TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER HUNT

AG2023/320

s.185 - Application for approval of a single-enterprise agreement

Application by Cannon Hill Services Pty Limited T/A Australian Country Choice & Australian Country Choice Production Pty Limited T/A Australian Country Choice (AG2023/320)

Brisbane

10.00 AM, TUESDAY, 2 MAY 2023

Continued from 13/04/2023

PN1124

THE COMMISSIONER: Good morning, parties. I note the appearances remain unchanged.

PN1125

MR WILLIAMS: Yes. Thanks, Commissioner.

PN1126

THE COMMISSIONER: Thank you.

PN1127

MR WILLIAMS: Good morning. Commissioner, we are here for oral submissions. Both Mr Buckley and I share objective to make the brief, but I guess it will take as long as it takes.

PN1128

Commissioner, we have taken the opportunity to record the bulk of our submissions, particularly on technical legal issues in writing. I know that you have those and I know that you will be familiar with them or certainly will be by the time you come to write your decision. So I did not intend to focus on those so much, apart from of course, answering any questions you might have. But we do rely on those written submissions.

PN1129

Having done so, I wanted to make two observations of general – general observations on two specific matters before you which are the quality of the explanation and whether or not the cohort has been fairly chosen. The first proposition which is of a general nature is that perhaps despiting appearances, this application is not a contested application.

PN1130

The employer and the seven – all seven employees, urge you to approve the agreement. And I say that by proxy in relation to the employee. But you have heard from two of them. The vote was unanimous and the employees stand to gain from the approval of the agreement. From the employer's point of view, they would prefer you to approve it because naturally, they then get pay rises, and there is a sign on bonus for 3.5 per cent pay rise from the rates they are currently on. Immediately available to them. But also, and it is not any real significance to the matter, also so that they have more confidence that the business that they work in will be sustainable and profitable and that their jobs will be safe and that new jobs – new permanent jobs may become available and they have a perfectly legitimate interest in that outcome.

PN1131

And it is clear from the evidence you heard, that the employer's rationale in that regard was explained to them and they took it to heart. And they accepted it. And that is not really surprising considering that their longstanding employees no doubt – who would no doubt lived through the experience of the loss of the Coles contract and the significant reduction in the workforce which occurred after that and I will say a little bit more about that in my next observation. But for those

reasons, no doubt the employees would prefer you to approve the agreement and the bargaining representatives on their behalf have said so.

PN1132

From the employer's point of view, it wants you to approve the agreement, firstly to keep faith with the deal that it is done, of course, with its employee. But also, so that it can begin to recover in a more strategic way from the loss of the Coles contract. And the need to reshape its establishment and particularly its wage platform in order to gain new work.

PN1133

Mr Els' evidence was that the business is currently losing money. My client wanted to stabilise this part of its business which is an adjunct to its meat processing business, but nevertheless a valued and important part of its undertaking. And compete for new business in the market where it is, has been cast as a consequence of the loss of a, sounds like, a pretty favourable contract at Coles.

PN1134

It does want to increase direct employment, but – and it wants to create a situation where these and the employees that were currently there will have some job security into the future as well.

PN1135

Now, Mr Buckley's union has been granted permission to make submissions and also the core evidence and he has done so in a courteous, measured and helpful fashion. But for all of that, he's a stranger to the agreement. His union is a stranger to this agreement because they were not a bargaining representative for it. They do not represent any of the employee's industrial interests for the purpose of this agreement.

PN1136

And in relation to some of the submissions he makes, we will ask you to exercise some caution as to the merit of the submission and perhaps the reason for them. That is the first proposition Commissioner, is that this is not a contested application. The parties to this agreement want it to be approved. But of course, they recognise, accept and respect the function that the Commission has in ensuring that the statutory requirements are satisfied.

PN1137

The second proposal or proposition I wanted to make is that this process has had a bit of a bumpy history, but it is actually a model of what true enterprise bargaining should be about. The enterprise bargaining was conceived in this country to allow businesses to adapt their circumstances to their operational and economic conditions. And not to have a business throttle by an inflexible and immutable wage system where there was no capacity for that response. It has always been the case that rates can go up and rates can go down. And that that is occasionally necessary or the rates going down part is occasionally necessary in order for a business to survive and thrive if the market changes.

PN1138

And we have observed a course that that is a proposal which has been accepted and embraced in the production enterprise agreement negotiations where rates have undoubtedly gone down over time with grandfathering of employees who voted for the various changes.

PN1139

Now, my client is a meat processor and in that business, it competes with the likes of Swift, JBS, TTEC, Cargill and others. But it also has perhaps unlike some of the others, it has a manufacturing business. Work creates value and products. Hamburgers, sausages and the like. And in that business, it does not compete with those meat processors, it competes with similar businesses such as those which are conducted by Primo and Hilton who also turn meat into value-added process products.

PN1140

And historically, as we know from the evidence, it has done so with the underpinning certainty of a contract with Coles, which was a cost-plus agreement. In other words, as long as Coles was happy, it – the rates did not particularly matter too much, because my client got reimbursed for those rates. Coles paid the rates.

PN1141

Now, and in that time, during that time, the employees, it appears, also prospered because the evidence is that the rates which were applicable under the agreements which were negotiated in the context of that contract were above, in some cases, significantly above, although in other cases, as we know now, below are the rates which the real competitors, Primo, Hilton and the like, were actually paying to their employees.

PN1142

So that was a – that was fine as long as it lasted. But it did not last and what we do not know from the evidence at least is whether or not that is because Coles came to the conclusion that the price was too great and went elsewhere. Or for some other reasons, but in any event, that does not really matter. The contract was lost, the workforce was significantly downsized and the – my client was then competing not with the underpinning certainty of that contract, but rather against the market where the business really, really exists.

PN1143

And that had lead to a situation where the business was losing money. It could not get customers, could not get new customers, and the business and the jobs in it, were at risk. That is a situation which calls out – cries out – for the kind of joint problem solving that we saw in evidence here.

PN1144

As I said, it is an example of good enterprise bargaining. My client approached the problem and the joint problem solving process in an entirely principled way. The first thing it did was its research. Good market research. And that it gathered to – it gathered through whatever sources, information about what its competitors were paying its employees, presumably primarily from information

which is on the public record, but we are not certain that that is the only – only source.

PN1145

And it discovered as of course it would have known because it is a competent – they are business people, that some of the roles were well over. The odds, that is they were paying well over the odds for some of the roles, but some of the role rates were under. And that lead to the proposal which is in the agreement for approval that some rates for future employees would go up and some would go down.

PN1146

Now, I just pause to make this point. If this was an exercise in exploitation, that is the kind of manipulation which His Honour Justice Buchanan in the John Holland spoke to.

PN1147

Then one might have expected that the proposal my client put to employees having grandfathered their own rates, might provide for a rates drop across the board. It is somewhat ironic that the – an issue which has become of considerable focus particularly in relation to the information provided to employees, has become the focus, because it really is the point or the issue.

PN1148

We should, in our submission, satisfy the Commission that this is a pretty good process, because my client did not try and drop rates for some exploitative purpose, to put new employees on rates which were below the market. To the contrary, for some of them, these hypothetical future employees, the rates did go up and they did go up because my client's intention was not to be exploitative. My client's intention was to meet the market. And I think on the evidence of Mr Els to stay slightly above it. But in any event, not to drive existing or future employees below what it had conscientiously determined was the market for labour in this particularly aspect of the industry. So that is the second point to make.

PN1149

Having done the research, my client transparently took that information to the seven employees and had a respectful and very mature discussion about what to do about it. This occurred originally when Mr Els and the then general manager Molly Auvaa met with the employees in December last year before bargaining had really kicked off. I think their NRR's might have been distributed, but the bargaining had not begun. And explained candidly, and transparently what the employer itself believed it needed to do to ensure the survival of this business.

PN1150

And it is clear from the evidence given by the employees, that they understood that and not only understood it, but they accepted it. And they had – as I said, - they had every contextual background to understand it, except what the employer had said because they had seen the effect of the loss of the Coles contract on their own workforce.

PN1151

And then bargaining commenced and in a bargaining process with one employer, and only seven employees, it appears there were 10 or 11 bargaining meetings before the proposal was put to a vote. And that is a pretty big investment in consultation and negotiation with seven employees. It certainly - - -

PN1152

THE COMMISSIONER: No, sorry, are you up to 10 or 11? I thought it was put that there might have been eight or so?

PN1153

MR WILLIAMS: Yes, look that came from me, that was a mistaken view. The best evidence is the email which came from Mr Els to the employees on, I think, the 2 February and there is a summary slide which says – which points to 10.

PN1154

I think there might have been some other evidence that was 11, but I mean, that – the evidence from that email suggests there was 11, so I am not quite sure whether the two meetings during the access period were lumped in the numbers in some way. But up to the point that the 2 February email went, the record is that there were 10 bargaining meetings.

PN1155

And that is – as I said, that is a pretty big investment. That does not suggest approaches whereby, in the One Key style of situation, an employer is trying to slide an adverse proposal past a limited bunch of employees. It points to a mature and respectful and very effective process of problem solving using the enterprise bargaining framework. And we know that the employees felt comfortable in that process, because although they undoubtedly have the ability to, and they were invited to, none of them appointed an external bargaining representative because Mr Buckley's union or another one. So – and if they had, well experience tells you that employees feel uncomfortable with what's being proposed and that is the point at which they seek external support and they did not.

PN1156

So we can take it that they felt comfortable in the process and the evidence from the two employees bears that out. They were – they did feel comfortable and they felt that they were being treated in an honest way. During these meetings, the employer through primarily through Mr Els, carefully explained the employer's objective and at a point in the negotiation and before the access period in our submission on the evidence provided the employees with the rates which became schedule 2.

PN1157

Now, the evidence from Mr Els, is that the – those rates were brought to the meeting by Ms Auvaa who's no longer with the meeting. Mr Els thinks she had it on a UPS. We have been unable to locate it. But Mr Els recalls and eventually the employees also appeared to recall that the rates that became Schedule 2 were put up on a screen and were discussed at a meeting with Mr Els and probably took place on 17 January.

PN1158

So that was in the negotiation itself, although, as I said at the conclusion on the last occasion, it is really what happens in the access period in terms of explanation which matters. But it might be of some note and even concern if the issue of what the rates would be were – was broached only in a perhaps a non-transparent way during the access period. But the evidence, we would ask you to accept Mr Els' evidence that at a time prior to the access period, the rates had been put up and had been put up exactly as they eventually appeared in Schedule 2. And the evidence read as a whole from the employees suggest that is probably – that well, not – Mr Els' evidence should be accepted but – it appears that the employees who had various and evolving recollections did recall that they had been advised of the rates before the – before the access meeting – access period meeting.

