PN330

MR WAINWRIGHT: Well, we say you have the evidence of the 1992 agreement, countersigned in - - -

PN331

THE DEPUTY PRESIDENT: Does that agreement make clear that employees are permitted to leave site 15 minutes early?

PN332

MR WAINWRIGHT: Yes, we say it does.

PN333

THE DEPUTY PRESIDENT: Where does it say that?

PN334

MR WAINWRIGHT: It says that when the credit of 15 minutes is noted. The only reason for the credit of 15 minutes to be present is if you are clocking off and leaving site. You don't clock off - - -

PN335

THE DEPUTY PRESIDENT: Can I take you then to the 2012 memo - okay - which seems to confirm the employer's acceptance of the continuation of those arrangements. You would agree with that?

PN336

MR WAINWRIGHT: Deputy President, could you give me a page reference?

PN337

THE DEPUTY PRESIDENT: Page 98.

PN338

MR WAINWRIGHT: Thank you. I will just get that in front of me, Deputy President. Yes, 12 December 2012.

PN339

THE DEPUTY PRESIDENT: All right. The second paragraph, it says, when clocking off, staff entitled to the wash-up time have received a 15-minute credit  
- - -

PN340

MR WAINWRIGHT: Yes.

PN341

THE DEPUTY PRESIDENT: - - - for the purpose of preparing themselves to depart the work site. 'Preparing to depart.'

PN342

MR WAINWRIGHT: Yes.

PN343

THE DEPUTY PRESIDENT: It doesn't seem to permit the actual departure.

PN344

MR WAINWRIGHT: Whereas the 1992 memo states quite clearly - - -

PN345

THE DEPUTY PRESIDENT: I don't know that it states clearly - - -

PN346

MR WAINWRIGHT: Can clock out.

PN347

THE DEPUTY PRESIDENT: - - - people are permitted to leave.

PN348

MR WAINWRIGHT: Can clock out.

PN349

THE DEPUTY PRESIDENT: Yes, and the 2012 memo doesn't change that.

PN350

MR WAINWRIGHT: Yes.

PN351

THE DEPUTY PRESIDENT: All right. But I'm just focusing on the wording. The focus on the wording there is for the preparation of departing, not on actual departure.

PN352

MR WAINWRIGHT: Yes, but I suppose, logically, that suggestion involves someone going to the clock card, clocking out, turning around and doing their ablutions, which doesn't seem - - -

PN353

THE DEPUTY PRESIDENT: Well, I have got no evidence from either party going to the objective intention of the party in 1992. All I've got is the text - all right - and the text of the 2012 memo, which appears to confirm the practice that was agreed 20 years earlier, makes no reference to people leaving site. It talks about preparation for departure.

PN354

MR WAINWRIGHT: Yes, but you have Mr Twomey's evidence that says two things: first of all, it says it's his preference to wash up at home and, secondly, he says it's been his practice over many years to wash up at home, so - - -

PN355

THE DEPUTY PRESIDENT: And I also have the evidence of the employer going to what their understanding and approach is. So, yes, I will need to make findings about the relevance of that, but there are some other constructional issues of the agreement that I want to come to which I want - and they are not dealt with by either party in the submissions.

PN356

MR WAINWRIGHT: You are referring to 3.1, I think, Deputy President?

PN357

THE DEPUTY PRESIDENT: Yes. I am also referring to the hours of work provision.

PN358

MR WAINWRIGHT: Yes.

PN359

THE DEPUTY PRESIDENT: Yes. So I need to be addressed on where an informal, unregistered agreement sits relative to 3.1, which makes it very clear that it displaces prior agreements, both unregistered and registered, and then how that can be then reconciled with the hours of work provision that requires people to work an average of 38 hours per week.

PN360

MR WAINWRIGHT: It is the case that, sometimes in documents of this sort, not every part of the document can be reconciled internally.

PN361

THE DEPUTY PRESIDENT: It's an explicit provision.

PN362

MR WAINWRIGHT: Yes. So, the explicit provision that we are concentrating on, Deputy President, is clause 13.

PN363

THE DEPUTY PRESIDENT: I will come to that.

PN364

MR WAINWRIGHT: Clause 13 is said to be full and final settlement of all matters - - -

PN365

THE DEPUTY PRESIDENT: No, it says 'all claims'.

PN366

MR WAINWRIGHT: Of all claims.

PN367

THE DEPUTY PRESIDENT: Yes.

PN368

MR WAINWRIGHT: And that, to us, is a vital point. I understand what you are saying, Deputy President, in relation to 3.1, whether or not that's on all fours with clause 13. I understand that we're going to have to address you on that. But, before we get off clause 13, I have to quibble with your characterisation of the 1992 agreement.

PN369

THE DEPUTY PRESIDENT: All right.

PN370

MR WAINWRIGHT: We say it's not an informal document outside of the EBA. We say it's a formal agreement that was a claim for this EBA.

PN371

THE DEPUTY PRESIDENT: But you would have to concede that, even if it were, there have been multiple agreements registered since then, none of which contain a provision in the form that was agreed in 1992.

PN372

MR WAINWRIGHT: Yes, but we can't have a dispute about the previous agreements, we can only have a dispute about this agreement, and what we say in relation to this agreement is that the 1992 agreement was the subject of a claim and - - -

PN373

THE DEPUTY PRESIDENT: No, it's not the subject of - clause 13 isn't directed to claims made in 1992.

PN374

MR WAINWRIGHT: No.

PN375

THE DEPUTY PRESIDENT: If you read clause 13, it's directed to claims that led to the formation of the current agreement.

PN376

MR WAINWRIGHT: And that's my submission, Deputy President.

PN377

THE DEPUTY PRESIDENT: Yes.

PN378

MR WAINWRIGHT: That the 1992 clock-off regime, if we want to call it that, was the subject of a claim in negotiating - - -

PN379

THE DEPUTY PRESIDENT: But where is the outcome of that claim reflected in the present agreement? That's what I'm trying to understand from your submission.

PN380

MR WAINWRIGHT: The claim didn't succeed in having the clock-off regime from 1992 included in the agreement. So, we were bargaining - - -

PN381

THE DEPUTY PRESIDENT: But there's no evidence before me in the previous matter, in the previous hearing, where I dealt with the - - -

PN382

MR WAINWRIGHT: With the jurisdictional?

PN383

THE DEPUTY PRESIDENT: Yes. There was no evidence that a claim had actually been made.

PN384

MR WAINWRIGHT: So the evidence in the previous jurisdictional consideration from the three union organisers, from memory - - -

PN385

THE DEPUTY PRESIDENT: There was no documentary evidence to support that. In fact, it was contrary to that.

PN386

MR WAINWRIGHT: Yes, there was no - - -

PN387

THE DEPUTY PRESIDENT: Yes.

PN388

MR WAINWRIGHT: We were relying on their recollection of claims made, and I hasten to say that there's no obligation on a bargaining party to document a claim, there's no legislative obligation to do so.

PN389

THE DEPUTY PRESIDENT: All right.

PN390

MR WAINWRIGHT: Would it be better if they had? Absolutely. But, regardless, the evidence, the unchallenged evidence, was that the 1992 clock-off regime was the subject of a claim for this - - -

PN391

THE DEPUTY PRESIDENT: Did you say 'the unchallenged evidence'?

PN392

MR WAINWRIGHT: Yes.

PN393

THE DEPUTY PRESIDENT: No, it was challenged by witnesses for the respondent. They said they had no recollection of the claim having been made.

PN394



MR WAINWRIGHT: Which is a world away from the claim wasn't made.

PN395

THE DEPUTY PRESIDENT: Well, I will go back and check the evidence, but  
- - -

PN396

MR WAINWRIGHT: Yes.

PN397

THE DEPUTY PRESIDENT: - - - it was pretty clear there was a contest over whether the claim was or wasn't made.

PN398

MR WAINWRIGHT: Well, I accept what you're saying, Deputy President, that there might have been a witness for Metro that said, 'I can't recall', but we say that the way to challenge evidence is by saying, 'That didn't happen.' They are two different things. We say that if there's not a witness saying, 'That didn't happen', then the evidence of three bargaining representatives is unchallenged.

PN399

THE DEPUTY PRESIDENT: All right. Let me distil this down to what my particular concerns are with your case.

