TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER MIRABELLA

C2022/6450

s.739 - Application to deal with a dispute

Health Services Union
and
Mercy Hospitals Victoria Ltd T/A Werribee Mercy Health
(C2022/6450)

Health and Allied Services, Managers and Administrative Workers (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2021-2025

Melbourne

10.00 AM, WEDNESDAY, 3 MAY 2023

AUDIO COMMENCES MID-SENTENCE AFTER BEING UNMUTED **[10.09 AM]**

PN1

MR WOOD: (Audio malfunction) I very much imagine those objections will be resolved by the Commission saying it's a matter of weight.

PN2

THE COMMISSIONER: Yes.

PN3

MR WOOD: And they've got the same objection to this second witness statement. But for the procedural point of should the applicant be able to rely upon it and introduce it into evidence, and be given leave to that effect, despite it being allowed we have no objection.

PN4

THE COMMISSIONER: Okay. Yes, it doesn't raise any new matters, issues that arise.

PN5

MR WOOD: No.

PN6

THE COMMISSIONER: That's the first thing. The second thing is, noting from the submissions of the respondent, Mr Wood, is it the respondent's intention to press any issues of jurisdiction?

PN7

MR WOOD: We thought we were obliged to, at least in a shorthand fashion, indicate what they are. In the footnote to our submissions we have said that it's a formal submission, and we say that for this reason. The challenge that we identified to jurisdiction at the start of our submissions is not one that we understand has ever been run before.

PN8

Every type of agreement of this nature that has been the subject of private arbitration has been held to confer jurisdiction on the Commission, and it is probably the sort of argument that is best dealt with by the Commission at the Full Bench level, but we do not wish to be precluded if the matter got that far from saying we didn't raise it here, and we do so formally, and that's our position.

PN9

That doesn't prevent you from determining it, Commissioner - - -

PN10

THE COMMISSIONER: But you are pressing it?

PN11

MR WOOD: Not pressing it other than formally, so that we're not shut out at the appeal stage from running it there.

PN12

THE COMMISSIONER: Thank you, Mr Wood.

PN13

MR WOOD: Thank you.

PN14

THE COMMISSIONER: Now, the way I intended, but I'm open to the parties' preference – the way I was intending to deal with this morning was to have all the witness evidence put in and then to move to submissions. I thought that would be a more efficient way of doing it. It would mean witnesses can then stay for the duration of the matter or they can go. Does anyone have an issue with that?

PN15

MR WHITE: No, your Honour. In fact, as I understand it there's only one witness that's actually required to be cross-examined today.

PN16

THE COMMISSIONER: Is that the case, Mr Wood?

PN17

MR WOOD: Yes, Commissioner.

PN18

THE COMMISSIONER: And that is - - -?

PN19

MR WHITE: Mr Pullin from VHIA.

PN20

THE COMMISSIONER: Mr Pullin, okay. What I might do for the sake of completeness is take those witness statements and include them as documents then.

PN21

MR WHITE: Yes. So for the applicant, I would tender the statement of Cameron Grainger dated 21 March 2023.

PN22

MR WOOD: And could I while my friend is introducing Mr Grainger's evidence just indicate that this is one of the three witness statements to which we make formal objection at paragraphs 3 to 12 on the basis that evidence of negotiations leading up to the instrument are inadmissible.

PN23

The normal position is such objections are normally overruled in this Commission, and normally the Commission treats these as matters of weight, but I make that formal submission.

PN24

THE COMMISSIONER: Thank you. Yes, you're correct to say that, Mr Wood. It is open to the parties to object to evidence on a number of bases, and

the Commission in its deliberations will give due weight to those matters. Mr White.

PN25

MR WHITE: The next - - -

PN26

THE COMMISSIONER: Sorry, which – so the witness statement of Mr Grainger – now, can we for the sake of making things easier for everyone use the numbered – at the court book with the numbered pages?

PN27

MR WHITE: Yes. Mr Grainger's statement commences at page 81 of the court book and with annexures runs through to page 857 of the court book.

PN28

THE COMMISSIONER: We will mark the witness statement of Cameron Grainger comprising 21 paragraphs, dated 21 March 2023 and attached annexures as exhibit A1.

EXHIBIT #A1 WITNESS STATEMENT OF CAMERON GRAINGER DATED 21/03/2023 PLUS ANNEXURES

PN29

MR WHITE: The next is the statement of Steven Riley dated 21 March 2023. It commences at page 916 of the court book and with annexures runs through to page 924 of the court book.

PN30

THE COMMISSIONER: The witness statement of Steven Riley on page 916 up until page 924, annexures included, dated 21 March 2023, will be marked exhibit A2.

EXHIBIT #A2 WITNESS STATEMENT OF STEVEN RILEY DATED 21/03/2023 PLUS ANNEXURES

PN31

MR WHITE: The next is a statement of Andrew Hargreaves dated 21 March 2023, commencing on page 75 of the court book, running through to page 80 of the court book with annexures.