PN1159

So by the end of the process, when the employees were asked to vote in February, they did understand the rationale. They clearly understood the effect, both on their terms and conditions and the effect on future terms and conditions, although, picking our way through the evidence, one might accept that there were different recollections and different understandings from the different employees. And for example, questions were put to them - Commissioner you put some of them, Mr Buckley put some of them, I put some of them – about what they understood from those meetings and there were questions about whether they'd been told that particular rates would go up 10 per cent or go up 8 per cent. They could not recall being told that.

PN1160

And probably they had not. Probably they had not been told in very specific terms what rates would go up and by what percentage. But if you take the whole entirety of their evidence and I will come to it, of course, in connection with my final issue, which is of course, that issue. As to what the employees were told and what they understood, but what they did understand was the – clearly understood the impact on them. That is, in my submission, the critical point. But they also understood, at least in general, and though, in fact by reference to all of the information, they got specific terms as to what the rates – the difference in the rates would be for hypothetical prospective employees as well.

PN1161

By the time they came to vote, they did so with a mature and sufficient appreciation of what they were voting on. And they plainly had, despite our submissions which Mr Buckley will make, they plainly had a proper interest in the establishment of a wage platform which would create a sustainable future for them as well as potential future employees.

PN1162

And the submission to the contrary that they do not – that those employees did not have a sufficient interest in the rates which did not apply to them, was really – really should not be accepted, because in this context, they had every right to be concerned about the employer's ability to maintain a sustainable business. And as I said, the wage model was not an exploitative one, it is consistent with the rates in the market including, by reference to research in respect of the competitive rates.

PN1163

As I said, and I just to conclude this point, this is what enterprise bargaining is about. It was conceived precisely to allow this. There is no boot issue, or at least none that has not been solved by undertakings. So the agreement is a good one, if I can use that term in inverted commas, against the minimum standards required by the legislation.

PN1164

But beyond that, there is no rule which says that rates have to be a particular level above the award. There is no rule which says that rates can't come down from one enterprise agreement to another and they do in this one, for some. And they do in the production agreement which covers vastly more employees at the same site. But irrespective of all of that, it is a good process. And it hopefully will lead to a good result for those employees and those – and optimistically, those to come.

PN1165

That was my second point. The third point is to deal with the objection which is still made – I do not recall, Commissioner, that you had the same concern about the issue. But Mr Buckley maintains the submission that the employees were not fairly chosen. When that submission was first made, it was made in connection with a concern that perhaps some of the logistics employees that might have been some mixing or inappropriate selection of these employees as opposed to logistic employees. But Mr Els explained that the production agreement covers logistics employees who are – who service the production work or the production aspect of the operation.

PN1166

And Mr Buckley has fairly conceded, I think, that it is not now suggested that the scope of the agreement is not unfairly chosen by reference to geography operation or organisation, which is the focus of section 186, subparagraph (3) at sub-section (3)(a). So in other words, it is at least conceded. Commissioner, you will have to make up your own mind about it, of course, but it is not contended by the union that the scope of the agreement is inappropriate by reference to those factors.

PN1167

And that would be a pretty tough submission to make, because this is a business which divides along completely orthodox operational lines. There is a production workforce, and they have their own agreement. There is a maintenance workforce and it has its own agreement, and then because this business, this meat processor, unlike many others, also has a value-add manufacturing business, there is an agreement which covers those – that workforce. And it has ever been so, or at least in the history relevant to this matter.

PN1168

There has always been a manufacturing agreement. In past occasions, Mr Buckley, the union has been a bargaining representative for it, and it has always been put forward with – to the Commission with the same scope, practically speaking as the 2023 agreement now before you.

PN1169

And the rhetorical question to be asked is that if these employees were not fairly chosen, where would you put them? You would not put them in the maintenance workforce. You would not put them with the production workforce which is a completely different operation. And where the remuneration structure is substantially at peace rate, the remuneration structure, it does not apply – it never has in manufacturing.

PN1170

And almost any other configuration that you could think of would mean that they would not be fairly chosen. If they had been lumped in with the production workforce, which appeared to be an early suggestion, well, the production workforce would overwhelm their numbers. And they would become an afterthought. So it is appropriate they'd have their own enterprise agreement and of course my client negotiated with all of the employees who were within the manufacturing business. He did not for example, which might excite some attention, it did not, stack the workforce with casual employees two weeks before the bargaining commenced. Because it had some agenda which was not an agenda which the permanent workforce would have – would have aligned with. It did not convert some of the – the labour hire employees into permanent employees for a short period of time, because it thought they might be more amenable to negotiation. Just negotiated with the workforce it had.

PN1171

So it would be very hard to make a solid argument that this work – that the workforce or the scope of the enterprise agreement meant that the employees were not better chosen. Remembering of course that from AeroCare, the current employees are irrelevant. What's relevant is the scope of employees that the agreement might cover in accordance with its coverage clause.

PN1172

And that coverage clause is and has always been in the predecessor agreement limited to the manufacturing business. So that is – and I think Mr Buckley now accepts that basis of objection falls away having regard to Mr Els' evidence. But there is a continuance in the AMIEU submission. They were not fairly chosen because there was essentially some unfair manipulation of the numbers or that the employers were asked to do something unfair. It is not a principle known to the Fair Work Act.

PN1173

I will come to the issue of – sorry, unless it goes to the issue of whether or not the employees had the moral authority to make other agreement in the first place, which is the One Key point. But in terms of whether they are fairly chosen, it is got – there can be no argument that when an employer bargains with the only – in a – part of its workforce, which is organisationally or operationally in this case, distinct, and where it bargains as all of the employees who are in that part of the business. And it does not do anything sneaky in the lead up to disadvantage the employees concern, but those employees by reference to the scope of the agreement are fairly chosen. And I will come back to say something more about Mr Buckley's concern when I deal with the fourth point, which I will come to now.

PN1174

Commissioner, most of the time on the first occasion was taken up with the issue of whether or not the employees had genuinely agreed to the enterprise agreement proposal. And in saying that, whether the requirement in section 180(2)(5) had been satisfied.

PN1175

And that requires the terms and the effect of those terms to be explained to the relevant employees in a way which is suitable to them. And for – sorry, for – exactly that. But it is explained in an appropriate matter having regard to the nature of the workforce and in particular whether or not there are employees with particular vulnerabilities in the workforce.

PN1176

Now, Mr Els carried the burden for the employer of that explanation. Mr Els presented as an experienced and measured industrial relations practitioner with many enterprise agreement negotiations under his belt. And he expressed Commissioner, in his polite way, he expressed some surprise that the quality of the explanation that he had given or been responsible for facilitating was under question.

PN1177

Now, he can possibly be forgiven for being a little bit surprised because he was at great pains to ensure that the explanation was sufficient and appropriate and that it emphasized the matters which would be of particular implication or concern to the employees. And we should remember this, that the employees were given, during the access period, and for all relevant times in the access period, hard copies of all of the material which is attached to the email of 2 February 2023. And that included relevantly the 2018 enterprise agreement with its rate schedule of course.

PN1178

The 2023 enterprise agreement with its rate schedule and a separate power point table, which appears in that material, attached to the email, which set out the new rate structure separately and with some emphasis. And it allowed the employees, that information of course allowed the employees to compare old and new rates. And Mr Lingard and Mr McLeod both did exactly that in accordance with their evidence.

PN1179

That is, they both compared the old and the new to see what had changed and they were put in a position to do that because the explanation provided by the employer included the – all of the source material which was required for them to do that.

PN1180

Now, in my observation, many enterprise agreements have been approved by this commission, without a whole lot more formality than that. Section 180(5) does not require an explanation to be given in any particular form. It can be entirely in writing, it can be entirely electronic and in my experience, it often is. So even if Mr Els had not taken the additional step on scheduling two additional meetings during the access period on 2 and 6 February, I would be defending the employer's compliance with section 185. As it turned out, there were more face to

face meetings – two face to face meetings, and in those meetings there was a clear explanation of the – once again, of the rationale - a clear explanation of the rate structure with the power point placed up on the screen and evidence which I will come to, Mr Els taking the time to point out to employees the areas where the rates have changed, particularly when they were lower for the employee, and the opportunity to ask questions.

PN1181

There were two face to face meetings with seven employees. There is no – it is impossible to conceive of an additional step which an employer could take whatever view it had of vulnerabilities or circumstances or whatever, to comply with the requirement in sub-section 185. And the rates explanation was clear and it was expected – it was efficient. Sorry – effective. And can I refer – Commissioner, I know you have the transcript, but I just want to refer to a couple of areas of it.

PN1182

I might say that the transcript that I have got, unusually does not seem to have page numbers. It is got transcript paragraph numbers, but not – does not have page numbers. So I will just have to go to the transcript numbers and I might be able to give you a page number.

PN1183

THE COMMISSIONER: Just the paragraph number will be fine.

PN1184

MR WILLIAMS: Yes, and I can – I do not need to dwell on these questions and I know you will have regard to the transcript in any event, but I just want to emphasize in particular items. At paragraph no.7, 156, Mr Els gives the evidence of the meeting which the thought was on 17 January where the employees were shown the schedule of rates which made its way finally into the enterprise agreement proposal. At paragraph No.811, in his cross-examination, Mr Buckley asked this question. "You told them that you would lower the rates. Did you expressly tell the employees that some of the rates in the 2023 agreement were lower than the 2018 agreement, but that some of the rates in the 2023 agreement were higher than the 2018 agreement?" Mr Els said, "I can't exactly recall what I told them, but I did tell them that some of the rates were lower and in fact I showed them the cases where they were lower, categories where they were lower, yes."

PN1185

Paragraph No.829, there is more reference to the - in response to a question from the Bench, about the slide which had been discussed at an earlier point. Paragraph number 800 and – I am sorry, was it that one? Paragraph No.835, he's asked a question by you at 834, I think you were asked whether or not you were comparing 2018 rates to the employees as against the 2023 rates? Yes. And then the question, "I thought – and I thought you answered yes, if so how did you do that?" Mr Els said, and this is in one of the February meetings, "For the employees had a copy of the new agreement in front of them with the schedule rates on Table 2, it was up on the screen, I had the information about which of the

categories were lower than the 2018 agreement which were higher and I explained that to them.

PN1186

Paragraph 880 – I am sorry – paragraph – I will also refer you to paragraph No.838. You were asked a question, "What did you say to the employees?" Mr Els says, "I said to the employees, because the employees who I was talking to in the case of food manufacturing were Level A and B and the employees from Logistics warehouse were Level 3 and Level 4. So I showed them that in Level A, the minimum and the maximum was lower than the 2018 rates. And that in the case of Level B, the maximum was lower than the 2018 rates.