PN400

MR WAINWRIGHT: Yes.

PN401

THE DEPUTY PRESIDENT: All right? The current - the 1992 provision does not appear in the terms of this agreement. I dare say it hasn't appeared in any enterprise agreement that's been registered since 1992. It stood as an agreement outside of the terms of what might have been the registered enterprise agreements. Okay? There's no evidence beyond that of - sorry, I'll retract that. There is a provision here which makes clear that this agreement, the terms of this agreement supersede and displace all previous agreements, both formal and informal. Okay?

PN402

MR WAINWRIGHT: Yes.

PN403

THE DEPUTY PRESIDENT: Now, I'm not sure how you can square a claim to preserve an unregistered agreement from 1992, how that doesn't conflict with 3.1?

PN404

MS McGRATH: Could I try and - - -

PN405

THE DEPUTY PRESIDENT: No, I'm pressing Mr Wainwright at the moment. You will have a chance.

PN406

MR WAINWRIGHT: We say a couple of things about that.

PN407

THE DEPUTY PRESIDENT: Yes?

PN408

MR WAINWRIGHT: First of all, the first thing we say is that reasoning accepts that the arrangement has been in place since 1992 to 8 August 2022 without difficulty, without disputation, without aggravation.

PN409

THE DEPUTY PRESIDENT: I am applying the terms of the agreement, not whether there is some broader entitlement that sits outside the agreement.

PN410

MR WAINWRIGHT: Yes, and then we have the agreement telling us very clearly that the agreement is in full and final settlement of all claims.

PN411

THE DEPUTY PRESIDENT: Mm?

PN412

MR WAINWRIGHT: And you have evidence in the jurisdictional matter that the clock-off regime was the subject of a claim. So, we say that, squarely, within the terms of the agreement, saying that you want to change from the clock-off regime of the 15-minute credit, not to clocking off on time - - -

PN413

THE DEPUTY PRESIDENT: But it's not a term that's contained in the agreement. The express provision in the agreement is that employees will be required to work an average of 38 hours per week.

PN414

MR WAINWRIGHT: Yes.

PN415

THE DEPUTY PRESIDENT: Right? Not 37, not 36.5, it's 38.

PN416

MR WAINWRIGHT: Yes.

PN417

THE DEPUTY PRESIDENT: And there's nothing in the agreement that goes to wash-up times and allowing people to leave site early. I'm trying to reconcile the absence of provisions dealing with that with 3.1.

PN418

MR WAINWRIGHT: And I think part of that involves looking at what is work. So, what's accepted here by all parties - - -

PN419

THE DEPUTY PRESIDENT: No, work is work performed on an employer's site, not leaving 15 minutes early. That's what I want you to focus on. How can I square people leaving 15 minutes early with the express obligation that they work an average 38 hours per week and 3.1?

PN420

MR WAINWRIGHT: Because their wash-up is work.

PN421

THE DEPUTY PRESIDENT: That's stretching it, Mr Wainwright, if I can be blunt. Leaving 15 minutes early - right - and saying what they do when they get home is work, that is stretching it.

PN422

MR WAINWRIGHT: Well, what is the alternative? The alternative is you stay and you do your ablutions at work. The work is the same. The only thing that's changed is the location.

PN423

THE DEPUTY PRESIDENT: I don't accept that submission, Mr Wainwright. Work is work performed at the employer's premises in this case. I'm not saying what the employer has done is right, wrong or indifferent. What I'm trying to square is people leaving site early, claiming that they're working, you're saying that they're now working at home, right? I'm trying to square that with a very clear statement in the agreement which neither party have addressed me on, in 3.1.

PN424

MR WAINWRIGHT: Well, we say we have addressed you, in relation to clause 13.

PN425

THE DEPUTY PRESIDENT: I know that. I know that, and I'll come to that. 3.1 has not been addressed. So are you saying that there is no tension between an express provision that requires the working of a 38 hour week with an express provision which says this agreement excludes all prior agreements, formal and informal?

PN426

MR WAINWRIGHT: Well, Deputy President, as you say, neither party has addressed you on the inter-relationship between clause 13 - - -

PN427

THE DEPUTY PRESIDENT: I can't look at clause 13 in isolation, I have to look at the entire agreement.

PN428

MR WAINWRIGHT: I accept that, unreservedly. It may be, Deputy President, that the way to get a considered response to the question - - -

PN429

THE DEPUTY PRESIDENT: No. I'm giving you an opportunity to address me now on it.

PN430

MR WAINWRIGHT: And you won't give me an opportunity to put a considered position to that.

PN431

THE DEPUTY PRESIDENT: This matter has been ongoing for six months. I expect parties to be in a position to address me on interpretation of the agreement.

PN432

MR WAINWRIGHT: Yes. Well, the first thing that I would say is, in terms of the hours of work, that the 1992 wash up regime includes a 15 minute credit.

PN433

THE DEPUTY PRESIDENT: I'm talking about the hours of work under this agreement.

PN434

MR WAINWRIGHT: Yes.

PN435

THE DEPUTY PRESIDENT: Thirty-eight hour week. How do I reconcile that requirement, which is an express requirement in the agreement, with people knocking off 15 minutes early?

PN436

MR WAINWRIGHT: Because they're not knocking off 15 minutes early.

PN437

THE DEPUTY PRESIDENT: They're leaving site potentially 15 minutes early.

PN438

MR WAINWRIGHT: They're leaving site potentially 15 minutes early, to do their ablutions at home. That is dealt with, in the timekeeping system of the company, by crediting in the 15 minutes.

PN439

THE DEPUTY PRESIDENT: All right. So you're saying they're not knocking off 15 minutes early.

PN440

MR WAINWRIGHT: No, they're merely clocking off.

PN441

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

PN442

MR WAINWRIGHT: In relation to 3.1, Deputy President, and you're focussing, I believe, on the last sentence?

PN443

THE DEPUTY PRESIDENT: Yes. You can see the capacity for past grievance to be preserved.

PN444

MR WAINWRIGHT: Yes. I'm wondering, Deputy President, if the no extra claims clause is a mechanism for preserving those past agreements and arrangements.

PN445

THE DEPUTY PRESIDENT: Well, that might turn on how you interpret 3.13.

PN446

It's interesting, the provisions of the no extra claims clause are different to other no extra claim clauses that I've seen, in that other no extra claim clauses can refer to both terms of the agreement and matters not dealt with in the agreement, whereas this is silent on that.

PN447

MR WAINWRIGHT: It's solid but different as well, in a different way, Deputy President. We say that it goes beyond matters in the agreement to matters that were subject of a claim, which is broader than matters in the agreement.

PN448

THE DEPUTY PRESIDENT: I'm not sure I necessarily accept that, because the agreement is the product of the outcome of bargaining, which includes all claims. So the agreement is the final product of bargaining, okay?

PN449

MR WAINWRIGHT: Yes.

PN450

THE DEPUTY PRESIDENT: Clause 3.1 makes clear that that agreement, having been reached, constitutes the exclusive instrument setting out terms and conditions.

PN451

Now, one construction of clause 13 might be that it's only changes to those instruments, that instrument that is covered by 13, because it makes no express reference to terms not dealt with in the agreement. It refers to claims going to the making of the agreement.

PN452

MR WAINWRIGHT: Yes, going to, but not included in. So I think, logically - -

-

PN453

THE DEPUTY PRESIDENT: Where does it say that?

PN454

MR WAINWRIGHT: It says, 'Subject to claims by parties covered by this agreement'.

PN455

THE DEPUTY PRESIDENT: So your submission is that if a claim has been made to include a particular provision in the agreement, even though that provision ultimately doesn't find its way into the agreement, then the employer can't, subsequently, do something in relation to a matter not covered in the agreement?

PN456

MR WAINWRIGHT: What we're saying is, Deputy President, that the logic of the position that you've outlined falls down.

PN457

THE DEPUTY PRESIDENT: That's one construction. One construction, not the logic I necessarily hold to, but one construction.

PN458

MR WAINWRIGHT: No, I understand. For the purposes of discussion, Deputy President. In an agreement process both parties are going to rock up with a log of claims. There's no expectation, from either party, that their entire log of claims will find its way into the agreement, either in the form that they want or included at all. But what this no extra claims clause does is it says, 'We have fully and finally settled all of the claims'.