PN32

THE COMMISSIONER: The witness statement of Andrew Hargreaves starting on page 75 of the court book until page 80, comprising of 11 paragraphs, dated 21 March 2023, will be marked exhibit A3.

EXHIBIT #A3 WITNESS STATEMENT OF ANDREW HARGREAVES DATED 21/03/2023

PN33

MR WHITE: Next there is a statement of Timothy Hodges dated 21 March 2023, commencing on page 865 of the court book and running through to page 876 with annexures.

PN34

THE COMMISSIONER: The statement of Timothy Hodges starting on page 865 of the court book, comprising of 15 paragraphs and associated annexures, up to page 876 will be marked exhibit A4.

EXHIBIT #A4 WITNESS STATEMENT OF TIMOTHY HODGES DATED 21/03/2023 PLUS ANNEXURES

PN35

MR WHITE: Next is a statement of Nicholas Barbuntay dated 21 March 2023, commencing on page 862 of the court book and running to page 864. There are no annexures to that statement, but there are separately annexures provided with the reply submission that related to emails, or they were emails, and I'll - - -

PN36

THE COMMISSIONER: What we'll do is - - -

PN37

MR WHITE: - - - tender that separately.

PN38

THE COMMISSIONER: Separately. The witness statement of Nicholas Barbuntay from page 862 to 864 comprising of 11 paragraphs will be marked exhibit A5.

EXHIBIT #A5 WITNESS STATEMENT OF NICHOLAS BARBUNTAY DATED 21/03/2023

PN39

MR WHITE: As I say, I separately tender four pages of attachments to the - - -

PN40

THE COMMISSIONER: What page, please?

PN41

MR WHITE: 854 to - - -

PN42

THE COMMISSIONER: Sorry, I didn't hear - - -

PN43

MR WHITE: Sorry, 954 to 957.

PN44

THE COMMISSIONER: The bundle of documents from page 954 to 957 will be marked collectively as exhibit A6.

EXHIBIT #A6 BUNDLE OF DOCUMENTS FROM PAGE 954 TO 957 OF THE COURT BOOK

PN45

MR WHITE: Next is the statement of Danny Harika dated 21 March 2023, commencing on page 877 of the court book, running through to page 915 with exhibits.

PN46

THE COMMISSIONER: The statement of Danny Harika from page 877 to 915 inclusive of exhibits, comprising of 31 paragraphs, will be marked exhibit A7.

EXHIBIT #A7 WITNESS STATEMENT OF DANNY HARIKA DATED 21/03/2023 PLUS ANNEXURES

PN47

MR WHITE: Then there is the first statement of Gavin Sharpe dated 21 March 2023, commencing on page 858 of the court book, running through to 861 with one annexure.

PN48

MR WOOD: That's the second of the witness statements to which we take formal objection on the same basis – sorry, similar basis to the basis we took objection to Mr Grainger's witness statement. We don't object to paragraph 1, but it's in effect an objection to the whole witness statement, and we make that objection in the same fashion that we made in relation to Mr Grainger.

PN49

THE COMMISSIONER: Thank you, Mr Wood. Noted. The witness statement of Gavin Sharpe from page 858 to 861 inclusive of an annexure, comprising of six paragraphs, dated 21 March 2023, will be marked exhibit A8.

EXHIBIT #A8 WITNESS STATEMENT OF GAVIN SHARPE DATED 21/03/2023 PLUS ANNEXURE

PN50

MR WHITE: And then next there is the second statement of Mr Sharpe that is dated 1 May 2023. It is not in the court book.

PN51

THE COMMISSIONER: I've marked those pages myself and just gone to the end of the court book and added the pages.

PN52

MR WHITE: Yes.

PN53

THE COMMISSIONER: So I've marked them from page 1804 to 1814.

PN54

MR WHITE: Yes.

PN55

MR WOOD: We foreshadowed our objection to the second Sharpe statement when the question of whether there should be leave given to file and serve it late - sorry, our objection to the second Sharpe statement is a formal objection, which we would expect to be resolved in the same manner, that is, Mr Grainger's statement goes to evidence of prior negotiations and we say is irrelevant, the two Sharpe statements goes to what was done on a post-agreement basis by other hospitals other than the respondent. Our formal submission is it's irrelevant, but we understand the way that these things are normally resolved.

PN56

THE COMMISSIONER: I will mark the second witness statement of Gavin Sharpe from page 1804 to 1814, dated 1 May 2023, comprising of five paragraphs and related annexures, as exhibit A9.

EXHIBIT #A9 SECOND WITNESS STATEMENT OF GAVIN SHARPE DATED 01/05/2023 PLUS ANNEXURES

PN57

MR WHITE: Thank you, your Honour. That's the evidence for the applicant.

PN58

THE COMMISSIONER: And that's it, nothing more?

PN59

MR WHITE: No.