PN1187

And that in the case of Level 3, for Logistics warehouse, both the minimum and the maximum were lower. Mr Els gave additional explanation in response to further questioning at paragraph No.882 where he – Mr Els' question about his quality of his explanation, he said, "I am trying to recall, but it is been quite a few months and quite a few things have happened since then. I know I pointed out to them what levels would be earning less and what levels would be earning more. And that paragraph 902, and it was question – "Yes, so did you tell them that some rates were more than 3 and a half per cent?" Mr Els: "I do not recall that I specifically told them because I – yes, I do not recall that I specifically – I was more interested in trying them at some rates, you know, employees could be earning less. The reason why some are more and some are less is because of our market analysis, we realised that in some cases, we had to pay more if we ever wanted to attract skills.

PN1188

And then the – he responds at paragraph No.903, he defends his process. He said that he provided them with all the material that I needed to. And I highlighted the areas that I thought was problematic. I did not think it would be problematic for them to get a 10 per cent higher rate.

PN1189

And so Mr Els' focus was on what he thought the employers would be most interested in, which was firstly their own rates, but there is no – there is no issue that they were not advised correctly of the effect on them, but also on the effect it might have on future employees. Which might be seen to be adverse to them.

PN1190

On the issue of the 3.5 per cent issue, and as to whether that applied in any relevant sense to – other than just employees, Mr Els' best evidence can be seen at paragraph 936. Where he – you asked him whether he thought that the – it was correct. The explanation in relation to that was correct. And Mr Els said – and we – we say correctly. "It is correct as far as the group of employees who I was speaking to, yes".

PN1191

And also at No.939, he says pretty much the same thing. At 955, he said "It is a 3.5 per cent increase for the people on the current salaries but they" - reference to

the employees, "They were fully, fully aware of how it would work for new employees".

PN1192

So that is Mr Els if you pick your way through Mr Els' evidence, it is clear that he focussed in his explanation, and this is probably supported by what the employees recalled. And he focussed on the areas where the rates of the new employees would be lower, but he did say that he also discussed the areas where they were high, he did say that. And of course, it should never be forgotten or not be forgotten that he provided them with the tables which allow them to make the direct comparison which it appears they did.

PN1193

So if you have a situation where the emphasis is appropriately on the effect on the employees themselves and I have a case reference for that proposition, where the explanation went further to explain how the proposed enterprise agreement might effect employees engaged in the future who might or might never exist, and the employees came away with an understanding that – which was pretty close to the mark that it is not a situation where you could, in our submission, you could fairly criticise the employer's process or find that it can comply.

PN1194

Now, as far as Mr Lingard and Mr McLeod were concerned, they – we accept that they said different things at different times in their evidence about these points. It was pretty obvious to me that – to a degree, one degree or another, they were overwhelmed by what appeared to be a fairly unfamiliar process. And they were trying to remember things which had been said from at meetings several months earlier. So it is not perhaps surprising that their recollection was imprecise or indeed what it may have evolved during the course of their evidence. But that is exactly what happened in my submission.

PN1195

And if you look at the totality of their evidence, they did clearly understand that firstly, the impact on them, but as I say, not really in contest. They did understand that future classifications might be reduced, but they also understood because what they were told and also because of the analysis they did on their own behalf, based on the material they were given, that there would be unders and overs. They did understand that. At various times in response to various questions, they could not recall exactly what he impact was and they were asked questions about were you told that there would be 8 per cent increase in this one. They could not remember that. And they probably were not told that. But they were told that rates would – and shown, that rates – some rates would go up and some rates would go down.

PN1196

I can give you some references, Mr Lingard. It was earlier in the transcript, commencing at paragraph No.127. This is on the issue of the 3.5 per cent term for the clause and the explanation said the rates would go up 3.5 per cent. He was asked by I think by you, Commissioner, at paragraph 122, "In relation to this issue, it is right for everybody?" And Mr Lingard said "For the existing

employees, yes", so he had a completely correct understanding of that. And he said the same thing at 123.

PN1197

And he was questioned as to what he understood at paragraph 126 and at 127, he confirmed that he understood that the clause applied to existing employees and not to future employees. And at paragraph 131 asked, "Who does it apply to?" He said, "For us full timers who are currently working here". And that in a practical sense is exactly, exactly correct. That is that the 3.5 per cent pay rise upon approval could only and did only apply to the employees who were there at the time of approval and for the future employees, if any, their rates would be set in reference to Schedule 2.

PN1198

We said in our written submissions that there is perhaps some incongruity in an unqualified clause which says, as it does, 11.3, that rates will rise by 3.5 per cent. It is precisely correct for the employees for whom that clause is relevant, that is those who are all likely to be employed at the time of approval. It is incongruous in its application to employees that come afterwards, but nobody's been misled, nobody's been disadvantaged and for future employees, the issue of what their rates are and what's relevant to them, the issue of how those rates have been derived and by reference to what prior standard is of historical interest only. And of no practical relevance to them. But perhaps more importantly for today, whatever one might think of the drafting of clause 11.3, the employees for whom the explanation is relevant had the explanation correctly explained to him. And they did understand it.

PN1199

THE COMMISSIONER: Do you address at all, the explanatory summary in Attachment G?

PN1200

MR WILLIAMS: Well, I think it comes to the same thing, Commissioner. It is really just a paraphrasing of the clause. It does not go much further than that really. So the explanation they got was that there'd – there would be a 3.5 per cent increase upon commencement, but that is true. The employees who were hearing that explanation that was true. For future employees, it is – whether true or not, it is irrelevant. But they are not the employees to whom the explanation's being given. They aren't employees at all.

PN1201

And Commissioner, can I come in, in that regard, because it is an important issue to this submission, which I am – which I make. And that is that the – it is unnecessary and ultimately unhelpful to focus on the quality of the explanation given to the employees who will vote on the agreement in relation to its affect on other employees. Either other employees or in this case, employees who may never exist.

PN1202

It is an unnecessary enquiry and might lead to – might lead the Commissioner to error, if you focussed on that. The explanation in sub-section 185 is an

explanation which has to cover the – which is designed to cover the terms and the effect of those terms on the employees who will vote on the agreement because it is about the issue of whether or not they genuinely agree to it. And I take some comfort from that. I appreciate it does not say that specifically in section 185, but it does seem practically – it must be the case. The – it could not be the case, for example, that the explanation has to put the employees in a position of knowledge so they could pass some quiz afterwards about what percentage would be – the rise would be for Employee X.

PN1203

Or what the percentage declining – the rate would be for Employee Y who's not employed yet. The purpose of these provisions are to give the employees themselves an explanation of how the agreement will affect them. The issue of whether or not they have the so-called moral authority to agree to an agreement which might treat other future employees in a different way is relevant – is not relevant to the issue under section 185. It is relevant to the issue of whether or not there is an agreement the employees have – that is, it is not relevant to explanation. It is relevant to whether or not with any level of explanation, those employees would be able to genuinely agree an agreement which has different implications for future employees.

PN1204

Commissioner, can I hand up the one – the decision at first instance in One Key? The decision of His Honour Justice Flick? And can I start by making a reference to what His Honour said at paragraph 40 on page 15? And at paragraph 40, Justice Flick makes the obvious point, other judges have said the same thing. "There is no difficulty in a small number of employees voting in favour of an enterprise agreement which has the potential to cover a large number of future employees". And there is reference to the John Holland decision. And His Honour Justice Flick refers to the observation by Justice Buchanan in John Holland that there is potential for manipulation of the agreement making procedures.

PN1205

But there was no manipulation of this agreement making procedure. My client negotiated with all of the employees who were within a distinct operational part of its workforce. As I said, it did not flood the workforce with casuals or do anything of that kind. There was no manipulation.

PN1206

The principle is that it is unremarkable that a small number of employees might make an agreement which covers – eventually covers future employees. But then his Honour, when discussing the issue under section 185 and the quality of the explanation, made some pertinent observations at paragraph 105. And I think we all understand that the process which support was looking at in One Key was an unfortunate one. One of a kind. But we go down as a – it will have a – probably have its own display cabinet in the – when the Museum of Industrial Relations in Australia is put together.

PN1207

THE COMMISSIONER: There is plenty of zombie agreements out there.

PN1208

MR WILLIAMS: Yes.

PN1209

THE COMMISSIONER: To cover every reward to the - - -

PN1210

MR WILLIAMS: I know there is. I know there is, Commissioner. But they were not subjected to - - -

PN1211

THE COMMISSIONER: And they were never - - -

PN1212

MR WILLIAMS: Never subjected to the rigorous explanation or exposition in One Key.

PN1213

THE COMMISSIONER: No.

PN1214

MR WILLIAMS: And hopefully the industrial relations community learned. If it did not, then they are not looking in the right places.

PN1215

THE COMMISSIONER: Oh well, it all finishes in December.

PN1216

MR WILLIAMS: Well, maybe. But paragraph 105 in making the obvious, what I would have said would be an obvious finding that reasonable steps were not taken, he said that:

PN1217

An explanation certainly well – such an explanation certainly fell well short of taking more reasonable steps although the email may have been linked, the further steps could have been taken to expressly identify the reference to particular clauses. Those provisions of the agreement which had particular application to the three employees of concern and such express references would have at least put those employees on notice that particular clauses of the agreement to which they could give greater attention and expressly identify the particular award which covered each of those employees and identified particular provisions in those awards which varied from or did not vary from the terms in the agreement.

PN1218

And he went on to say:

PN1219

One of the things which is missing from the explanation provided with any guidance being provided to Mrs O'Brien, Raymond and Marfell as to the manner in which the agreement affected their personal interest.

PN1220

And we say that is what section 185 is about. It is not about repairing the employees for a pop quiz on how the agreement affects other employees. Even in the – even employees who are already there. So it was not necessary for Mr McLeod as they – as forklift driver to be exhaustively tutored on the effect of the agreement on Mr Lingard as a production employee. What was necessary was for each of the employees to get an explanation which told them what the agreement meant for them.

PN1221

The issue of whether or not there is a different sort of concern was a concern which probably the most famous learning from One Key is different and discussed differently by His Honour, commencing at paragraph 115 where he again said – that is on page 40 – he again said:

PN1222

There is no difficulty with a small number of employees entering into an agreement which has the potential to cover a vast number of future employees.

PN1223

But at paragraph 116, he says:

PN1224

There is considerable difficulty in respect to the prospect that three employees with a very confined employment experience and covered by a limited number of awards could have proven agreement that would cover employees fully within such a diverse range of awards as set forth in Clause 2.1(b).

PN1225

And that was the rule of (indistinct) of the One Key process. Such an agreement would lack authenticity and moral authority. Now, Commissioner, I am not going to make a submission because I might one day be instructed to make a different submission that it would not be available with appropriate explanation for a small cohort of employees covered by one award to make an agreement which covers multiple awards. I mean, One Key does not really say that. All it really says is that these employers were not put in a position where they have normal authority to do that. And it is hard to disagree.