PN459

So we talk about the - and it was our submission, in the jurisdictional matter, you decided on a different basis. But we said, in the negotiation phase of this agreement we have a claim to bring the 1992 wash up regime into the document. Metro opposed that, as their perfectly entitled to.

PN460

THE DEPUTY PRESIDENT: My counter is, 'So what' So what?'. The agreement is the final product of the negotiation.

PN461

MR WAINWRIGHT: Yes.

PN462

THE DEPUTY PRESIDENT: It doesn't include a provision dealing with wash up time. It includes a provision dealing with 38 hour weeks. It includes a provision saying, 'All other agreements, formal or informal, forget it', right.

PN463

MR WAINWRIGHT: Yes.

PN464

THE DEPUTY PRESIDENT: So the fact that a claim may have been made and rejected, how does that alter the effect of the no extra claims clause? The no extra claims clause normally is directed to the parties not making claims over and above the terms of the agreement, or other matters, if it's specified in the no extra claims clause, but it doesn't say that.

PN465

MR WAINWRIGHT: It does, Deputy President, and you said, 'Normally'. In regard to this clause, what this clause tells us it's in full and final settlement of all matters raised, subject to claims. So let me put a scenario to you. We say, in bargaining, 'We want to get the 1992 wash up regime rule and put it into the agreement so that we don't have these discussions, it's in the agreement'. Metro says, 'No, we don't like that'. They don't say, 'No, we don't like that and we think the credit should be altered from 15 minutes to five', they don't say that. They say, 'No, we don't like that, we won't include that in the agreement and the 1992 regime goes on'.

PN466

THE DEPUTY PRESIDENT: But if you had a provision in the agreement which specifically preserved the 15 minute wash up time, as was reflected in the 1992 agreement, then there would be no argument.

PN467

MR WAINWRIGHT: Yes.

PN468

THE DEPUTY PRESIDENT: That changing that would be an extra claim. There'd be no argument - - -

PN469

MR WAINWRIGHT: Absolutely.

PN470

THE DEPUTY PRESIDENT: - - - because the employer couldn't walk back from a specific provision in the agreement. Herein lies the problem. It's not a provision in the agreement.

PN471

MR WAINWRIGHT: We say that there is a provision in the agreement and to allow Metro to do what they have done, as at 8 August, is effectively to rewrite the agreement. It's effectively to rewrite that this agreement is not in full and final settlement of all matters that were subject to a claim.

PN472

THE DEPUTY PRESIDENT: All right, I'll use another scenario. If the employer sought to unilaterally increase the average hours of work from 38 to 39, okay, when the agreement provides for a 38 hour week, again that would clearly be an extra claim, which would not be permitted by clause 13. I'd agree, there'd be no argument, all right. But what's not being sought here is an increase in the average hours of work, from 38 to 39, it's not being sought, is it?

PN473

MR WAINWRIGHT: Well, I'll say to you it is.

PN474

THE DEPUTY PRESIDENT: No. Well, I'm putting a proposition to you that an increase in the average hours of work, beyond 38, aren't being sought.

PN475

MR WAINWRIGHT: I'll say to you that I believe what is being sought here is an increase in the hours of work.

PN476

THE DEPUTY PRESIDENT: But not beyond 38?

PN477

MR WAINWRIGHT: Not beyond 38. We have no dispute, under the hours of work clause of the agreement. We have a dispute, under clause 13. We say that this is an extra claim that the extra claim goes to the quantum of the credit. So it's not a dispute about do you clock off on time - - -

PN478

THE DEPUTY PRESIDENT: In simple terms, it's a dispute over the operation of the 1992 agreement, which is not reflected in the terms of this agreement.

PN479

MR WAINWRIGHT: That's accurate but an incomplete assessment of our case.

PN480

THE DEPUTY PRESIDENT: All right.

PN481

MR WAINWRIGHT: So the accurate and complete assessment of our case is that we made a claim in arriving at this agreement. The claim was to include the 1992 wash up regime in the agreement, so that we didn't have disputes of this nature, so that we didn't have future depot managers come in trying to wind back conditions, and because we made that claim and because Metro arrived at the document that we have here, that was voted on, and because they allowed the 1992 regime to go on unfettered and unchanged, after that bargaining - - -

PN482

THE DEPUTY PRESIDENT: Well, that's a different argument about whether it's part of the contract of employment and there's a line of case authority which deals with that. That's a separate point, okay. Now, you may wish to argue that, and that's fine, but I'm focusing on the terms of the agreement at this point.

PN483

MR WAINWRIGHT: Yes, and I think my friend will come to some of those arguments once I'm concluded. But we do say, Deputy President, that there is no need for you to seek to arrive at complete unity between the terms of 3.1 and clause 13 of the agreement. There's no need for you to do that. It's not unusual for a document of this nature, put together by non-legal practitioners, to have such internal tensions, if you conclude that there are, in fact, internal tensions, which is not a point that we concede.

PN484

THE DEPUTY PRESIDENT: I don't know how you can say that there is no tension, I really don't, because it can't be said to be more explicit than it is. It excludes - it excludes prior agreements.



PN485

MR WAINWRIGHT: If I say clause 13 is equally explicit, where does that leave us?

PN486

THE DEPUTY PRESIDENT: Well, I have to resolve that. As I say, neither party have led evidence that goes to the objective intention of the parties when they negotiated these agreements. Normally, with an argument over an interpretation of agreement, I'd expect parties to do that, but they've not, unhelpfully.

PN487

What did the parties intend by clause 13, by that meaning? There's no evidence before me as to what the objective intention of the parties were.

PN488

MR WAINWRIGHT: But, Deputy President, wouldn't you only need that objective intention evidence if the provision itself was unclear?

PN489

THE DEPUTY PRESIDENT: The provision is unclear to me, Mr Wainwright.

PN490

MR WAINWRIGHT: Which aspects of the provision are unclear?

PN491

THE DEPUTY PRESIDENT: Well, specifically, it doesn't make clear that the no extra claims clause is directed to either the terms of the agreement only or to the terms of the agreement and matters covered not by the agreement, which other no extra claim clauses do say. So there is ambiguity, in my view, in relation to the meaning of that clause.

PN492

MR WAINWRIGHT: Deputy President, I can only submit that there is no ambiguity in the words, 'Matters subject to claims'.

PN493

THE DEPUTY PRESIDENT: All right, I hear that submission. I've just made the observation, in almost every dispute that comes before me, Mr Wainwright, I hear evidence about what the intention of the parties was when they negotiated the provision which is the subject of the dispute, and I've not got that from either party in this matter.

PN494

If I'm – if you're sensing irritation, I'm irritated by both parties failure to do so.

PN495

MR WAINWRIGHT: Deputy President, we can address that matter.

PN496

THE DEPUTY PRESIDENT: No. This has been going for several months. Parties have had an opportunity to file material that they thought was relevant to the dispute before the Commission. If they've chosen, for whatever

reason, not to do so, that's a matter for them, but I'm not going to delay determining this dispute.

PN497

MR WAINWRIGHT: Well, you do say, 'It's a matter for the parties'. I say it's a matter for Metro to raise that concern under clause 3.1 and they have not done so. We brought a dispute - - -

PN498

THE DEPUTY PRESIDENT: Well, I'm giving the parties an opportunity to address me now, and I'll give the same chance to the employer, to address me now on the clauses which I believe are relevant to determining whether this is or isn't permitted. Whether the change is or isn't permitted.

PN499

MR WAINWRIGHT: Yes. From a procedural fairness perspective, Deputy President, we bring a case, under clause 13 and we address that case. We understand that procedurally the respondent is perfectly entitled to raise matters, under 3.1 - - -

PN500

THE DEPUTY PRESIDENT: And so is the Commission.

PN501

MR WAINWRIGHT: - - - and so is the Commission. But, from a procedural fairness perspective, we should be afforded the opportunity to properly respond to that.

PN502

THE DEPUTY PRESIDENT: I'm giving you that chance now.

PN503

MR WAINWRIGHT: In my submission, a proper response to the - - -

PN504

THE DEPUTY PRESIDENT: I'm giving you that chance now, Mr Wainwright.