PN60

THE COMMISSIONER: Okay. Mr Wood.

PN61

MR WOOD: Our first piece of evidence is a statement from Tamara Kingsley. It is found in the court book at page 993. It, including annexures, stretches to page 1773 of the court book. There is one annexure with attachments A through U, and there's no objection to the receipt of that statement.

PN62

THE COMMISSIONER: The witness statement of Tamara Kingsley from page 993 to 1173 including annexures, comprising of 54 paragraphs, signed and dated 4 April 2023, will be marked as exhibit R1.

EXHIBIT #R1 WITNESS STATEMENT OF TAMARA KINGSLEY DATED 04/04/2023 PLUS ANNEXURES

PN63

MR WOOD: The second witness is the statement of Daniel Pullin. It is found in the court book at pages 1787 to 1803. We should say as a matter of fairness that if our criticisms of the Grainger statement are correct, that is, the content of negotiations are admissible, then that would apply to various aspects of Mr Pullin's statement at paragraphs 15 to 19 and 38 to 39.

PN64

THE COMMISSIONER: Was this the witness that was intended to be cross-examined?

PN65

MR WHITE: Yes, your Honour, and the applicant doesn't press any objection to Mr Pullin's statement.

PN66

MR WOOD: Would you prefer that we call him and have him adopt his statement, and then leave him to be cross-examined, Commissioner?

PN67

THE COMMISSIONER: Yes.

PN68

MR WOOD: That's - - -

PN69

THE COMMISSIONER: The usual course.

PN70

MR WOOD: Yes. That's our second and last piece of evidence that we wish to have received. There's no objection to it being received by my learned friend, but I'll do it formally through the witness if you'd prefer.

PN71

THE COMMISSIONER: Yes, please.

PN72

MR WOOD: I would then, if the Commission considers this a convenient course, call Daniel Pullin.

PN73

THE ASSOCIATE: Please state your full name and address.

PN74

MR PULLIN: Daniel Mark Pullin. My office is 88 Maribyrnong Street, Footscray, Victoria.

<DANIEL PULLIN, SWORN [10.25 AM]

EXAMINATION-IN-CHIEF BY MR WOOD [10.26 AM]

PN75

MR WOOD: Your name is Daniel Pullin?---Yes.

PN76

You're employed by the Victorian Hospitals Industrial Association?---Yes.

PN77

And you're employed in that capacity as a senior workplace relations consultant?---That's correct.

PN78

And in that capacity you've made a witness statement in this proceeding, Mr Pullin?---Yes.

PN79

Do you have it in front of you there in that bundle of documents? If you look at page 976 – the numbers are at the top of the page?---I'm there, thank you.

PN80

Is that your statement which runs to some 39 paragraphs?---Yes.

PN81

And it has three attachments?---Yes.

PN82

And those, for the record, are found at pages 976 to 992, that is, the witness statement and the three attachments. Is your witness statement signed 4 April of this year?---Yes.

PN83

Have you read the witness statement and the attachments before coming to give evidence here in the Commission?---I have.

PN84

Are there any amendments you wish to make to this witness statement?---There are not.

PN85

Is the witness statement and are the attachments thereto true and correct?---Yes, they are.

PN86

We tender the witness statement.

PN87

THE COMMISSIONER: Thank you, Mr Wood. I'll mark that as exhibit R2, that being the witness statement of Daniel Pullin from page 1787 to 1803 of 39 paragraphs and three attachments.

EXHIBIT #R2 WITNESS STATEMENT OF DANIEL PULLIN DATED 04/04/2023 PLUS ANNEXURES

PN88

MR WOOD: I have no examination-in-chief for this witness.

PN89

THE COMMISSIONER: Thank you. Mr White?

PN90

MR WHITE: Thank you.

CROSS-EXAMINATION BY MR WHITE [10.28 AM]

PN91

MR WHITE: Mr Pullin, as VHIA's senior workplace relations consultant, I think you've said that you led the bargaining team for the VHIA in the recent round of bargaining for this enterprise agreement?---That's correct.

PN92

And that was on behalf of the employer health services?---That's correct.

PN93

Including on behalf of Mercy?---Yes.

PN94

In your statement, you've said that in preparing the statement you were provided with and reviewed the statement of Cameron Grainger provided on behalf of the union?---Yes.

PN95

Is it fair to say that your statement expressed broad agreement with Mr Grainger's account of bargaining for the new agreement?---Broad agreement, yes.

PN96

One matter that Mr Grainger referred to in his statement was a heads of agreement that was reached between the VHIA and the union in May 2021?---Yes.

PN97

You didn't refer to the heads of agreement in your statement, but can we take it that you do not dispute that that heads of agreement was reached between parties in May 2021?---Yes, that's correct.

PN98

Can I show you an annexure to Mr Grainger's statement, which is marked as being that heads of agreement? It commences on page 777?---I've just got to change books, Mr White. One second.