PN1226

But that is not our situation. The situation here is that we have seven employees, they did not have confined employment experience, they had extensive employment experience. They'd been bound by enterprise agreements in this business before, covered by one award and with the benefit of a very patient explanation of the effect of those terms on them and I would say that my submission is that is sufficient. But they also were given a sufficient explanation of how the agreement would affect other employees to come as well. But I make the submission as a primary submission that it was unnecessary for the – strictly unnecessary for Australian Country Tours to give the – the draw the employees attention at all, or certainly not beyond giving them copies of the agreements and allowing them to be prepared for themselves. Any information about how future employees might be affected by it? My submission is that was unnecessary.

PN1227

But my alternative submission is that to the extent it was necessary or desirable, it was done. It was done. It was done by providing them with the precise information they needed to make the comparison and it was done by taking them through that information with Mr Els' best judgment of what would be of particular interest to them in the meetings on the 2 and the 6 February. That having taken place, it was unnecessary for my client to go further and pick out particular examples which were irrelevant to the employees concern in respect of hypothetical future employees and say to them that compared with the 2018 agreement which I have emphasized, would be an historical artefact only for a future employee. And emphasized by reference to that that there was some difference between the rates which would have applied if they had been employed earlier under that agreement rather but which – the different rates of which apply under the 2023 agreement. It gets to a level of hypothesis, even speculation and irrelevance which takes it well outside the requirement for an employer to take reasonable steps to explain the terms and the effect of the agreement to the employers who will vote on it.

PN1228

THE COMMISSIONER: You understand that the union's contention – and the matter before me, is whether or not the material put in the explanations given to employees was misleading? That is been put by the union. And they are the concerns that I have raised. So was it misleading?

PN1229

MR WILLIAMS: In no sense – in no sense was it misleading. They are - - -

PN1230

THE COMMISSIONER: I appreciate you've put in submissions at the same time, but you understand that is the concern?

PN1231

MR WILLIAMS: Commissioner, it was not misleading. I – we took up and addressed what we accepted was a valid point, although not one which in our submissions would be a concern. In relation to the issue of the three – what Clause 11.3 says, in respect of the 3.5 per cent, we have taken that issue up and we've addressed it. The employees were not mislead about that, because they plainly understood that that clause affected them, but did not affect future employees. Mr Lingard said so in terms, in precise terms. He understood that the future employees would not be getting a 3.5 per cent wage rise. So those – the employees were not misled about that point and we've offered in our submissions, that if you feel that there is an infelicity in that expression which deserves to be corrected, so that it is put beyond any reasonable doubt that employee could not be misled by it, we will cooperate in the appropriate amendment of section 28(a), if that is a concern.

PN1232

But as to whether these employees were misled by it, they were not. And even if you found that they were, by anything that the employer had done, which could have only been in the drafting itself because there is no evidence that an employee was told that future employees would get a 3.5 per cent wage rise against

anything. What they were told is that the new employees would get the wage rates in Schedule 2. But if in any sense they were misdirected or insufficiently informed or even misled, it can't have had any consequence for the approval of the agreement, because the employees would have voted for it anyway, because it is as obvious as anything.

PN1233

So it is a matter which - - -

PN1234

THE COMMISSIONER: And why do you say the employees? I have only heard from two.

PN1235

MR WILLIAMS: Well, I think it would be an exercise in nothing short of speculation, Commissioner for you to make a finding that the employees were disadvantaged by it. Or that it was other than a minor procedural issue, the failure. And therefore it can be cured of course under section 186(2). But in my submission, you do not get to that. Employees were not misled. They were – an enterprise agreement was put before them, which like thousands of enterprise agreements before does not – isn't perfectly drafted. I have never picked up one that was.

PN1236

So any agreement which has a failure of draft or any agreement which has – which everyone thinks has a meaning and then a court finds it has a different meaning, I suppose you can say that they were misled. But we are in, with respect, having a discussion about speculative and completely abstract things. This process has not expired. These employees were not misled. They were when precisely correct information about the impact on them, which in my submission is the relevant question. And they were given information, only in the text of the agreement which might be incongruous in its application to future employees. That is all.

PN1237

In relation to the understanding of the employees, I had commenced – I have given you some references. I will give you a couple more. Mr Lingard gave evidence in relation to his understanding that some rates would go down and some would go up. And this may be another issue where you are – you have a concern about whether or not they were misled.

PN1238

There is no evidence whatsoever that the employees were told that all of the rates would go down. They were told – they were given specific information which allowed them – they wanted to – to make a direct comparison, and they were given an explanation by reference to that information from Mr Els, which did not mislead them, but which focussed it appears predominantly on the rates which were going to go down. But it is – there is not, there is no evidence that employees were told by my client, in other words, misled, into believing that rates would all go down.

PN1239

I accept that at least in some parts of their evidence, but not others, each of the witnesses, accepted a proposition that they were told that rates would go down. But, can I - - -

PN1240

THE COMMISSIONER: So paragraph 80, Mr Lingard, gave exactly that evidence - - -

PN1241

MR WILLIAMS: He did.

PN1242

THE COMMISSIONER: But you say it shifted later?

PN1243

MR WILLIAMS: Well, it appeared to evolve and as is – now I do not know whether it evolved by reference to his recollection or whether it evolved by reference to he thought he was asking the questions. I mean, we do not know. What I do know is that he was in a pretty unfamiliar place, but Mr Lingard did say in other places, that he understood, from what he was told, but also by reference to the documents he reviewed, that some rates would go up.

PN1244

Paragraph 176, no, sorry, not 176, I won't trouble you with that one, but at 184, in a question from me, "So do you remember actually being conscious yourself irrespective of what Mr Els might have told, that some of the rates were in fact going up and some were going down?" Mr Lingard said, yes, he did understand that. He repeated that at 185. Paragraph 195 he affirmed again that some were in fact going to go up and he agreed.

PN1245

I accept that this evidence is not entirely congruent with the evidence he'd given earlier, but he looked to me like a witness who was trying to get used to a very unfamiliar situation.

PN1246

THE COMMISSIONER: Yes, I said he was nervous.

PN1247

MR WILLIAMS: He was very nervous. And then at paragraph 211, sorry, paragraph 209 he was asked, and this may have been you, I think, asking questions now. "You were asked just now whether you – or not you compared the rates. Did you do that?" He said, "Yes. Back a couple of months ago, yes." Paragraph 210, "When?" And he said, "February when we got them, yes." Paragraph 211, "When you were given a copy of the 2018 agreement?" "Yes. We went through the changes." "Right. Why did you look at the 2018 rates?" "Just to compare to find out what's different. We just went through the documents."

PN1248

Now, at paragraph 231 in response to your question from you, "Your evidence is you saw some went up, some went down?" And Mr Lingard said, "Yes."

PN1249

Paragraph 309. And this is, I think, Mr McLeod, just to emphasize again that the recollections and what they recalled they understood evolved during their time in the witness box. You've asked the question, "When you have these meetings, Mr Els has taken you through the enterprise agreement. Was it your understanding that the company was going to lower the pay rates for all your employees?" Mr McLeod said, "Yes". And I had accepted in my re-examination of Mr McLeod that that was his understanding. It was not necessarily what he was told but I accepted provisionally at least that that was his understanding. But when I did ask him some questions, paragraph 317, "But you were sure that you were aware of what the proposed new rates were before you voted?" And he said, "100 per cent, we knew what the rates were before we voted." And he accepted in the next one that explanation. It was definitely before the meetings in February.

PN1250

Paragraph 319, "And what about what the new rates would be for other employees? What the schedule of rates would be?" "Yes." They are shown a table. That is a – it is Commissioner, with respect, a bit problematic to conceive of an employee as being misled - as if there were some intention or maybe even just careless carelessness - were misled, when they were given the documents which would prove or establish one way or another what the comparisons were. It is not as if the – this employer was saying without context to these employees, do not worry about anything, the rates go down for new employees but they deserve that or whatever, I mean, why would an employer do that? But it is not as if there was any intention to mislead these employees at all. In fact, quite to the contrary. Because how silly would it be for my client to do that and then give them the rates for 2018 agreement rates in the 2023 agreement rates? It just really does not make any sense.

PN1251

As I say, at least at this point in Mr McLeod's evidence, I accepted that the impression you took away from it all was that he thought all rates would go down, but he certainly was not told that. So if you believe that, that was something which he took away from the process and maybe because consistent with Mr Els' instinct, that would be the issue of concern.

PN1252

But as it turns out, as Mr Lingard's – sorry, Mr McLeod's recollection involved, he also it appears understood that there would be some variation in this regard. Paragraph 367, "You will be asked to vote on it, did you know that?" "Yes. We understood or I understood that we were voting for a lower rate to the new starters who came in the future." And he said, "That was in one of the meetings before we voted." So again that is consistent with the recollection.

PN1253

However, at paragraph 401, and this is pretty critical, Mr McLeod gives evidence that he did exactly what the employer intended him to do and what he was put in a position to do which was cross-reference the rates. The question about the 2018

enterprise agreement. Go back and have a look at the rates and he says, "I am pretty sure I did, because when I was looking through both agreements, I was cross-referencing, like working out what was different from this one to the old one."

PN1254

So if there was – been some strategy to mislead him, heaven knows why.

PN1255

THE COMMISSIONER: Well, I think you said earlier, intention to mislead. One can be inadvertently misled.

PN1256

MR WILLIAMS: Yes, one can be but these employees were not, because they were given, they were given the documents and the explanation can be given in writing. They were given the documents - - -

PN1257

THE COMMISSIONER: I do not know that there is been any suggestion by the union that its been intentional misleading.

PN1258

MR WILLIAMS: Well, let's hope not.

PN1259

THE COMMISSIONER: But someone could easily mislead – I could say, look, oh yes, you know, that is down there and I actually have that wrong that I made the wrong directions.

PN1260

MR WILLIAMS: Look, absolutely and then most of the enterprise agreements which founder this point, in my experience, is something like that is happened. Employers have actually had information - - -

PN1261

THE COMMISSIONER: Well, we can move away from any issue. It is not put by the union that there is been any intentional misleading.

PN1262

MR WILLIAMS: Well, I suppose the proposition I put is this. That what is beyond any doubt, is that the employees were given the – before they voted – they were given – in fact, considerably before they voted, they were given the rates that would become schedule 2 in the 323 agreement. They were specifically in the access period, given electronically and in – and in hard copy, the 2018 agreement which obviously included the rates which were being varied.

PN1263

They were given that specifically so or at least would allow for the employees to do the comparison which both Mr McLeod and Mr Lingard apparently did. So it is problematic to conceive of those employees having been misled unless you can

point to evidence where the employer told them something which was contrary to what the – what that comparison would have told them. And that does not exist.