PN505

MR WAINWRIGHT: I understand, but I do need to make this submission.

PN506

THE DEPUTY PRESIDENT: I understand the submission. The fact that parties have failed to do their jobs, and I'm being as blunt as I can.

PN507

MR WAINWRIGHT: I enjoy your bluntness, Deputy President, I have no difficulty with that at all. I point out to you that our job was to run the dispute that we saw. The respondent's job is to run - - -

PN508

THE DEPUTY PRESIDENT: In running the case as you saw fit you've ignored key provisions.

PN509

MR WAINWRIGHT: And you have brought those provisions to my attention. And, Deputy President, I submit to you that we should be entitled the opportunity to put a considered response to you. That's my submission and I understand that you've already ruled on that.

PN510

THE DEPUTY PRESIDENT: This has been going around for 12 months, Mr Wainwright.

PN511

MR WAINWRIGHT: Yes, it has.

PN512

THE DEPUTY PRESIDENT: If you couldn't, as an experienced official, put yourself in a position to identify basic rules of interpretation, require one to consider the terms of the clause within the context of the agreement, right, how could 3.1 not be relevant to that?

PN513

MR WAINWRIGHT: Well, Deputy President, I need to be blunt here.

PN514

THE DEPUTY PRESIDENT: Yes, I appreciate it.

PN515

MR WAINWRIGHT: It was not relevant because it wasn't raised by the respondent. That's why it wasn't relevant.

PN516

Now, in us, as applicants, bringing a matter we're entitled to bring the matter as we see it. We are then obligated to respond to what the respondent puts.

PN517

THE DEPUTY PRESIDENT: All right. I understand the submission. You're putting to me that I should now give you a further opportunity to make submissions on that point. I'll consider that submission.

PN518

MR WAINWRIGHT: Thank you.

PN519

So, Deputy President, what we say is what has occurred here is the credit in time that existed, since 1992, has been altered from 15 minutes to five minutes. It's about making people wait to leave site to perform their ablutions at home. It's not about work hours, it's not about productivity, it's not about any of those matters.

PN520

We say that the time for the company to raise concerns with the 1992 agreement was when the claim was raised in negotiations. Now, in negotiations the response was, 'We don't think that matter should be put into the agreement'. The response was not, 'We don't think that that 1992 arrangement should continue'. That was

performed by fiat, on 8 August 2022, in a unilateral, and you heard the very clear evidence, from Metro today, they did not have the agreement of the AMWU.

PN521

There's no evidence about consultation absent an agreement. Consultation doesn't need an agreement, but they certainly did not have the agreement of the AMWU to institute that change. We say that by unilaterally instituting that change they breached clause 13 of the agreement.

PN522

Deputy President, I want to address you about Metro's evidence today. One aspect of it went to employees have brought it on themselves to leave site early. We say that that flies in the face of the clear evidence that from 1992 employees were entitled to clock out, to clock out, and that they were given a credit. It didn't affect the overall hours of work, the hours of work was the same. The credit was there to make it clear that those hours had been worked.

PN523

In fact, Deputy President, if you follow that logical argument through to today, the hours of work clause does not match the hours that are worked. Because what you've heard today is, instead of having a credit of 15 minutes, workers can access a credit of five minutes. So that, in our view, definitively demonstrates that this is not about the hours of work and you've heard, definitively, that it's not about the productivity.

PN524

THE DEPUTY PRESIDENT: I know it's not about the hours of work because the hours of work are supposed to be 38 and the parties have been working under an arrangement, since 1992, which has permitted people to pull up short of that, I understand that.

PN525

MR WAINWRIGHT: To receive a credit.

PN526

THE DEPUTY PRESIDENT: Yes, yes, yes.

PN527

MR WAINWRIGHT: So the debate today is about the quantum of the credit.

PN528

THE DEPUTY PRESIDENT: That's not the debate I'm dealing with. Whether it's five, 15, 10, seven, eight or nine, what I'm dealing with it whether a change to what may have been the arrangement, for a longstanding time, is permitted by or not permitted by clause 13.

PN529

I know there's a focus on the five versus 15, that won't be my focus. My focus is on whether any change is permitted by clause 13.

PN530

MR WAINWRIGHT: We encourage you to reconsider that view because we think that the change from five to 15 demonstrates that it is the credit that has been altered. The credit was a - - -

PN531

THE DEPUTY PRESIDENT: I understand what you're asking me. But whether a change from 15 to five, or 15 to nothing, the argument would be the same. The argument would be that that change, whether it was by 10 minutes or whether it was by 15 minutes, was contrary to the no extra claims clause. It's just the extent of the change that's occurred.

PN532

Now, you would say, I suspect, that it's because it's not a productivity issue, the fact that the five minutes knocking off early is permitted, means their argument has no merit, I understand that. But I'm looking at whether any change to the arrangements that were in place in 1992, restated in 2012 and 2018, whether that constitutes an extra claim, whether it's 10 minutes, five or 15.

PN533

MR WAINWRIGHT: Yes.

PN534

THE DEPUTY PRESIDENT: So that's the question I'll be answering, does it constitute a change that is permitted, or not.

PN535

MR WAINWRIGHT: Yes. And we think that it assists that consideration if you take into account the evidence of Mr Hilbert, utilising the mechanisms of the 1992 agreement, to suspend the arrangement for two week - - -

PN536

THE DEPUTY PRESIDENT: I understand that.

PN537

MR WAINWRIGHT: - - - on 24 June 2022.

PN538

So the way that we characterise that, Deputy President, is that that demonstrated, effectively, that the 1992 agreement was on foot, that the provisions of it were clear to the manager and that the manager was prepared to utilise the agreement to what he saw as being his benefit, which then goes to the announcement, on 8 August 2022, to change the credit arrangement. We say that that is what demonstrates that this is an extra claim, very clearly.

PN539

Deputy President, I might say a few quick things about the CSL case that you've been taken to. We say that the CSL decision stands for attempts to vary a right. We say that what's clear, from Mr Twomey's evidence, is that his rights have been varied and his pay has been reduced.

PN540

So we say that paragraph 21 of the Metro submissions, at page 136, are not accurate. They don't have to clock off on time, they can clock off five minutes early. So it's not the concept of clocking off early that's under challenge, it's the quantum of time, as I've said.

PN541

THE DEPUTY PRESIDENT: The CSL agreement actually, however, was focused on a provision that specifically permitted something but didn't compel something. I'm not sure it's on foot with the circumstances of this case.

PN542

MR WAINWRIGHT: We say, for that reason, and for the reason that I've raised, that it's not.

PN543

In terms of the - I don't know how to say it, is it Coregas, or Corregas? That was a matter where there were almost no records. That was a matter that pertained to an arrangement.

PN544

THE DEPUTY PRESIDENT: It might be said to be somewhat analogous, although there are records of the agreement, although there's not much evidence going to anything beyond that.

PN545

MR WAINWRIGHT: Yes. Well, we say that we're a world away from where they were, in Coregas, in that we do have the documentary evidence, which is often thought to be superior to the evidence of what people recall from negotiations.

PN546

So we say that the other difference between that matter and our matter here is that the Coregas arrangement, the superannuation arrangement, did not apply across an entire workforce or an entire depot or workplace, it pertained only to a small number of operators. We say that that is clearly very different in nature to the dispute before you today and, again, that decision should be distinguished.

PN547

Further, and for completeness, we say that you - - -

PN548

THE DEPUTY PRESIDENT: I note that in both those cases, however, I think the no extra claims clauses were different.

PN549

MR WAINWRIGHT: Yes.

PN550

THE DEPUTY PRESIDENT: Quite different, because they talked about extra claims relating to conditions of employment, or any other matters related to the employment of the employees, whether dealt with in the agreement or not.

PN551

MR WAINWRIGHT: Yes.

PN552

THE DEPUTY PRESIDENT: It leaves not doubt that it covers all things, essentially, relating to the employment relationship.

PN553

MR WAINWRIGHT: Yes. And we hasten to add here that there is no doubt that this no extra claims clause includes claims brought up in negotiations by the negotiating parties. So, yes, they are different, each has their own components and we say that the dispute falls squarely within the no extra claims clause that we're referencing here.