PN99

That's not a problem?---Was it 777 did you - - -?

PN100

777?---I'm at page 777.

PN101

You'll see that this document is marked as a draft dated 13 May 2021, but I'm told that was the final version of that heads of agreement document. Do you agree with that?---It was the version that was submitted to government, and there was

no further versions provided to government beyond the version provided in Mr Grainger's statement.

PN102

Can I take you to page 788, which is that agreement, and at the top of that page there is a underlined heading, 'Trustworthy and committed', with a subheading, 'Examining and addressing underpayment of wages', and you'll see that it there says:

PN103

It is agreed that the agreement provide for a detailed method by which alleged underpayments are examined and corrected in a timely manner.

PN104

?---Yes.

PN105

You recall that being part of the heads of agreement that was reached?---It is part of the heads of agreement that was reached, yes.

PN106

So can we take it that the underpayment provisions that were ultimately agreed were a reflection of that mutual understanding that they would provide a method by which underpayments are corrected in a timely manner?---I think - - -

PN107

MR WOOD: Could I just for the record (indistinct) that the witness's evidence on this point is not relevant. There is no utility in receiving the evidence of what a witness thinks about the construction of an agreement. It's just not relevant to the construction of the agreement. That's up to you.

PN108

THE COMMISSIONER: Did you want to re-word the question, Mr White?

PN109

MR WHITE: I don't want to re-word the question, your Honour. I respond to the submission as to relevance by saying that evidence of a mutual understanding at the time of a new agreement being reached is relevant to the construction of the terms of an enterprise agreement. I say that the Commission can, and should, receive the evidence. I mean, if there is an argument to be had, it may be about weight to be given to it, but I say that the evidence is relevant.

PN110

MR WOOD: That's sufficient for our purposes, Commissioner.

PN111

THE COMMISSIONER: So be it. Thank you.

PN112

MR WHITE: I can repeat the question if it would help?---Thank you. I appreciate that.

PN113

Given that it's what was agreed in the heads of agreement, can the Commission take it – can we take it that the underpayment provision that was ultimately agreed was a reflection of that mutual understanding that they would provide a method by which underpayments would be corrected in a timely manner?---So the amendments that are being referred to by way of the heads of agreement have to be read in the context of Appendix B51, but the amendments that were made dealt with addressing some exceptions that were added to the previous underpayments clause from the 2016 agreement, and there were exceptions added which addressed circumstances such as where the employee agreed to delay their correction of their underpayment that a penalty wouldn't arise, or circumstances such as where the underpayment was alleged but the employee didn't follow internal policies and procedures with respect to timecard completion. So the clause within the heads of agreement that you're referring to does have to be read in context of the changes that we made.

PN114

So is your evidence that this heads of agreement relates only to amendments to the enterprise agreement and not to the terms that were ultimately agreed?---Yes, the heads of agreement refers to the changes, and then that's why it should be read in the context of the appendix B51. This reflects and supports the changes and the outcome of negotiation, not an explanation of the terms, and an explanation of the terms was provided through the ballot process, which was separate to this.

PN115

That brings me to my next line of questioning. It might help if you have the terms of the enterprise agreement in front of you, that is, the new enterprise agreement, specifically clause 29.3, which appears as an annexure to Mr Grainger's statement on page 496 of that court book?---What was the page again, sorry?

PN116

496?---496, apologies. Thank you.

PN117

So there you'll see that is the page there containing the relevant clause, clause 29.3. You've just given evidence relating to the amendments that were made introducing new exceptions to the penalty provision. Am I right in understanding that those amendments were made to paragraph (e) of clause 29.3?---That's correct.

PN118

And the clauses' paragraphs (a) to (d) of that provision went unchanged from section 2 of the previous agreement to this section of the new agreement?---To the best of my recollection, yes. There may have been very slight amendments to things like cross-referencing. There would have been, because I believe the clause changed its position within the agreement.

PN119

Yes. So - - -?---But notwithstanding that, I don't recall, and not to the best of my recollection, that we made amendments to paragraphs (a) through (d) when compared to the 2016 agreement.

PN120

Yes. So when you say 'cross-referencing', you mean, for instance, in paragraph (d) there's reference to action required under subclause 29.3(b) and subclause 29.3(c) that that would have had to change to reflect the new numbering, that's what you mean?---That's correct, yes.

PN121

So in your witness statement at paragraph 18, you say that you estimate the bargaining time in relation to the underpayments provisions took up about 1 per cent of total bargaining time. I can take you there if you need to be reminded of that?---I recall that part of my witness statement, and that's correct.

PN122

And so that 1 per cent then related to those exceptions that were inserted into clause 29.3(e)?---Yes, that's correct, and that formulated part of our employer log of claims.

PN123

And those exceptions were a claim made by the VHIA on behalf of employers?---That's correct.

PN124

The HWU, the union, didn't log any substantive claims in relation to the wording of the underpayments provision, isn't that right?---With respect to this clause, that's correct.