PN1264

At best, what exists is an oral explanation which may have been unnecessary. Maybe it complicated things, unnecessarily, but an oral explanation which according to Mr Els' evidence did extend to the rates which were going up and going down, but which focussed not inappropriately on the rates which were – were going down.

PN1265

And you can't – you can't make a finding, Commissioner, with respect, that those employees were misled by that explanation. All you can say is that emphasis was given to some things and not others. And I have made my point that the explanation which is of real relevance under section 185 is the explanation of the impact on them. And not on employees who may never in fact be employed. But to complete, Commissioner, the paragraph references, paragraph 457. You are questioning – in fact, it probably commences at paragraph 451, and this is fairly instructive as – in the sense that it establishes that the employees were put in a fair position to understand not just the effect on him as it turns out, but the effect on others. And you asked him a question about rates for a particular classification, whether he understood it or provided or accepted that.

PN1266

Paragraph 453, "a new starter could be paid as little as $24.50. Were you told that, did you know that?" "Yes."

PN1267

Then he went on to say something slightly different in the next one, "Sorry, no, we were not told that", but then he goes on to say, "It was in the – we accept that it was in the agreement", and then relevantly you asked him whether he looked at it and he did. He understood as he said at 458, that somebody could get paid as little as 24.50. He did understand that.

PN1268

And then, more critically, paragraph 461, so only a handful of your questions, so only a handful of the rates in fact, went down from the 2018 rates. So the 2023 rates that you saw attached to the back of the 2023 agreement that you are being asked to vote on, only two of those had a minimum rates that was lower than the 2018 agreement. "Did you understand that the rest had increases of various amounts?" "Yes, I understood that."

PN1269

"How did you understand that?" "By looking at the tables." I am pretty sure it was some way that they had the pay table, it was in (a), (b), (c) or something and of course that is – that strikes as completely authentic evidence from Mr McLeod, because of course, there are (a), (b) and (c).

PN1270

I just want to make a particular point by reference to the evidence he gave at 487. Because Mr McLeod was asked, and with respect of course, he was asked

some fairly complex questions. And at 487, as opposed to 2359 in the current 28 agreement on the far left hand side, and that presents – that represents a 10.22 per cent increase. "So you would not have known that, would you, that the same classification for a new employee is going to be paid more than 10 per cent more under the 2023 agreement than the 2018 agreement?" "No. I did not."

PN1271

Which goes to say that Mr McLeod did not know that a new employee was going to be paid more than 10 per cent more under the 2023 agreement. That will be a level of detail which was not of particular interest to him. It certainly – we do not point to evidence and Mr Els, for example, said, just so you are all aware, "This classification will be paid 10 per cent more or 8 per cent more or 7 per cent more". And a lot of the time, the witnesses were asking questions, Commissioner. They were asking questions which had within them, reference to percentage rates and they agreed they had not been told what the proposition was, but why would they have been? It is – as I said, the task under this process is not for the employer to give employees a tutorial by reference to rates and percentage of rates as to whatever a configuration would be. I mean, if it is well, enterprise bargaining is going to - - -

PN1272

THE COMMISSIONER: Just on the one hand, Mr Williams, they were told that rates needed to go down to be more productive – to be competitive.

PN1273

MR WILLIAMS: Yes. And so they did. And so they did. They did go down. Some rates did go down. That was precisely true.

PN1274

THE COMMISSIONER: For two classifications.

PN1275

MR WILLIAMS: Yes.

PN1276

THE COMMISSIONER: So that is the issue that I have to weigh up.

PN1277

MR WILLIAMS: Well, maybe I can summarise the – my position as follows. The section 185, and I won't labour this, but it focusses on the impact and the effect of the agreement on the employer being asked to vote. In my submission, you do not need to go beyond that. If you do need to go beyond that, then you have to evaluate in a common sense way, whether the explanation was sufficient within the process that it was designed to operate.

PN1278

An enterprise agreement might contain 180 provisions. It is not required that the employer takes the employees through every one of those 180 provisions in an exhaustive way and points out every possible configuration of each of those terms for current future or future employees. That simply is not required and it never has been required.

PN1279

What is required is that the employees get accurate information, and as I said, about how it affects them particularly, but accurate information about what they are voting on. My client satisfied that task when it gave the employees a copy of the 2018 agreement and a copy of the 2023 agreement and an explanatory table.

PN1280

That is what many, many processes begin and end at that point. So my client had satisfied its obligation then and we have evidence, direct evidence that two of the employees concerned took that information away and compared one with the other. And therefore had an accurate explanation of the impact on not only them but also future employees that that was relevant. In the purest way that that could be done, that is, in hard copy.

PN1281

So that any action by the employer which would have diverted them from that task, in fact to the contrary. So at that point, my client has satisfied its obligation and nobody – if that is all it had done, we would not be having a discussion about whether or not they were misled. Because they would have been given nothing but precisely correct information.

PN1282

And we might be having a different discussion about whether that was sufficient for different reasons, but we would not be – it would not be any argument they had been misled, because they would have been given the source material which would have told them precisely and without any qualification what the impact was.

PN1283

Now, Mr Els went further than that, and he went further in the evidence and perhaps if he, as had been his experience in some other similar processes, he went further than that, and he met with them twice in between the 2 and the 6 February in the access period. They could have asked him any question they wanted to and they did ask him some questions and he answered them. He put up a table, he put the table up of the rates, and the overs and the unders and it was up on the screen and he explained those – that table to the employee and you could find, based on the evidence but from all witnesses, you could find, that he emphasised the areas where the rates were going to go down.

PN1284

He did not say and he denied that he said that all rates were going to go down. He did not say that. So the most she could find is that having given the employees precisely correct and accurate information about all rates and all comparative rates, he then gave them an explanation which focussed on the rates which were going down and did not focus at least as much on the rates that were going up. But he did not mislead them. So there is no evidence before you, direct evidence or by inference or in any other way, which suggests that my client told employees directly or in any way that all rates were going to go down. And that would have been a remarkably stupid thing to say to a bunch of capable people when they had just been given the information which would have given immediate lie to that proposition. Our client did not do that.

PN1285

So all that you could find and in my submission you won't find on the totality of the evidence is that two employees came away from that explanation with an impression that the rates were going down. And without a specific picture in their mind, as to which rates were also going to go up. Hardly surprising when those rates were of no relevance to them at all. But my client can't be criticised for misleading them, or my client should not be criticised for failing to give an adequate explanation as required by 185. And I have to say that if that is the result, well, they would – I would – my submission is with respect is, that would be an erroneous approach, but if that is correct, enterprise bargaining is going to finish in this country, because no employer is going to be able to do that.

PN1286

Can one imagine that in the processing enterprise agreement, where as we know, as we know, there is a complex tiering of the rates, there is grant – there is old rates, and there is grandfathered rates and then there are new rates.

PN1287

And employees get different rates whether they - depending on whether they joined the organisation in 2002 or 2010 or 2024. They get different rates. Can you imagine that the employer did explain to everyone of those employees who voted on it exactly what the impact would be on those – on other employees whether those were already employed there but perhaps engaged earlier or later, or employees that would be engaged in future years. It is just not – it is unthinkable. And if that is what is required, we are in trouble. This process is in trouble.

PN1288

My client has actually presided over an exemplary negotiation process which has – which contains all of the hallmarks of a – an effect of enterprise bargaining process and has lead to a result which should be recognised as such. Has not misled anyone, employees all voted with a solid understanding of what the – a complete understanding of what it meant for them and a solid understanding of what it might mean for others if that was relevant.

PN1289

They all voted yes. None of them were disadvantaged by any aspect of the process which even if you did find it was deficient in any way, it is almost axiomatic that the employees would have voted yes, even if my client had not said anything about future rates at all, because I could imagine they were not the biggest – they were not the main focus and they deserve to have the agreement approved because it provides some valuable benefits for them.

PN1290

If you did find, Commissioner, against my submission that there had been a procedural defect under section 185, it appears to be quintessentially one which ought to be cured under section 188(2) because it would be minor at best and because you could not find any disadvantage in the employees who voted on it.

PN1291

So we commend the agreement to you, Commissioner, as one which ought to be approved so that these industrial parties can get on with their lives and hopefully succeed. There are three additional things I want to say, Commissioner, and I will answer any questions. One is that you raise say, an issue in relation to the notice of employee representational rights and the declarations. Having considered and done a little bit of research on the matter, we – our submission is that what's been done is completely orthodox. There does not seem to be any requirement that a notice of employee representational rights has to be given separately from different employers. They just have to be given the notice of employee representational right which is accurate, which they were.

PN1292

In fact, I would imagine that if they got two different notices, from two different employers, that it might be quite confusing. So we say that there is compliance with that and in the event that is another matter which if at all could be cured under section 108(2). And nor could we find any requirement, Commissioner, that a declaration has to be issued, given separately, by the employers. If you are concerned about that, Commissioner, we will provide one, but it just – we could not find a basis in the legislation of the regulations or in practice which suggested that that would be necessary.

PN1293

THE COMMISSIONER: Yes, all right. I think each employer needs to complete a Form F17 to be clear how many of their employees voted.

PN1294

MR WILLIAMS: All right, Commissioner, we will do that. We will do that (indistinct) thing. Yes, we will do that. the – Commissioner, we delivered to your chambers, the documents which were in response to your request. I have not referred to any of them. And it has not come up in my submission. If it does come up - - -

PN1295

THE COMMISSIONER: Well, there is an important issue here that Mr Buckley's not aware of.

PN1296

MR WILLIAMS: Well, he's got no right to be aware. He's a - - -

PN1297

THE COMMISSIONER: Mr Buckley, a confidentiality request has been made.

PN1298

MR BUCKLEY: Sorry, beg your pardon?

PN1299

THE COMMISSIONER: A confidentiality request has been made in respect of documents. It was put on Friday night, I think. So that ought to be discussed.

PN1300

MR WILLIAMS: Well, can I suggest this then, Commissioner. With – you are obviously entitled to look at them. If you think they are relevant to your – genuinely relevant to your determination, then perhaps you could let us know and if you can take the matter further if required. On my review of them, none of them are.

PN1301

THE COMMISSIONER: The only thing I thought could be shared and I had my Associate just produce – so it is on the spreadsheet. Well, I think we – we ought to share with Mr Buckley the description of the document. So can you please do that, Mr Williams?

PN1302

MR WILLIAMS: The spreadsheet is a spreadsheet which provides this comparative analysis of the enterprise agreement rates as between Australian Country Choice and the relevant competitors who I have identified as Hilton and Primo.

PN1303

THE COMMISSIONER: Yes. And I thought the first four columns in blue might be the only thing that ought to be shared with the union.

PN1304

MR WILLIAMS: Well, certainly, we would resist any delivery of competitive rates. That would not be fair to them or to us.

PN1305

THE COMMISSIONER: Yes, of course.