PN554

THE DEPUTY PRESIDENT: All right.

PN555

MR WAINWRIGHT: Deputy President, if you have any other - - -

PN556

THE DEPUTY PRESIDENT: Just one question, if I give you extra time to make submissions on 3.1 would five working days be enough?

PN557

MR WAINWRIGHT: Yes.

PN558

THE DEPUTY PRESIDENT: All right, thank you.

PN559

MR WAINWRIGHT: Thank you.

PN560

THE DEPUTY PRESIDENT: Ms McGrath?

PN561

MS McGRATH: Thank you, Deputy President.

PN562

Yes, the no extra claims clauses are different from Coregas and the current one, but I think the principles that are enunciated in the cases can be transferred. So we say that the matter was raised in discussions, so it was a claim that was discussed around bargaining, so it became a claim that fell within the clause. But after that, if we look at a claim, it was a condition of employment. Once it reaches the hurdle of being a claim within our clause, the principles of how you treat a condition of employment becomes relevant.

PN563

So no extra claim clauses, in general, they cover conditions of employment, not just conditions that are in enterprise agreement.

PN564

THE DEPUTY PRESIDENT: Is that right, in the context of the current - going to clause 13 again, 'The agreement is in full and final settlement of all matters subject to claims by the parties'. So it appears to be claims directed to the establishment of an agreement, okay? It doesn't seem to be claims related to unregistered agreement, the agreement is the product of all claims, seemingly directed to the establishment of the agreement.

PN565

And, 'For the life of agreement no further claims'. Again, does 'claims' there have the same meaning, that being claims relating to the agreement, as used for the first - used for the term 'claims' where it first appears in the clause?

PN566

MS McGRATH: I don't see there's any reason why it needs to be so boxed in. There's no words that narrow it to that. 'No further claims will be made or supported by either of the parties', I don't see how it has to be narrowed to the first clause.

PN567

THE DEPUTY PRESIDENT: 'Claims' seem to be directed to claims in relation to the agreement, not claims at large, because it doesn't use the language of, as I referred to in relation to the CSL case.

PN568

MS McGRATH: I don't think – thank you, Deputy President. I don't think there's anything that says that the claims have to have been raised in those negotiations. 'No further claims will be made or supported', so the agreement is in full and final settlement of all matters that were subject to claims. So everybody sat at the table and they discussed all the matters that related to claims that were going to be covered by the agreement, and here it is. We have reached agreement on all these claims.

PN569

THE DEPUTY PRESIDENT: You can see why I'm unbemused by the lack of evidence on what this clause means, because I know Mr Wainwright says it's clear as the nose of my face, I'm not so sure.

PN570

MS McGRATH: Thank you, Deputy President.

PN571

So, 'For the life of the agreement no further claims will be made or supported by the parties'. So I would say it's claims that are over and above the ones that were negotiated, because they would be further claims.

PN572

THE DEPUTY PRESIDENT: I understand that, but are they claims that go to matters just dealt with in the agreement, or can it be related to - - -

PN573



MS McGRATH: I'd say the word 'further' extends that, Deputy President.

PN574

THE DEPUTY PRESIDENT: All right.

PN575

MS McGRATH: The life of the agreement those further matters will be made in support of other parties. So we can't turn around and now say, 'We want the workers to be only working a 33 hour week'.

PN576

THE DEPUTY PRESIDENT: I understand that, just as the employer can't demand a 40 hour week.

PN577

MS McGRATH: Yes. Yes, Deputy President. So we would say we've met the hurdle of coming within the clause and if we have, then we say the Coregas decision can be analogous, in terms of principles.

PN578

So the principle then looks at whether if there is an extra claim, and we say that they're demanding an extra claim because they're trying to take away the entitlement to - - -

PN579

THE DEPUTY PRESIDENT: In Coregas it was the cessation of the additional superannuation contributions - - -

PN580

MS McGRATH: That's correct, Deputy President.

PN581

THE DEPUTY PRESIDENT: - - - which the Deputy President in that matter was assessing whether that constituted an extra claim.

PN582

MS McGRATH: Yes, that's correct, Deputy President. And the assessment that Easton DP undertook, in order to clarify whether it met the hurdle of being a claim, in the terms of an extra claim clause, they looked at various case law and there was the differentiation of whether there was a discretionary benefit or there was a claim that could be characterised, in terms of being a potential benefit.

PN583

THE DEPUTY PRESIDENT: Yes.

PN584

MS McGRATH: As Mr Wainwright was saying, we think – we understand the contractual benefit, initiated in 1992, more substantially can be seen as a contract.

PN585

If we have a look at the document itself, so that would be page 96, it says, 'These suggestions that were raised by the site committee, the site implementation

committee, have been agreed to and they will be implemented'. So the first, 'Tradesmen are to assume more responsibility for their work by signing off'. So we say that the tradesmen, they gave something to get this extra entitlement.

PN586

THE DEPUTY PRESIDENT: I understand that it may have been in relation to the bargain at that time, I understand.

PN587

MS McGRATH: Yes. So we say that there's an element of consideration in that wording. 'We're going to give you these 15 minutes, the workers are going to be more responsible, they're going to have to sign off on the work they did'. So that raises the level of the quality of their work. So we say there's consideration in this contract.

PN588

We also say that the terms are very clear. The terms say that you can clock out, with to my mind means you clock out.

PN589

THE DEPUTY PRESIDENT: Well, that doesn't say, with respect, you can leave. I mean I'm aware of the history of wash up time, having been working night on 40 years.

PN590

MS McGRATH: Certainly, Deputy President.

PN591

THE DEPUTY PRESIDENT: I've never come across a wash up time provision that permitted people to leave early, until this matter.

PN592

MS McGRATH: Yes, Deputy President.

PN593

THE DEPUTY PRESIDENT: So it's somewhat unique.

PN594

MS McGRATH: I agree. Well, I don't agree I have your experience, but I'm prepared to accept that it is unique.

PN595

So we say that there's consideration, the terms are clear and it's signed off by the five people on the site implementation. So there's an intention to create legal relations.

PN596

THE DEPUTY PRESIDENT: And re-signed by Mr McLeod, in 2012.

PN597

MS McGRATH: Yes. So we say that it did - unlike the superannuation provisions in the Coregas case, that this is different because it does meet the

hurdle of being a contractual entitlement. That's fallen out by the way it went on for the 30 year period, the way it was re-negotiated, in 2012 and again in 2018, and the fact that the policing of it has stayed the same.

PN598

If we have a look at this document in 1992, after suggestion 3(a), if we go down about four paragraphs, four or five paragraphs, 'This system will be policed by supervisors', yes. What they were policing was whether the entitlement - they couldn't leave before 15 minutes - - -

PN599

THE DEPUTY PRESIDENT: No, it doesn't say that. It says, 'If staff abuse the entitlement by cleaning up before the 15 minute credit', right. So, again, if one looks at the words, it suggests that - - -

PN600

MS McGRATH: Or 'leaving work which could have been finished in the 15 minutes prior to the' - - -

PN601

THE DEPUTY PRESIDENT: That's separate. 'Or leaving work which could have been finished in the 15 minutes, without a valid reason'.

PN602

MS McGRATH: Yes. But one must see that - Mr Twomey's evidence as not cross-examined - - -

PN603

THE DEPUTY PRESIDENT: Yes, I understand.

PN604

MS McGRATH: - - - so if we look at Mr Twomey's evidence, he says, 'I knew all this time that I could leave the depot'. So if the respondent wanted to challenge that evidence, they had Mr Twomey here today and they could have cross-examined him on that.

PN605

THE DEPUTY PRESIDENT: I understand that.

PN606

MS McGRATH: But he's saying, 'No, everybody knew you could walk out the door'.

PN607

THE DEPUTY PRESIDENT: But that's a different - that may have been the practice that's evolved over time. What I'm focusing on is what that original agreement permitted, okay, and I don't have direct evidence that the original agreement permitted persons covered by it to leave 15 minutes early. The evidence is that what's occurred over time is, in fact, that people have left early.

PN608

MS McGRATH: Yes. But we'd have to say that Mr Twomey's a longstanding employee of many, many years, at the site, in fact his old experience is you can walk out the door. So if we look at the customer practice, that's how this entitlement would work.