PN125

And so there was no bargaining at all around the terms of clauses 29.3(a) to (d)?---Of the clauses that led to that, as in the underpayment clause, there was no conversation, to the best of my recollection, about those components.

PN126

THE COMMISSIONER: Can I just interrupt? You said the clauses that led to that. The question was about 29.3(a) to (d)?---Yes.

PN127

Specifically?---Yes.

PN128

Regarding those?---The previous agreement was not where that clause existed. In my answer, Commissioner, I was just confirming that it was with respect to the underpayment clause in dispute, that under the agreement that was being replaced, it didn't exist at 29.3, it existed at another clause.

PN129

Thank you. Mr White.

PN130

MR WHITE: Thank you. The VHIA did not seek to vary or clarify the words in paragraphs (a) to (d) of the new clause 29.3, did it?---To the best of my recollection, we did not.

PN131

Was that because the meaning was sufficiently clear?---No. The issues that were put to us by our members focused on their challenges with the matters that arose out of (e).

PN132

In paragraph 17 of your witness statement, which is in the other volume that you've got in front of you at page 978, you refer to a document that's annexed to your statement marked DP1, which you describe as 'a document showing the progress of bargaining in relation to the underpayment clause'?---Yes.

PN133

Do you recall that?---I do recall that.

PN134

I'll take you to that document, which is further into that volume at page 984. It commences there on 984. Did you prepare that document?---The source document that led to the first table on 984 is a standardised VHIA bargaining tracking document. So I would have been, or my colleague would have been responsible for the preparation of that source table and the insertion of the comments within it, in what I'll describe as a generally contemporaneous timeframe to when bargaining was occurring and the meetings were held.

PN135

And so even if it was prepared, or aspects of it were - - -

PN136

THE COMMISSIONER: Mr White, can I just interrupt you there? My apologies to interrupt you midstream. Just in terms of referencing, I'm working off Mr Pullin's signed witness statement - - -

PN137

MR WHITE: Okay.

PN138

THE COMMISSIONER: Just in terms of the pages.

PN139

MR WHITE: Yes.

PN140

THE COMMISSIONER: I presume they're the same, but I just wanted to note that.

PN141

MR WHITE: Yes. So 984 is the first page of attachment DP1.

PN142

THE COMMISSIONER: Yes.

PN143

MR WHITE: Yes. So even where aspects of the document were contributed by other members of your staff, you were aware of them being added, those aspects of it?---The component in E21, absolutely. Sorry, when I say claim ID, E21, the first table that we're referring to, absolutely.

PN144

Not only that first table but the rest of the material in that entire document?---It's a very large document, Mr White, but I would say that generally speaking I would be aware, generally speaking, of the additions.

PN145

Yes?---They reflected minutes that would have been reviewed by myself before they were sent as a final version through to the unions, and to the department bargaining parties. So I would say that they would generally reflect material that I would have already been across.

PN146

Yes, okay?---But I can confirm that that table at the top of my witness statement, page 9, or 984 in the court book, would be something that if I didn't insert it in there, it actually reflects my recollection of the discussions on that day.

PN147

So you'd reviewed it and as far as you were concerned it was accurate?---Absolutely.

PN148

Over the page in the second page of that summary document – I'm working off page 985, which was your draft statement, of the court book, there's reference to the meeting on 29 October 2020. That was a meeting with the Health Services advocates and mediators, who are also an employee bargaining representative, is that correct?---We're referring to the bottom of my witness statement at page 10, at the bottom of 985?

PN149

Yes, bottom of 985?---Thank you. Yes.

PN150

So over the page there - this is the minutes of that meeting - over the page on 986, the third page of that summary document, the first line in the right-hand column, it says:

PN151

VHIA 25.3(c) changed so a correction happens at end of next business day, because employers can't comply if it's a weekend/public holiday.

PN152

The reference there is to clause 25.3(c). Taking account for the changing of numbering, do you understand that to be a reference to what became 29.3(c)?---If we're referring to this, it may very well be that the reference to 25.3(c) is – and I'm just reviewing whether that is in reference to section 2 or section 3 of the previous agreement, if you could just bear with me. Yes, so on my reading of the previous agreement, the late payment provisions commence – and I'm referring to page 130 of the court book – that for the purpose of section 2 of the previous agreement, the concerns around underpayment commenced at subclause 25.3 and ran through to 25.7 of section 2. Similar commentary existed, but to a less detailed – less amount of detail in section 3 of the previous agreement from subclause 24.3 through to 24.5. So it appears that the reference to 25.3 in our bargaining tracker may well have been incorrect.