PN1306

MR WILLIAMS: Or relevant at all. Commissioner, I have to say that I am struggling to see the relevance to the matter before you or any reason why the union in the role that it has, should be keeping a copy of it. What could he do with it?

PN1307

THE COMMISSIONER: It appears as though at some point, Mr Els did put them side by side. And this is, I think, the only occasion where I have got evidence that he put the rates side by side.

PN1308

MR WILLIAMS: But for who? The only relevant matter before you is what the employees were told. There is no suggestion that this is given to the employee.

PN1309

THE COMMISSIONER: No, that is – I understand that.

PN1310

MR WILLIAMS: So it is not relevant to any determination that you had made.

PN1311

THE COMMISSIONER: No, but this is – is this the only occasion where Mr Els put the rates side by side.

PN1312

MR WILLIAMS: I have no idea, but it is completely irrelevant to the matters before you.

PN1313

THE COMMISSIONER: Well, you've provided it to me.

PN1314

MR WILLIAMS: At your request.

PN1315

THE COMMISSIONER: Yes. And I now have it. So it was put side by side on this date when this spreadsheet was put. So I think.

PN1316

MR WILLIAMS: Well, so it appears, but - - -

PN1317

THE COMMISSIONER: Well, I will let you – that is what I can share with Mr Buckley, then. Mr Buckley, when this spreadsheet was put together, the rates were put side by – they were not the settled rates, were they, Mr Williams? Because those - - -

PN1318

MR WILLIAMS: I am not even sure what they are.

PN1319

THE COMMISSIONER: Well, the Level C classification rate where it is lower than where it ends, is 50 cents lower, isn't it?

PN1320

MR WILLIAMS: It – I do not think we can make any assumptions at all, I mean - - -

PN1321

THE COMMISSIONER: I just want to be making sure – Mr Buckley does not know what we are talking about.

PN1322

MR WILLIAMS: I understand that. He shouldn't.

PN1323

THE COMMISSIONER: And I want to be – well, you are asking me to make a confidentiality order and I need to determine whether or not it is appropriate to do so.

PN1324

MR WILLIAMS: Well, Commissioner, I am asking for the documents just to be sent back to my client and there is no need – we have complied with your request

but in my submission, they are not relevant to your exercise – the application before you at all. It should just be handed back to the company. That is all I asked to be done.

PN1325

THE COMMISSIONER: Well, I have asked for the material. I need to go through it and see whether it – I want to have it as part of my consideration.

PN1326

MR WILLIAMS: Well, that is a different issue. If you feel against what I – my submission, that relevant to part of your consideration, well, I can accept that. But if you did, then sure. Sure. And perhaps the - - -

PN1327

THE COMMISSIONER: And I have not had time obviously to analyse it deeply as to whether it is part of my consideration.

PN1328

MR WILLIAMS: Well, then I object - - -

PN1329

THE COMMISSIONER: Looking at the spreadsheet, this appears to be an occasion where the rates are put side by side and I do not think they are the settled rates. I do not know why there is two cells in yellow but it appears to me that you know, I know what the rate is in the 2023 agreement for a forklift driver and that is not where it lands in this document.

PN1330

MR WILLIAMS: No. And why would that be of any moment? This is a document – a commercial – sensitively commercial document which reflects some of the employer's analysis. We do not have any evidence - - -

PN1331

THE COMMISSIONER: Yes, I am not having Mr Els come back.

PN1332

MR WILLIAMS: No, I am not going to recall him, unless you do. I am not going to. But he - - -

PN1333

THE COMMISSIONER: But it has come to my attention now that at some point, he did put the rates side by side.

PN1334

MR WILLIAMS: Because you asked us to provide that document in a certain category and we conscientiously did that.

PN1335

THE COMMISSIONER: Yes.

PN1336

MR WILLIAMS: But we've never accepted that the documents were even remotely relevant to the matters before you. And they are not. So I ask for them to be returned, having complied with your request, that they be returned. If you did consider that in some way they were relevant, and I - - -

PN1337

THE COMMISSIONER: Was that within your email?

PN1338

MR WILLIAMS: Well, we just provided the document.

PN1339

THE COMMISSIONER: That you are asking for them to be returned and not considered?

PN1340

MR WILLIAMS: Well, they are considered but in my submission, you can consider them and work out pretty quickly that they are of no assistance to you.

PN1341

THE COMMISSIONER: Well, I won't know that today.

PN1342

MR WILLIAMS: Well, then perhaps we should let the matter rest there, Commissioner? And if in your having read them, you have realised – you take the view that they might be relevant, then we can have a discussion.

PN1343

THE COMMISSIONER: All right. Well, we have not shared them with Mr Buckley.

PN1344

MR WILLIAMS: And I object to them being shared.

PN1345

THE COMMISSIONER: Yes. Well, I just wanted to make him aware that this was on foot.

PN1346

MR WILLIAMS: Yes. Thank you. Well, I think it is – because of Mr Buckley's role, it is appropriate that he is informed of what has happened but as an intervener with no – and not a party, why should the employers confidential, internal documents, never suggested to have been provided to employees, and therefore irrelevant to the matters in contest before you, why should they be provided to begin with? Particularly, when they have no explanation.

PN1347

THE COMMISSIONER: Well, because I have asked for the material and I may consider it. And therefore, I have got one party who has been allowed to be here and whether or not something as benign as that first four columns there, in purple or blue, whatever colour it is. Whether it is relevant, Mr Buckley does not know because he has not seen it.

PN1348

MR WILLIAMS: He has no more entitlement to know than the person I can see walking down the street.

PN1349

THE COMMISSIONER: Well, I have said he does not need to see the competitors material, but I don't know. We will hear from Mr Buckley.

PN1350

MR WILLIAMS: All right. Thank you, Commissioner.

PN1351

THE COMMISSIONER: Is there anything else that you would like to put? I do not have any questions. I have asked everything I have wanted to ask.

PN1352

MR WILLIAMS: No, thank you. Commissioner, there was one other – when I (indistinct) the transcript reference and it is probably irrelevant for me to - - -

PN1353

THE COMMISSIONER: Well, they certainly got my Member colleague's name wrong.

PN1354

MR WILLIAMS: Yes, they did. And that was not the only mistake. So I normally don't worry about these, but there was a – Commissioner, we had an exchange where I was recording an objection to a line of questioning. I can't remember where it is now, but I will see if I can find it. Yes, it was actually PN518. I just wanted to make a point of that. I am recorded as saying, "Commissioner, I say with respect that the tone has been derogatory at witnesses." I did not say that. What I said was "interrogatory".

PN1355

THE COMMISSIONER: Okay.

PN1356

MR WILLIAMS: Nor do I make any submission - - -

PN1357

THE COMMISSIONER: Sure. That makes sense.

PN1358

MR WILLIAMS: I do not suggest that your question is derogatory. The term I used was interrogatory.

PN1359

THE COMMISSIONER: All right. I will note that.

PN1360

MR WILLIAMS: All right. Commissioner, the final thing was that you created a table which was used in questioning, I think, all of the witnesses. Probably now that it has been used that way, it should become part of the recording.

PN1361

THE COMMISSIONER: I think I marked it FWC1.

PN1362

MR WILLIAMS: Thank you. I just wanted to check.

PN1363

THE COMMISSIONER: I did later go and look at some formulas because I am pretty decent at spreadsheets and – but that morning I didn't use formulas and I went and double-checked and I was, I think, spot on. I should have used formulas in the first place, but I just wanted to double-check, before I sent it to you, or - - -

PN1364

MR WILLIAMS: I thought it was an amusing moment, that when you asked Mr McLeod about spreadsheets, he was – he said, yes, I am completely familiar with those. So I suppose you get good at what you are asked to do day by day.

PN1365

THE COMMISSIONER: I don't think I am an expert, but I can plug in a formula at a basic level.

PN1366

MR WILLIAMS: I aspire to be that one day.

PN1367

THE COMMISSIONER: Just plus sum, Mr Williams.

PN1368

MR WILLIAMS: Yes. Thank you. Those – there were no questions from me, Commissioner. I'll rest at that.

PN1369

THE COMMISSIONER: All right. Thank you. You'll have opportunity to reply. Mr Buckley?

PN1370

MR BUCKLEY: Yes, thank you. Good morning, Commissioner.

PN1371

The AMIEU has provided some written submissions and further submissions in relation to this matter and we continue to rely upon those except to – except to the extent that the submissions identify a matter that is not pressed. I, too, will probably try and focus upon the evidentiary issues that emerged in the course of the hearing. And most of my submissions will be directed to the question of the explanation and the quality of the explanation given to employees.

PN1372

So the issue of – under section 180(5), whether the employer took all reasonable steps to ensure that the terms of the agreement, the effect of those terms were explained to the relevant employees and whether that explanation was provided in an appropriate manner, taking into account those employee's circumstances.

PN1373

Now, Mr Williams has submitted that the effect of the explanation does not need to concern itself with the effect on other employees, that is employees other than those who have been provided with the explanation. And the focus should be on the personal interests of those employees. The AMIEU would not agree with that submission. Indeed earlier in his submissions, I believe Mr Williams made a comment to the affect that the employees had every right to be concerned about the wage model that would apply to the future of the – future of the business. And we say that is correct. And that is particularly so given the way the bargain was conducted and given what was said during or at the outset and then of course, during the course of bargaining. Now, the circumstances of these employees include the fact that the employers met with them, it has told them that they are going to negotiate a new agreement, that there will be wage increases for the current employees. They are told that wage rates will be lowered for new employees and in the course of that explanation, they are also told that the future of the business, their job security is going to be affected by whether or not the company can get the type of cost structure that it wants for the business.

PN1374

Now, indeed, when I suggested to both Mr Lingard and McLeod during the course of cross-examination, that it may be that they did not care about what the rates for the new employees were, both of them disagreed with that proposition. Mr Lingard does that at paragraph 81 of the transcript and Mr McLeod does it at paragraph 301 of the transcript. Mr Lingard said that it mattered to him that new employees were meant to be getting lower rates in light of what he had been told about job security and that is at – if we go on through paragraphs 81 through 83 of the transcript.

PN1375

Now, Mr Els in his statement, I believe he makes a bold statement that he – or an unqualified statement that rates needed to be lowered and it may be that he did not specifically say they were going to lower every single rate in the new agreement. But that may well have been the impression created upon employees and it would certainly seem to be inconsistent with the ultimate result which was that many of the rates actually underwent some kind of increase.

PN1376

Now, the Commission took Mr Lingard to some specific pay rates in the agreement and some rates which had been the subject of increases. Now, Mr Lingard agreed that he had not been told about those particular increases or at least had not been told the specific details of those particular increases and there are paragraph references at – or transcript references at paragraphs 95, 98, 102 and 103. And in my submission that's consistent with the evidence of Mr Els, who says that in giving his explanation during the meeting on 2 and 6 February, he focussed on pointing out where rates had gone down and didn't seem to think it important to point out where those rates had increased and there's a number of transcript references I can give there.