PN609

Even when we had Mr Hilbert in the stand, I said to him, 'Did you police people washing up off site, before the recent emails that came through?', and he said, 'No'. It's my understanding his response was, 'No'. So nobody has ever policed whether it was a problem with them going off site to clean up, until recently.

PN610

So if the respondent has never questioned that, until the last six or 12 months, one could pretty well assume that that was the understanding of how this agreement, this contractual entitlement, operated.

PN611

THE DEPUTY PRESIDENT: Yes.

PN612

MS McGRATH: Do our submission would be that the wording, under the agreement, does stretch out to the further claims and then once we say, 'Yes, there's no further claims than - we can't make any further claims than we discussed at the table, you're not allowed to do that', but they have done that. They've made a further claim. 'A further claim' is a very broad statement.

PN613

THE DEPUTY PRESIDENT: Well, the further claim goes to an unregistered agreement.

PN614

MS McGRATH: Well, a further claim could be lots of things but, in this case, it's a further - well, if we look at the Coregas decision, they say - could I draw your attention to it?

PN615

THE DEPUTY PRESIDENT: Yes. It was a different no extra claims clause.

PN616

MS McGRATH: I understand that, but I'd say, because 'further claims' is broad. They're talking about what would constitute - they do make the point that the no extra claims clauses are directly focused on these conditions of employment that sit outside the bargaining. Clearly if it's in the agreement - - -

PN617

THE DEPUTY PRESIDENT: No, no, no, no, sorry. That was said in the context of the particular provision that was the focus of the no extra claim dispute, which specifically referred to matters outside of the terms of the agreement.

PN618

MS McGRATH: But by their nature they do refer to matters outside the agreement. There's no point - we wouldn't be here arguing if there was anything on the agreement.

PN619

THE DEPUTY PRESIDENT: My role is to interpret the terms of the agreement.

PN620

MS McGRATH: Yes, certainly, Deputy President.

PN621

THE DEPUTY PRESIDENT: I'm just focusing on the difference between the provisions that were the subject of the dispute in Coregas versus the provision which is the subject of the dispute in this matter.

PN622

MS McGRATH: Yes, Deputy President. So we're saying - - -

PN623

THE DEPUTY PRESIDENT: I understand the submission that you say 'claims' is broader, it doesn't just go to terms of an agreement, it can go to matters that sit outside the agreement, I understand that.

PN624

MS McGRATH: There's nothing in clause 13 to say that it is curtailed in that way. So once you've done your bargain, you've wrapped up your clause, you can't - by its nature it's looking for something beyond that, isn't it? So we say it's looking - a further claim has got to be outside of that because otherwise it would be inside.

PN625

So if it's outside of that, then the question becomes, is it a discretionary benefit or is it a contractual entitlement, in accordance with the way Easton DP has dealt with the question. If it meets the hurdle of being a contractual entitlement then it's the sort of claim that a no extra claims clause will support. It offends the no extra claims clause if there is a party to the agreement that's trying to interfere with a contractual entitlement.

PN626

THE DEPUTY PRESIDENT: Okay.

PN627

MS McGRATH: Thank you.

PN628

THE DEPUTY PRESIDENT: Mr Shaw?

PN629

MR SHAW: Thank you, Deputy President.

PN630

We say that, in reality, there's no claim, whatsoever, by Metro to abolish - - -

PN631

THE DEPUTY PRESIDENT: Sorry. How can it be said there's no claim of a change of practice?

PN632

MR SHAW: We're not seeking to abolish or change the entitlement to wash up time. The agreements, going back as far as 1992, to provide wash up time for employees, prior to leaving the site, still remain. What we're seeking to do is to get the employees to clock off after they've had their wash up, not as currently applies, where they clock off prior to going to wash up.

PN633

The reason for doing that is that, as Mr Hilbert stated, he discovered that employees are not washing up at all, that they're leaving the premises 15 minutes early. We say - - -

PN634

THE DEPUTY PRESIDENT: On the unchallenged evidence of the witness for the applicant, that has been occurring for a considerable period of time.

PN635

MR SHAW: I've got no doubt. We're not challenging the fact that this may have been occurring. What Mr Hilbert is saying is that once it came to his attention he was seeking to stop that from occurring. That employees should use wash up time for the reason for which it's provided, to wash their hands or face, to have a shower, whatever, prior to leaving the premises. So I - - -

PN636

THE DEPUTY PRESIDENT: I'm still struggling to understand what the utility of the change is, in circumstances where the concession is made that, essentially, there are limited productivity benefits. So if every employee finished work, had done their handover task, went to the washroom, completed their ablutions and then left site, let's say at or around five to, or at 7 am or 7 pm, as opposed to employees departing the site, let's say that same cohort, departing the site at a quarter to. On that analysis there doesn't seem to be any productivity benefit.

PN637

MR SHAW: I'd have to ask Mr Hilbert to comment on that, but - - -

PN638

THE DEPUTY PRESIDENT: No, that's all right.

PN639

MR SHAW: - - - I would say that if the employee is still onsite, but in the washroom and they were required for an urgent job, then we could contact them. If they've left the premises, they're in the car on the way home, there's no way of getting them to return.

PN640

THE DEPUTY PRESIDENT: I don't have any evidence before me which goes to the effect of the arrangements that had, let's say, crept in over time. So I accept

your argument that it has crept in over time. There's no evidence before me to suggest that that has been a barrier to the performance of urgent work.

PN641

MR SHAW: No. We haven't submitted evidence to that extent, because what we see we're arguing today is whether or not the change that Metro intends to make, and it's only a minor change, firstly, is it a claim, as such and, if so, does it offend the no extra claims clause in the agreement. We say that it doesn't. There's not an extra claim which could offend the no extra claims clause in the agreement. Mr Wainwright's submissions seem to dwell on the fact that somehow this was a claim made during bargaining for this agreement, but there's no evidence of that.

PN642

THE DEPUTY PRESIDENT: I'm not sure that's right. I mean the evidence that I dealt with, in the first decision, was to the effect that various officials said it had been a claim. Witnesses for the respondent were to the effect that it didn't form part of the log of claims and the documentation was provided in support of that evidence. So I don't know that it could be stated as highly as, 'The issue wasn't raised'.

PN643

MR SHAW: We you have two bargaining reps who certainly have no recollection of this matter being raised or discussed. But what Mr Wainwright seems to be arguing is that having made a claim for wash up time to be included in the agreement, if that claim was subsequently rejected and not included in the agreement that somehow that prevents that arrangement from being changed forever. If that were determined to be accurate or correct, then what it would mean is that the bargaining reps could raise a whole raft of different claims, which are rejected by the employers, but subsequently become unable to change any of those matters, for the life of the agreement.

PN644

We say that those original agreements, from 1992, reinforced by Mr McLeod, in 2012, subsequently for the Rail Tram and Bus Union, were for the provision of wash up time and there was no option, no alternative of employees leaving the premises without washing up.

PN645

THE DEPUTY PRESIDENT: Well, the evidence, I think, of the respondent was that employees weren't compelled to wash up, that was a matter for them, as I understand it, but the time was, you say, available for them to do that.

PN646

MR SHAW: Yes. Yes, there's no compulsion for someone to - - -

PN647

THE DEPUTY PRESIDENT: I'm always hesitant to be critical of those that have drafted previous agreements, because I'm sure I'll be criticised for documents I've drafted in the past, but it's less than elegantly drafted, as you'd expect.

PN648

MR SHAW: Yes, I understand that.

PN649

THE DEPUTY PRESIDENT: It's not entirely clear what was intended by the parties.

PN650

MR SHAW: Correct, I agree. I agree with you. But we still say that the logical interpretation is that employees will get 15 minutes to wash up and, presumably, I wasn't around in 1992, but presumably the reason for them clocking off and getting a credit was so when they've completed their wash up they don't have to return to the workplace and clock off, they can just leave.

PN651

THE DEPUTY PRESIDENT: I don't know what - why the arrangement was put in place, because I've got no evidence of that, but it seems passing strange that you would clock off, because normally clock stations are at the boundary of the site, in most locations. You would normally, in my experience, again, you would complete your ablutions, you'd do your wash up, pack your gear away then you'd clock off, not the other way round. It's sort of an odd arrangement.