PN153

Yes. Given the context, the reference to 'corrections happening at the end of the next business day', would you understand that to be a reference to the provision relating to underpayments worth more than 5 per cent of the pay packet?---This was in respect to the list of exceptions that would have occurred – sorry, that existed in subclause 25.7, which dealt with the list of exceptions. So, that was referring to allowing corrections to occur if an issue was raised, say, on a Friday. Health Service can't correct that on a Saturday or a Sunday, because their payroll team doesn't operate. So I would say that it wasn't with respect to when the clock starts or with any respect to that. It actually was around the exceptions that we were looking to amend at 25.7 of the previous agreement.

PN154

And so it recorded the concern of the VHIA that employers would not be able to correct an underpayment where it fell on a public holiday?---That's correct, or a weekend.

PN155

Yes. And so at the time of bargaining for this new agreement, was it the VHIA's understanding that clause 29.3(c), that is, the clause relating to underpayments worth more than 5 per cent, required the underpayments to be corrected within 24 hours?---Just to be very clear, clause – when you're referring to that question, are you referring to – you were putting it in the context of at the time of bargaining?

PN156

Yes?---And 29 didn't exist at the time of bargaining.

PN157

Well - - -?---I'm just trying to be very clear - - -

PN158

Sure - - -?---And just to be clear, I've mentioned I've provided just reference – there are two sections within the previous agreement, which was obviously in our minds at the time.

PN159

Yes?---That both refer to different ways to address underpayments, depending on whether you were under section 2 or section 3.

PN160

Well, can we take, for example, then 25.5 of the old section 2, which is in identical terms to the new 29.3(c)?---Yes.

PN161

And I repeat the question?---Thank you.

PN162

At the time of bargaining for this agreement, the new agreement, was the VHIA's understanding that 25.5 of section 2 of the old agreement required underpayments to be corrected within 24 hours?---Our understanding – sorry.

PN163

MR WOOD: Commissioner, can I just say, just for the record, to prevent me having to get up all the time, it's understood that the objection I made to this type of question applies to this question, and it's being resolved as a matter of weight, which I'll address you on at a later point.

PN164

THE COMMISSIONER: Yes.

PN165

MR WOOD: Thank you.

PN166

THE COMMISSIONER: Thank you?---So with respect to 25.5, we would say that it deals with the taking of steps to correct the underpayment within 24 hours and to provide confirmation to the employee of the correction.

PN167

MR WHITE: I'll repeat the question, which is a yes or no question. At the time of bargaining for this new agreement, was it VHIA's understanding that clause 25.5 of section 2 of the old agreement required underpayment to be corrected within 24 hours?---To be corrected?

PN168

Yes?---No.

PN169

Thank you. I have no further questions.

*** DANIEL PULLIN XXN MR WHITE

PN170

THE COMMISSIONER: Thank you, Mr White.

PN171

MR WOOD: There's no re-examination, Commissioner.

PN172

THE COMMISSIONER: Thank you. You're excused?---Thank you, Commissioner.

<THE WITNESS WITHDREW [10.50 AM]

PN173

MR WOOD: Commissioner, I did say that we only had two witness statements. My learned friend, Mr Pym, has reminded me that we have put in a document, which I don't imagine will be the subject of any objection, and that's the union rules, which is a separate document which we should have provided to the Commission, and it's in the respondent's authorities bundle, which is found at – it's tab 18 at page - - -

PN174

THE COMMISSIONER: Is that a public document?

PN175

MR WOOD: It is a public document. It's an argument that we don't need to receive into evidence. Thank you.

PN176

THE COMMISSIONER: So I don't see why you're - do you have a different view, Mr White?

PN177

MR WHITE: No, your Honour, and there would be no objection in any case.

PN178

THE COMMISSIONER: Thank you. Now that we've completed receiving evidence we'll move on to submissions, and of course I'm not expecting parties to read their written submissions from woe to go, but obviously focusing on the key parts.

PN179

I note, Mr Wood, you mentioned that the jurisdiction issue might be for higher powers, but I still would like to hear from the parties to include a discussion of that as well. So in light of that, I might hand over to Mr White.

PN180

MR WHITE: Thank you. The first point that I make on behalf of the applicant is that in terms of the factual background to this, the written materials might suggest that there is some dispute as to the particular date that those allowances that fell due by reference to a date before the commencement of the agreement – the union doesn't press any dispute as to the due date for those payments.

PN181

We concede that the correct due date for the payments was the first pay on or after the new agreement. In her witness statement, Ms Kingsley at paragraph 53 gives a methodology for calculating those dates, which she gives a conclusion that the relevant dates were 4 May 2020 for one of the pay cycles, and 11 May 2022 – sorry, the first date was 4 May 2022, second date 11 May 2022 for the other pay cycle.

PN182

The union adopts that methodology and those dates for those payments due by reference to the date before the commencement of the agreement, and say that the Commission may adopt those dates as the due dates for the payments.

PN183

Similarly in relation to the third nauseous work allowance, which was said to fall due in the first pay period on or after 1 July 2022, there was agreement in the written materials that for one pay cycle that due date was 20 July 2022.