PN1377

It occurs at paragraph 860, at paragraphs 877 to 878. He talks about identifying a lower rate for employees. There's paragraph 892 where he indicates he didn't

specifically point out an increase. There's paragraphs 902 and 903 where he says he – which is where he talks about focussing on – how he focussed on trying to identify the lower rates but not the higher rates. And again at paragraphs 912 to 914.

PN1378

Now, Mr Lingard did give some evidence when being questioned by the Commissioner during re-examination that he was aware generally that some rates were going up rather than down. And that occurs at paragraph 184 but that's an exercise. That's an awareness that seems to have arisen not from the explanation he got from Mr Els, but from an exercise he did at home comparing the rates material and the old and the new agreement which he had been provided by the company.

PN1379

And that seems to be – there's references at paragraphs 216 to 230 and 231. Now, then we have Mr McLeod who was a forklift driver and he actually testified when initially cross-examined that it was his understanding that all of the rates for new employees had been reduced and we can find there's a reference to that at paragraphs 311 and paragraphs 312 of the transcript.

PN1380

Now, I believe during his address, my learned friend referred to the exchange at paragraph 461 and 462 which was said to be Mr McLeod demonstrating on there that's – or being told that there was some rates to be increased while others were decreased but that occurs in the context of slightly further down the page, at 462, when he says he did that by looking at the tables and when questioned about that at paragraph 464, he says "It might be just the 23 rate we got shown. Maybe I'm getting confused". So we would submit it is not clear that he was not being told that some rates would increase and indeed, when questioned by the Commission, there is a series of questions at 485 through 490 where Mr McLeod denies being told about specific increases to specific rates in the 2023 agreement.

PN1381

And then at paragraph 493, he reiterates his understanding that he understood that new employees were going to get paid less, at paragraph 494, "That's what you were told?" "Yes, that I understood that". And at 495, "This document doesn't bear that out, does it? For some?" Answer: "Yes". And paragraph 496, "Would you have liked to have known that?" "Yes, but I don't think it would have changed my vote, what I voted."

PN1382

If indeed if I could turn to paragraphs 30 and 31 of the closing submissions, submitted by the applicant in this matter, it refers to the evidence of the employees as supporting a conclusion that the explanation provided about comparative rate information being effective. On the contrary, the AMIEU would submit that a contrary conclusion should be drawn from the evidence of those two witnesses. But Mr McLeod was certainly – was of the understanding really, that all rates would go down. Mr Lingard certainly did understand that not all rates would reduce, but the evidence suggests that he didn't derive that explanation from the – sorry, he didn't derive that understanding from the explanation

provided by Mr Els. But indeed from the analysis, he does at home with the material that has admittedly been provided by the employer.

PN1383

It seems that Mr McLeod on the other hand was in fact misled by the explanation that he was given. Now, there is no suggestion that the misleading as the Commissioner pointed out earlier, there is no suggestion that that was intentional, but the AMIEU says where in a situation where the employer has effectively said to a small group of employees look, your job security depends upon us lowering the rates in the agreement for new employees, that is what we are going to do. And then ultimately, they decide that the employer decides at some point that they are not going to do that, then given what they have told employees and given the history of what is being said to them in negotiations, it really should be the case that an appropriate explanation would have drawn attention to the fact that there has been a change. That some rates have in fact been increased. And indeed increased by varying percentages for new employees and have not gone down.

PN1384

In circumstances where employees have been told that lowering wage cost structures and lowering the rates of employees is important for their job security, we say that is something the employees ought to have been told. If the Commission were to accept that the explanation was not appropriate in failing to draw attention or to draw a specific attention to those increased rates, again, bearing in mind the evidence that is extracted in the AMIEU's further submissions, the evidence of Mr Els at paragraph 52 of his witness statement where he conveys his explanation that he told people that the rates lowered or that rates were lowered from your employees, again, it may not be literally inaccurate to say that.

PN1385

In circumstances where some of the rates were lowered but nevertheless, we say that a reasonable employer would have understood that that creates the possibility that employees may be misled, given that in fact a significant number of rates have been increased compared with the 2018 agreement.

PN1386

Now, if the Commission were to determine that the employer had not taken all reasonable steps, it would then require the Commission to consider the application of section 188(2) and issues of whether or not the – it was a minor defect. It would also require consideration of whether or not the employees were not disadvantaged by the potentially misleading explanation.

PN1387

Now, we have got the evidence of Mr Lingard. I believe he said at paragraph 198 that he said it would not have changed his vote. Mr McLeod gives his evidence at page – paragraph 496 that he would have liked to have had that information but again, the most he says is that he says, "I don't think it would have changed my vote". And there is of course, five other employees who voted on the agreement and there is no evidence about their views on that particular issue.

PN1388

Now, for completeness, I also mention the fact that – I mention in our original submissions, the rig force decision, the Full Bench Rigg Force decision which, and I mention it only because it makes the point that in those circumstances it held that a misleading statement given in the course of the explanation of the agreement was sufficient to enliven the concern that section 180(5) had not been satisfied, notwithstanding that the rest of the process, I believe it described it as being a model for the way in which explanations were given.

PN1389

Now, what happened in Rigg Force was that the Full Bench then remitted the matter to the original Commissioner and left it to the Commissioner just to go through the exercise of determining whether or not section 188(2) could be used to correct the effect of the – what was a misleading representation in Rigg Force. In Rigg Force employees were told that rates would increase, that their rates would increase notwithstanding that the rates actually went down in the agreement. And indeed, those decreases applied to the employees who voted upon the agreement and that, I believe the employee wanted to contend that the employees were not disadvantaged because their rates were – that although we – the agreement allowed the rates to be reduced, their rates were not going to be reduced in fact.

PN1390

When it was remitted to a single Commissioner, the Commissioner said that well, the fact of the misleading explanation being given in the circumstances of that case constituted a separate ground for believing that the agreement had not been genuinely agreed under section 188(1)(c).

PN1391

And that being the case, it wasn't open to be corrected by section 188(2) because it refers only to paragraphs (a) and (b) of sub-section 188(1). Now, I have a copy of that in judgment and I will hand it up, largely because it's 2020 Fair Work Commission 591 and I should draw the Commissioner's attention to the fact that the decision refers to an appeal having been lodged to that – to that decision. The appeal is identified as C2020/3057. Now, to the best of my research abilities, I haven't been able to locate any Full Bench decision in relation to the matter.

PN1392

Now - - -

PN1393

THE COMMISSIONER: What? When it was remitted back to the Commissioner Lee?

PN1394

MR BUCKLEY: Yes. The decision that was remitted to Commissioner Lee indicates that that decision was subsequently appealed. But I can't find any appeal judgment, so I don't know if that appeal was discontinued or whether it exists somewhere and I just haven't found it for some reason.

PN1395

THE COMMISSIONER: So the Full Bench in 2020, 591, remitted it back to Commissioner Lee?

PN1396
MR BUCKLEY: That's the remitted decision of Commissioner Lee.

PN1397
THE COMMISSIONER: Yes.

PN1398
MR BUCKLEY: In the Full Bench decision - - -

PN1399
THE COMMISSIONER: I see, yes.

PN1400
MR BUCKLEY: - - - they said - - -

PN1401
THE COMMISSIONER: You've given me the decision, I think.

PN1402
MR BUCKLEY: Yes. That's Commissioner Lee's decision.

PN1403
THE COMMISSIONER: Yes.

PN1404
MR BUCKLEY: The Full Bench decision was referred to in our initial submissions, I think.

PN1405
THE COMMISSIONER: Oh, I see, so you have got Commissioner Lee's consideration after remittal.

PN1406
MR BUCKLEY: Yes.

PN1407
THE COMMISSIONER: A decision of Knight v The Bakery of 2020. And there was an appeal.

PN1408
MR BUCKLEY: So Commissioner decision – that's not the original decision of Commissioner Lee.

PN1409
THE COMMISSIONER: No. No.

PN1410
MR BUCKLEY: Commissioner Lee made a decision, it was appealed to the Full Bench.

PN1411

THE COMMISSIONER: Right. Yes.

PN1412

MR BUCKLEY: The Full Bench said section 180(5) - - -

PN1413

THE COMMISSIONER: Yes, I have that decision in front of me.

PN1414

MR BUCKLEY: - - - had not been satisfied. But then it remitted to Commissioner Lee the question of what that meant. That is - - -

PN1415

THE COMMISSIONER: Just one moment. Just one moment. Can you see what happened to that? Do you know, Mr Williams? The outcome of the appeal? Mr Williams?

PN1416

MR WILLIAMS: I don't. Should I - - -

PN1417

THE COMMISSIONER: No. My associate will just look at it now. We have C2020/3057.

PN1418

MR WILLIAMS: I'm not aware that the Lee decision was appealed, but Mr Buckley thinks it might have.

PN1419

THE COMMISSIONER: Well, it says it at the top.

PN1420

MR BUCKLEY: Well, at the top of the - - -

PN1421

MR WILLIAMS: Oh, I see, I beg your pardon.

PN1422

MR BUCKLEY: - - - which indicates it was.

PN1423

MR WILLIAMS: I'm sorry. I see that, yes.

PN1424

MR BUCKLEY: But often, on the Commission's website, if once an appeal decision has been made, that would often be incorporated into that headnote.

PN1425

THE COMMISSIONER: Yes. Yes. Well, I suppose - - -

PN1426

MR BUCKLEY: And – but I have searched separately for an appeal judgment in the matter.

PN1427

THE COMMISSIONER: Well, the appeal was withdrawn I am told.

PN1428

MR BUCKLEY: I will – I was not able to find that out, Commissioner.

PN1429

THE COMMISSIONER: So the decision of Commissioner Lee is that he found that 188(2) could not assist. Is that - - -

PN1430

MR BUCKLEY: In circumstances where he found that the misleading explanation was a separate ground under section 188(1)(c).

PN1431

THE COMMISSIONER: Okay. All right. Well, we have news that it was withdrawn, so - - -

PN1432

MR BUCKLEY: I do not have a great deal to add. I should touch on the issue of fairly chosen, which has been pressed by the AMIEU. Again, as Mr Williams pointed out, we are not pursuing the question of whether the coverage of the agreement was geographical organisationally operationally distinct. The AMIEU was long accepted in the past that the manufacturing section was a distinct section in the business but the uncertainty arose because of the recent production agreement which included some warehousing and logistics classifications within it and it was not clear that distinction was being maintained. Mr Els put in a statement which clarified that and that seems to resolve that issue.

PN1433

The AMIEU accepts that this is a more difficult position or proposition to have the Commission accept, but nevertheless, the AMIEU says there is a concern about whether the group is fairly chosen in circumstances where you have got a small cohort. It is intended to apply to a wider number of employees and that combined with the grandfather and indeed the promise of grandfathering at the outset of the negotiations.