PN652

Now, I don't have the benefit of a layout diagram to indicate why the clocking off would have occurred prior to completion of your ablutions, but it just seemed a little bit off.

PN653

MR SHAW: Ms McGrath's submissions went to the fact that somehow the wash up time has become part of an employee's contractual arrangement. We say that that's not the case. Even if you were attracted to that proposition then the contractual benefit is simply to have wash up time, 15 minute wash up time, not to be able to replace that with leaving work early as an alternative. So there's no contractual arrangement for employees to leave work 15 minutes early, even if that has been the practice.

PN654

We also say that the practice of leaving work 15 minutes early is in direct conflict with clause 54 of the enterprise agreement which goes to the hours of work. Given that this arrangement for wash up time was agreed in 1992, well before the current enterprise agreement, provided for an average of 38 hours work per week. We say that washing up at home cannot be defined, certainly not defined by Metro, as being work. It doesn't contribute to the averaging of 38 hours of work, for which the agreement provides for.

PN655

We might decide that we would employ the 15 minutes per day wash up time in the premises as being work related, but we certainly haven't gone as far as defining the washing up time at home, which is totally unsupervised. There's no evidence as to whether employees take advantage of that. They could go to the supermarket - - -



PN656

THE DEPUTY PRESIDENT: It would seem extraordinary to suggest that they'd go home and not, if they needed to clean up, wouldn't clean themselves, but I understand your argument. I mean, ultimately, you say there's little or no change, save for the fact that instead of clocking off at the commencement of the ablutions they're required to complete their ablutions before they clock off.

PN657

MR SHAW: That's correct. And the reason for that is that the employees were not using the wash up time at all, they're just leaving the premises. Had they been using the wash up time for its intended purpose, then there would be no change at all to the practice.

PN658

THE DEPUTY PRESIDENT: What do you say clause 13 actually means?

PN659

MR SHAW: My understanding of that clause is that - - -

PN660

THE DEPUTY PRESIDENT: My criticism is just as strong, in relation to the employer not having brought any evidence on this.

PN661

MR SHAW: I understand that. Accepted.

PN662

My understanding of reading that clause is that the agreement was in full and final settlement of all matters which were subject to claims by the parties covered by the agreement. At that time - - -

PN663

THE DEPUTY PRESIDENT: Maybe I'll be clearer. Does clause 13 act to prevent the employer changing arrangements, practices, policies, that sit outside the terms of the agreement?

PN664

MR SHAW: We say no. That to the best of my knowledge it was never intended that be the case. That would place - if that were the case, it would place not just Metro but, indeed, any employer who has an enterprise agreement which includes a similar no extra claims clause, it would preclude them from making any changes to any work practices, any rosters, any work arrangement whatsoever, for the life of the agreement. We say that could never have been the intention. That's just too farfetched for us to contemplate. That, irrespective of whether a matter was accepted at the bargaining - accepted as a claim but subsequently rejected, irrespective of that, there could be no change, whatsoever, to that practice. It would just prevent any change whatsoever within Metro. We couldn't just - - -

PN665

THE DEPUTY PRESIDENT: It's not unusual for employers to say, when they're confronted with a range of claims during bargaining, 'Well, don't you worry about

that, this is dealt with in policy, we don't need to include it in the terms of an agreement'.

PN666

MR SHAW: That's correct.

PN667

THE DEPUTY PRESIDENT: And those policies might provide for substantive entitlements of employees, which might be worth money, it might be in forms of various leave, not dealt with in the agreement. The no extra claim clause, without focusing on yours, certainly the ones referred to at CSL and also Coregas, seem to take into account that an employer would not be at liberty to change conditions of employment, which would constitute an additional claim. It's not confined in those - certainly in those particular matters, it was not confined to matters dealt with in the agreement.

PN668

MR SHAW: And that's understandable. I mean it would be unacceptable for an agreement to be reached and then for either party to seek to institute major change. But we say that changing the way that we administer wash up time just cannot be defined as an extra claim.

PN669

It might be argued that if we were seeking to abolish wash up time, then perhaps the applicants might want to argue that that is an extra claim, but we're not seeking to do that.

PN670

THE DEPUTY PRESIDENT: I don't think it could be argued that the effect of the change has impacted employees who - I know you say the practice has not been endorsed, approved, but a practice clearly has arisen, on the evidence of the applicant witness, that over time they've clocked off early, gone home 15 minutes early and then completed their wash up at home. That has unquestionably impacted those employees, wouldn't you agree?

PN671

MR SHAW: It's difficult for me to respond to that because it would depend on whether or not they go home and spend 15 minutes washing up at home. If they went to the supermarket or went for a beer, or whatever else, that might have an impact. But we don't know what they do in that 15 minutes.

PN672

THE DEPUTY PRESIDENT: But to just constitute a change, in relation to those employees, that rather than complete their wash up time on site they've gone off site to do it.

PN673

MR SHAW: Yes. It's a change to the practice that has been in place for some time. But we don't agree that it's a change to any previous agreement. We say that it's a practice that has crept in, has been condoned, but it's not a practice that has been accepted by Metro as being appropriate for the current environment that

we work in. We say that if the agreement was for wash up time, you use it. If there's no reason, no desire to use the wash up time, then it begs the question of why we provide it in the first place.

PN674

THE DEPUTY PRESIDENT: All right.

PN675

MR SHAW: Thank you.

PN676

THE DEPUTY PRESIDENT: Mr Wainwright.

PN677

Sorry, before you sit down, if I'm inclined to grant Mr Wainwright's request for an opportunity to make submissions on, and I'll be very narrow on what I do allow, if I do allow it, submissions in relation to the effect of 3.1, the hours of work provision and how that interacts with clause 13. If I were to grant Mr Wainwright and Ms McGrath additional time, would you be content for five days in reply?

PN678

MR SHAW: Yes.

PN679

THE DEPUTY PRESIDENT: All right, thank you.

PN680

Mr Wainwright?

PN681

MR WAINWRIGHT: Deputy President, I just want to address this concept of leaving site crept in. We reject that, we don't think that is a proposition supported by the evidence. We think that what you can see, on the face of the 1992 document, is that you can clock out and get a 15 minute credit. So the only logical explanation for that is people who decided to wash up at home could leave to do that.

PN682

THE DEPUTY PRESIDENT: I don't accept that. The evidence doesn't support that. I have evidence from the witness, which doesn't indicate how long they personally have been doing the wash up at home and leaving site. Unless I'm misreading the witness statement, I don't have any evidence going to what the practices were, in 1992.

PN683

MR WAINWRIGHT: Yes, but you - - -

PN684

THE DEPUTY PRESIDENT: I understand you to say that, on a fair reading of the agreement, that would be an inescapable conclusion.

PN685

MR WAINWRIGHT: Yes, thank you.

PN686

I just want to go to Mr Shaw's point about claims being then banning forever the company from taking action on a particular point, we say that's not correct. We say the way to have a look at that question is the claim is raised about the wash up, as you pointed out, employees are going to wash up, let's not get into that.

PN687

The claim is made about wash up, the company says, 'Don't worry about that, we won't put that into the agreement', that's a logical thing to surmise as to what happened.

PN688

What the company is then, on our reading of clause 13, banned from doing is they're banned from revisiting or relitigating that particular claim for the term of the agreement. What they are perfectly entitled to do is to come to the next negotiation and say, 'We don't like the wash up system, we want to change it', perfectly entitled to do that.

PN689

THE DEPUTY PRESIDENT: I'm struggling with that submission a bit, and I'll have to think about it. But I'm more attracted to the argument if it were the fact that the wash up time arrangements were actually reflected in the terms of the agreement.

PN690

I mean because, again, without going back through the arguments, that would - if you're right on that, then that would simply invite a bargaining representative to increase the number of ambit claims they put into bargaining, let's say 50, 100, 200 claims, most of which might be rejected and, on your argument, the employer would then be prevented from doing anything, in relation to matters that were on the log of claims. That doesn't seem right.

PN691

MR WAINWRIGHT: I would have thought that that circumstance would be dealt with in the bargaining and good faith provisions of the Act.

PN692

THE DEPUTY PRESIDENT: I see. Okay. All right.