PN184

The union also accepts that for the other pay cycle, if there were any eligible workers in the other pay cycle, the due date for that would have been 27 July 2022.

PN185

As to the nature of the dispute before the Commission, the union has brought the dispute under the dispute resolution clause of the enterprise agreement in its own capacity as a party to the agreement.

PN186

The union has asked the Commission to resolve a dispute as to whether employees who were entitled to be paid allowances on their due date but were not so paid should also be entitled to a penalty payment under clause 29.3(d) of the agreement, and if so, how that should be calculated.

PN187

In essence, the dispute really turns on the proper interpretation of clause 29.3 of the enterprise agreement and how it should apply to affected employee in the circumstances.

PN188

The enterprise agreement expressly contemplates that the union will participate as a party in its own right in disputes arising out of the agreement implementation process. Can I take the Commission to page 579 of the court book, which is - - -

PN189

THE COMMISSIONER: Just give me a moment, please.

PN190

MR WHITE: Yes.

PN191

THE COMMISSIONER: Yes.

PN192

MR WHITE: This is the annexure to Mr Grainger's statement, the enterprise agreement – the current enterprise agreement. Clause 70.10 is a provision relating to the agreement implementation committee that is referenced in the evidence, and then over the page, at the top of page 580, clause 70.10 says:

PN193

The AIC –

PN194

that is, the committee –

PN195

will, where practicable, comprise equal numbers of representatives of the employer and the HWU for the purposes of –

PN196

And then number (3):

PN197

To deal with any local disputes that may arise without limiting the dispute resolution procedure in this agreement.

PN198

I say that the express statement that the committee system would not limit the dispute resolution procedure may be taken as an acknowledgement that the union is entitled to participate as a party in its own right, and alternatively to bring disputes concerning implementation under the dispute resolution procedure.

PN199

The Commission will also be aware that the dispute resolution procedure in clause 17 of the agreement expressly contemplates an entitlement to bring disputes of a collective character, and I say that the only sensible way of understanding that provision is that it authorises the union as a representative, or perhaps even the VHIA as a representative of employers to bring disputes on behalf of employers or employees collectively.

PN200

Now, in bringing a dispute of this type, there is no requirement to identify individually every employee who is affected by the late payment. In the written reply submission, the union has relied for that proposition on a decision of the Full Bench in *Australian Rail, Tram and Bus Industry Union v Asciano Services Pty Ltd t/a Pacific National* [2017] FWCFB 1702 at paragraph 15. I won't read from that case, but there is an extract provided in the written reply submission.

PN201

As the Commission has observed, in its written submissions Mercy has attempted to recast the dispute more narrowly than the union would cast it around the entitlement of three specific employees of Mercy.

PN202

Respectfully, I say that it is not open to Mercy to do so. The union, as I've said, was entitled to apply to the Commission for arbitration of this dispute, and the Commission's jurisdiction is to resolve the application that has been made.

PN203

With the apparent intent of preserving its position on appeal, as has been discussed this morning, Mercy has also raised the separate issue of the constitutional validity of the dispute resolution clause in the agreement and section 739 of the Fair Work Act.

PN204

My learned friends have said already this morning, they've acknowledged that in their written submission at footnote 5 that the Commission was entitled to assume the validity of those provisions and assume that it has power to resolve this dispute.

PN205

Consistently with that position, the union says that the Commission should assume the validity of the provisions empowering the dispute resolution procedures. It is consistent with the way things are done in many numbers of arbitrations in this Commission and this is not the occasion for any different approach to be taken.

PN206

The only substantive submission I propose to make against the constitutional argument is to say that it proceeds from an incorrect premise, and that is that the union is not a party to this agreement.

PN207

The union is clearly defined as being a party to the agreement at clause 6E(e) of the agreement, which I'll take your Honour to at page 466. About two-thirds of the way down 466, 'party' means 'the employer, employees and the HWU, who are covered by this agreement.'

PN208

I also say that, contrary to Mercy's submission, the fact that the union gave notice that it wants to be covered by the agreement strengthens the proposition that it along with the other parties have voluntarily submitted to the arbitral jurisdiction of the Commission.

PN209

Unless the Commission has any questions in relation to what I've said so far, I propose to move to the substance of the application, and I propose to structure that submission as follows: I'll first address the two questions that were posed by the Commission in turn. Those are questions posed in directions made in March this year. Secondly, I will respond to issues raised in Mercy's written submission, which are relevant to an aspect of the Commission's second question.

PN210

The first question that was asked was whether the late payment of each of the allowances was an underpayment for the purposes of clause 29.3 of the agreement. There is no dispute as to the date on which each of the allowances fell due.

PN211

It is also uncontroversial that none of those allowances were paid by their due dates, and I say that according to the ordinary and accepted meaning of the word, 'underpayment', the missed payments were underpayments from the moment that they were not paid by their due dates. An underpayment may be rectified, as was the case here, but that does not alter the character of the missed payments as an underpayment.