PN1434

You have sat a group of workers down and said that well, "We want to negotiate a new agreement. We are going to have a lower set of conditions for new employees but not for you, so at the start, you are going to be looked after, you are going to have wage increases applied but that is not necessarily going to apply to the other people and essentially telling them that they do not really have to be too concerned about the rates of pay for those people.

PN1435

But of course, that has to be interpreted in light of the evidence people have given about what was important to them and what they did care about. The most we can

say is that it would be open to the Commission to decide that in those circumstances the group had not been fairly chosen. However, I can't point to any relevant authority.

PN1436

THE COMMISSIONER: Well, that is the One Key issue, isn't it? That you – the moral - - -

PN1437

MR BUCKLEY: We would say yes.

PN1438

THE COMMISSIONER: - - - the moral authority issue?

PN1439

MR BUCKLEY: Yes.

PN1440

THE COMMISSIONER: I mean, the irony is, Mr Buckley that you – in the decision there is only two classifications that are paying lower than the 2018 agreement and the irony of the union wanting to be involved in this matter where people are getting up to 10 per cent increases - - -

PN1441

MR BUCKLEY: Oh, look, I accept that, Commissioner.

PN1442

THE COMMISSIONER: I'm sure that would be lost on some readers.

PN1443

MR BUCKLEY: I understand that, Commissioner. Right. Just make a – I think that is all I have, perhaps. Just to – except perhaps just to put on record that the union does not quibble with – or does not disagree with the applicant's submissions in relation to either the – any – the notice of employee representational rights or the Form 17s. We think the better view is probably the two Form 17s. But that is – that can be corrected.

PN1444

THE COMMISSIONER: All right. Well, the issue about the request for a confidentiality order. Yes, Mr Williams?

PN1445

MR WILLIAMS: Well, Commissioner, if the documents provided are the – if you think the material that you need to refer to them and they therefore become part of the Commissioner's record then we would ask for a confidentiality order. But as I said, I just can't see a basis on which that could possibly be relevant.

PN1446

THE COMMISSIONER: All right. So I should have some time to consider them?

PN1447

MR WILLIAMS: Yes. And if not – if they're not, then what we ask is you simply send them back or delete them.

PN1448

THE COMMISSIONER: Okay. And if I am to consider them and they're not to be shared with the union, Mr Buckley, what are your views on that?

PN1449

MR BUCKLEY: Well, if – well, firstly, if they were to be shared with the union, the AMIEU would have no objection to the confidentiality order being made by the Commission.

PN1450

THE COMMISSIONER: But the confidentiality order requested is that it's only to the Commission and not to the union?

PN1451

MR BUCKLEY: Oh, I see. Yes, but I see – sorry, if the Commission were minded to give them to us.

PN1452

THE COMMISSIONER: So can we explain what they are, Mr Williams?

PN1453

MR WILLIAMS: Yes. It is difficult for me to - - -

PN1454

THE COMMISSIONER: And I don't know if there is any – I assumed if there was privilege attached that would have been raised?

PN1455

MR WILLIAMS: Well, it's not really a matter of privilege. We're not privileged in the sense of being legally privileged. But Commissioner, you'd asked for some email correspondence between Mr Els and Ms Auvaa. We have provided that. But it is emails between those two. So hence, we can't see how it could be relevant to an issue as to whether or not the employer met its obligations in the approval process.

PN1456

And then the one which has been referred to so far is some comparative pay rates. Again, given that it formed no part of the material supplied to the employees and as you pointed out Commissioner, on its face, it appears to be some embryonic analysis at an early point in the company's confidential business analysis. We just make a submission that it is – there is no basis upon which it could be relevant to the – your discretion.

PN1457

But that is what it is, Mr Buckley. There is a table which does include some competitive rates and it has an unexplained table which appears to compare to – at 2018 rates as what was then described as 2022 rates. So I suppose that gives you

some idea how far back in the process it was. And there are some emails which are unremarkable correspondence between but still confidential correspondence between company representatives. I would welcome Mr Buckley's acceptance that given the limited role an intervener has, we need take the matter no further.

PN1458

THE COMMISSIONER: All right. But if I do want to have regard to them then what do you propose I do? Make a confidentiality order?

PN1459

MR WILLIAMS: Well, have regard to them. But to the extent you refer to them, perhaps be discreet in the way that you refer to them in your written reasons. But what we say is not necessarily an unhelpful and inconsistent with Mr Buckley's role, would be for them to be provided. This enterprise agreement approval - application for approval in the enterprise agreement process should not be allowed to be used as a proxy for the delivery of internal company analysis and correspondence to a union who in this case has no status as a bargaining representative. And I make no criticism of the role that Mr Buckley's played. But that's our situation.

PN1460

THE COMMISSIONER: So I think I might have asked Mr Els this. You know, why didn't you provide the 2018 rates and the 2023 rates?

PN1461

MR WILLIAMS: Provide them to?

PN1462

THE COMMISSIONER: Well, show the employees the – like what I did, you know, this has gone up by 8 per cent and - - -

PN1463

MR WILLIAMS: Well, they did.

PN1464

THE COMMISSIONER: And – so that is – I think I asked him those questions.

PN1465

MR WILLIAMS: They did because they provided them with both the 2018 rates and the 2023 rates.

PN1466

THE COMMISSIONER: Yes, but doing what I did and saying this rate is at 8.1 per cent.

PN1467

MR WILLIAMS: Well - - -

PN1468

THE COMMISSIONER: Is – that is the reason why I asked for the material.

PN1469

MR WILLIAMS: But the matter before you is the issue of the explanation to employees. I have never seen an explanation process which descended to that level of detail.

PN1470

THE COMMISSIONER: Because employees are typically rolling over enterprise agreements on the large part and not in every situation.

PN1471

MR WILLIAMS: Well - - -

PN1472

THE COMMISSIONER: But look, that is I think why I called for it. And it shows that at some stage there was side by side and the issue was why wasn't the side by side – I do not think the employees were shown a side by side, were they?

PN1473

MR WILLIAMS: In a sense of a schedule here and a schedule there.

PN1474

THE COMMISSIONER: Yes.

PN1475

MR WILLIAMS: I can't recall any evidence of that kind.

PN1476

THE COMMISSIONER: No.

PN1477

MR WILLIAMS: But during the access period at least, they were provided in the same email with both documents.

PN1478

THE COMMISSIONER: Yes, I know that.

PN1479

MR WILLIAMS: And they went and had a look.

PN1480

THE COMMISSIONER: Well, I have got evidence of two people - - -

PN1481

MR WILLIAMS: Both of them who went and say they had a look.

PN1482

THE COMMISSIONER: And they are bargaining representatives. Two or three bargaining representatives.

PN1483

MR WILLIAMS: Well, I suppose the – perhaps I can make my very limited submissions in reply now, Commissioner? I will deal with that issue?

PN1484

THE COMMISSIONER: Well, I am not sure. Have you finished, Mr Buckley?

PN1485

MR BUCKLEY: Yes. Yes, those were my submissions.

PN1486

THE COMMISSIONER: All right. I don't think I have any questions of you other than let me, Mr Buckley, decide what I want to do with it once I have digested the material.

PN1487

MR BUCKLEY: Yes, Commissioner.

PN1488

THE COMMISSIONER: And if I need to communicate with you, parties, I will. I certainly will not provide anything, Mr Buckley, without having heard from the applicant first.

PN1489

MR BUCKLEY: No, I understand that.

PN1490

THE COMMISSIONER: Thank you. Yes.

PN1491

MR WILLIAMS: Yes.

PN1492

THE COMMISSIONER: Mr Williams?

PN1493

MR WILLIAMS: Thanks, Commissioner. So my reply is a limited one of course, but by reference to the Rigg Force decision, it is pretty obvious it is a different type of problem.

PN1494

In Rigg Force, the employees were positively misled about the effect of the agreement on them in circumstances where they were told the agreement provided the pay rises and in fact sent their wage rises down. So that is an explanation which was specific to the interest of the employees who were being asked to vote. It is information which would obviously have a material impact on whether they might support the agreement or not. And unremarkably, the Full Bench, and then subsequently, Commissioner Lee upon referral, decided that the requirements had not been met and that section 188(2) was of no assistance.

PN1495

They are pretty different circumstances. What we have here is a situation where the explanation provided to employees was precisely correct insofar as it – it affected their direct interests, (1). Secondly, because they were provided with the information in – with both schedule and of course, they would have had access to them anyway but they were specifically provided with both schedules, so they

were given accurate information about the changes. Specific and accurate information about the changes. Although, the term misled has been used and we have responded to it, there is no evidence at any time that Mr Els or anyone else told these employees that all rates would be going down. They were told that there needed to be a rebalancing of the cost equation and that rates would go down, but they were not told that all rates were going to go down. And we also have the evidence that at least Mr Lingard and perhaps with slightly less clarity, Mr McLeod as well, did the analysis that they were allowed to do and they - certainly Mr Lingard and probably Mr McLeod at a point in time were aware that there would be rates which were going up and were going down. And some which were going down.

PN1496

So it is highly problematic to speak of that as an example of employees being misled, whether intentionally or not. They were not. The most that can be said is that in the separate explanation which Mr Els took the time to give on the 2 and 6 February or one date or the other, he emphasized some of the changes more than others. And he did so, because he assumed correctly that they would be – the issues of rates going down, which would be of more interest to employees.

PN1497

So the most that – the most that you could find would be that he did not emphasize in that discussion that by reference to the tables that some of the rates would be going up as well as going down. That is an entirely different situation to Rigg Force including for the very good reason that employees who voted on this agreement would have hardly been concerned if they had been told that - the good news – that some rates would be going up. It would not be regarded as a reason not to approve the agreement. If anything it would be a reason why they would – with better conscious approve the agreement.

PN1498

So they were not misled, they were given the information. There was a differential in emphasis between some aspects of the impact on future employees than others. They voted unanimously yes and two of the witnesses who – two of the employees who have been before you have positively said it would have made no difference to them, their vote. And of course, it would not have. So Commissioner if you do find against my submission that there has been a failure to discharge the requirements of section 180(5), then it is a perfect situation for the application of section 188(2), because a lack of – a differential emphasis in explanation when accurate information had already been given, could only be a minor procedural error and no employee has been disadvantaged. And they are my submissions, Commissioner. Thank you.

PN1499

THE COMMISSIONER: All right. Thank you all for your participation. I will decide what I wish to do with the confidentiality order request. And following that, I will reserve my decision. Thank you all.

PN1500

MR WILLIAMS: Thank you.

PN1501

MR BUCKLEY: Yes. Thank you.

ADJOURNED INDEFINITELY [12.09 PM]