PN693

MR WAINWRIGHT: But it's never been questioned here that the claim that we did make was made in anything other than good faith. We wanted that in the agreement. If it had been in the agreement, Deputy President, we would not obviously be here.

PN694

THE DEPUTY PRESIDENT: I understand your argument to be, and also Ms McGrath's position to be that in relation to the no extra claims provision it's not confined to the terms of the agreement. So where it talks about no extra

claims, that is a term which has broader import, such that it could cover any claim beyond that that was reflected in the agreement or beyond that that was part of the employees contract of employment. Am I correct in my understanding?

PN695

So let's use an example. Say a matter wasn't dealt with within bargaining, so the employer and the bargaining representative reach agreement. Employees have voted up the agreement. Let's say in the terms that are reflected in the current Metro Trains Agreement, then some 12 months after that agreement has been voted up the employer decides to make a change to a condition of employment that is not dealt with in the agreement and is not dealt with in a prior agreement or in an unregistered agreement. Do you say the no extra claim clause, as it's drafted in this agreement, would prevent the employer from doing that?

PN696

MR WAINWRIGHT: No. I say that the employer should, under those circumstances, go through the normal consultative program and then make a decision about the change that they - - -

PN697

THE DEPUTY PRESIDENT: So let's use, for example, the drug and alcohol clause.

PN698

MR WAINWRIGHT: Yes. They say, 'We want to implement a drug and alcohol policy that talks about random urine tests'. Consult with us about it, we say what we say. They then say, 'Here is our decision about that policy'.

PN699

THE DEPUTY PRESIDENT: As opposed to the scenario, in the present case, where you say there was an actual claim made in relation to this matter, 'There's a pre-existing agreement, from 1992, restated in 2012 and 2018, you can't change that'.

PN700

MR WAINWRIGHT: Yes, and actual implementation of it, in a live sense.

PN701

THE DEPUTY PRESIDENT: All right.

PN702

MR WAINWRIGHT: I want to highlight to you, Deputy President, that in this matter it's not an academic question. You've got evidence from Mr Twomey that he's losing money. So he's doing what he's always done, that's his evidence, he's doing what he's always done, and he's losing money.

PN703

What we know is that his workmate is doing the same as him and, for a long period of time, wasn't losing money. The evidence before you is that the only reason for that is that the RTBU hasn't lodged a dispute.

PN704

THE DEPUTY PRESIDENT: I understand that Mr Hilbert confirmed that that seeming inconsistency has been corrected.

PN705

MR WAINWRIGHT: Has been corrected but did exist, troublingly.

PN706

THE DEPUTY PRESIDENT: Yes, I understand that and I might be critical of inconsistent treatment of employees. I'm not sure that assists me resolve - - -

PN707

MR WAINWRIGHT: And I hasten to say, that's a matter about which we reserve our legal rights.

PN708

In terms of clause 3.1, we say that it's important to focus on the exclusion of prior agreements. So we heard that the 1992 agreement was being implemented. On my assertion of the facts the practice hadn't crept in, the practice was instituted from 1992. One thing that is absolutely - - -

PN709

THE DEPUTY PRESIDENT: You keep saying that, but I'm asking you, where's the evidence that supports that, beyond the words?

PN710

MR WAINWRIGHT: You have a submission from the Bar table, Deputy President.

PN711

THE DEPUTY PRESIDENT: All right.

PN712

MR WAINWRIGHT: That's what you have.

PN713

THE DEPUTY PRESIDENT: All right.

PN714

MR WAINWRIGHT: That's all that I can offer you at the moment.

PN715

THE DEPUTY PRESIDENT: Yes. I accept the evidence about the practice has been in place. That evidence was unchallenged, I accept that. But it doesn't go to what was intended and what, in fact, took place in 1992, or what got the words of the agreement.

PN716

MR WAINWRIGHT: So the import of that is after the agreement's on foot, the wash up regime is in place. So we say that then, in terms of the provisions of 3.1, it can't be seen as being a prior agreement, it's an existing condition.

PN717

Secondly, and I've touched on this earlier, the hours of work clause incorporates the meaning of the 1992 memo, such that the shifts included the 15 minute wash up time as part of the work. I said to you earlier - - -

PN718

THE DEPUTY PRESIDENT: That would require me to accept that people going home to wash up constituted work?

PN719

MR WAINWRIGHT: But as you say, Deputy President, people are going to wash.

PN720

THE DEPUTY PRESIDENT: No, I know that, that's a different - - -

PN721

MR WAINWRIGHT: People are going to wash - - -

PN722

THE DEPUTY PRESIDENT: - - - that's a different point to whether it can be regarded as work, for the purposes of an entitlement under the agreement.

PN723

MR WAINWRIGHT: Yes. We say that it's merely about that personal choice. You're going to wash here or you're going to wash at home. Either way, what is the import of that? Regardless, it's already been accepted because you can wash up here on work time, that it's work. So there's no reason why doing that particular task at home takes it away from being work, within the provisions of the agreement.

PN724

Deputy President, unless there are any other further matters, that's all.

PN725

THE DEPUTY PRESIDENT: All right.

PN726

MR WAINWRIGHT: Now, in terms of 3.1, I might just consult with my friend.

PN727

THE DEPUTY PRESIDENT: Before you do, I am inclined to allow the time that you sought, Mr Wainwright, in fairness to both parties, to make submissions on that point. So you don't need to complete submissions on that point today, if you'd rather do it in writing.

PN728

MR WAINWRIGHT: I'll take that time, Deputy President. Thank you.

PN729

THE DEPUTY PRESIDENT: Ms McGrath?

PN730

MS McGRATH: Nothing further, thank you, your Honour.

PN731

THE DEPUTY PRESIDENT: All right. Thank you to the parties. Mr Wainwright has persuaded me that it would be appropriate to allow time for the parties to make submissions, in relation to the interaction for the meaning and effect of clause 3.1, and the hours of work provision, in the context of the no extra claims clause. I will allow five working days for the AMW and the CEPU to file written submissions, in relation to that point. The employer will then be allowed five days to file any replies. If either party then wishes to be heard on that narrow point, they can make a request to my Chambers. It that clear? All right.

PN732

MR WAINWRIGHT: Yes, Deputy President.

PN733

THE DEPUTY PRESIDENT: Thank you. Is there anything else, before I adjourn?

PN734

MR SHAW: Yes, Deputy President. Whilst it's not a matter for today's hearing, I just want to put on the record the reason for the alleged discriminatory treatment of employees, in relation to docking their pays.

PN735

THE DEPUTY PRESIDENT: It's not a matter that I think is relevant. I understand there may have been reasons why you did that, but it doesn't bear upon  
- - -

PN736

MR SHAW: No, I understand that.

PN737

THE DEPUTY PRESIDENT: - - - the matter before - - -

PN738

MR SHAW: I understand that. But for the benefit of the employees here, the - - -

PN739

MR WAINWRIGHT: Deputy President, I object to this submission being made.

PN740

THE DEPUTY PRESIDENT: Yes, and I have to sustain the objection. It's not relevant.

PN741

MR SHAW: Okay. Thank you.

PN742



THE DEPUTY PRESIDENT: I mean I've got evidence from the witness, to the effect that there was inconsistent treatment. I'm not forming a view, a judgment, as to why it occurred. I've also got evidence from Mr Hilbert that the inconsistency was remedied. As far as I'm concerned, that ends the matter on that point. Thank you.

PN743

MR SHAW: Okay. Thank you.

PN744

THE DEPUTY PRESIDENT: All right, thank you. The matter is adjourned.

**ADJOURNED INDEFINITELY**

**[12.50 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**EXHIBIT #AMWU 1 WITNESS STATEMENT OF MR A TWOMEY .....PN29**  
**PETER ERIC HILBERT, SWORN .....PN52**  
**EXAMINATION-IN-CHIEF BY MR SHAW.....PN52**  
**EXHIBIT #R1 WITNESS STATEMENT OF PETER ERIC HILBERT .....PN60**  
**CROSS-EXAMINATION BY MR WAINWRIGHT .....PN62**  
**CROSS-EXAMINATION BY MS MCGRATH.....PN214**  
**RE-EXAMINATION BY MR SHAW .....PN295**  
**THE WITNESS WITHDREW .....PN309**