PN212

An analogy may be made with an obligation, or a liability to pay civil penalties in relation to contraventions of provisions of the Fair Work Act; for instance, an employer may be exposed to civil penalties if it underpays an employee under an award or an enterprise agreement. Even if the underpayment is rectified before a civil penalty proceeding, it would still be liable to penalties.

PN213

In Mercy's written submission, it urges the Commission to answer this first question 'no', however, on my reading at least, the substance of Mercy's submission is really directed to the second question. It says that a number of conditions apply to an underpayment before it will attract an entitlement to penalty pay, and so it really is addressed to the question of whether a penalty should accrue, the first part of that question two.

PN214

And I say that question two posed by the Commission is where the real dispute between the parties in this matter lies. It calls attention to the construction to be given to clause 29.3 of section 1 of the agreement.

PN215

Before going to that provision, I'll say some short things about the approach to interpreting enterprise agreements, acknowledging that the principles relating to the construction of industrial instruments are well-traversed in both parties' submissions.

PN216

In our written submission in chief, we've given an extract from a decision of the Full Court in *James Cook University v Ridd* [2020] FCAFC 123; 278 FCR 566 at paragraph 65 in the joint judgment of Griffiths and SC Derrington JJ. I rely on that summary as containing the relevant principles and do not intend to read from it, but would emphasise two specific points that I say have special relevance in this case.

PN217

The first is that the approach to construction of an industrial instrument should be informed by the purpose of the provision, and that purposive approach should be preferred to a narrow or pedantic approach.

PN218

Now, it was this point that was emphasised by the High Court on appeal in that decision in Ridd. Can I hand up copies of that High Court decision? At paragraph 17 of that decision in the last four lines of the paragraph there, the Court said:

PN219

> *In that process of interpretation, an important matter of context is the industrial nature of the instrument. Industrial instruments are not always drafted carefully by lawyers or professional drafters, and hence the literal words of a provision might more readily be understood to have a meaning other than their ordinary meaning if the context so suggests.*

PN220

At a very general level, I say that a general criticism that may be made of Mercy's response to this application is that it takes an overly strict and legalistic approach to the interpretation of the words in clause 29.3.

PN221

Another principle of interpretation I emphasise came out as an aspect of the receipt of evidence, and in my cross-examination of Mr Pullin, is that industrial custom and understanding is relevant to context when it comes to interpreting the words of an agreement, and for that proposition I rely on paragraph 65(vii) of the Full Court's decision in James Cook University v Ridd. The full text of that decision is at tab 11 of the applicant's bundle of authorities.

PN222

THE COMMISSIONER: Yes.

PN223

MR WHITE: On page 581 of the reported version – does your Honour have that?

PN224

THE COMMISSIONER: Which - - -?

PN225

MR WHITE: The - - -

PN226

THE COMMISSIONER: Where do you want me to be at?

PN227

MR WHITE: Paragraph 65(vii), which is - - -

PN228

THE COMMISSIONER: Yes. I was getting page numbers mixed up. There we go. Yes, thank you.

PN229

MR WHITE: Griffiths and SC Derrington JJ there said:

PN230

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

PN231

And so I say that the Commission can, and should, have regard to the way that things are generally done in the health services industry in its search for the meaning of a term of the agreement, and that is relevant to the objections to relevance that have been raised by my learned friends.

PN232

Turning then to the obligation to pay a penalty as it appears in the enterprise agreement, the obligation is contained at clause 29.3(d), which can be found on page 497 of the court book:

PN233

If the employer does not take the action required under subclause 29.3(b) and subclause 29.3(c) above, the employee will be paid a penalty payment of 20 per cent of the underpayment, calculated on a daily basis from the date of the entitlement arising until such moneys are paid.

PN234

According to the plain words of that provision, the only condition that attaches to the obligation to pay a penalty on underpayment is if the employer does not take the action required by either clauses 29.3(b) or clause 29.3(c).

PN235

Now, whether paragraph (b) or (c) applies depends on the size of the underpayment. It is common ground between the parties in this dispute that it may be resolved on the basis that each of the underpayments were sufficiently large that paragraph (c) applied. And then paragraph (c) says:

PN236

Where the underpayment exceeds 5 per cent of the employee's fortnightly wage, the employer must take steps to correct the underpayment within 24 hours and to provide confirmation to the employee of the correction.

PN237

In other words, if the employer does not take steps to correct the underpayment within 24 hours and provide confirmation of the correction, then the penalty obligation in paragraph (d) will be triggered.

PN238

It is an issue in this case whether Mercy took steps for the purposes of paragraph (c). The primary issue here really is one of construction. Read in context, I say that 'take steps to correct the underpayment' should be understood as requiring the employer to do all within its power to correct the underpayment, that is, effectively to effect or authorise the payment within 24 hours.

PN239

I say that looser language of 'take steps' that was used in the clause may be thought to reflect the short timeframes involved. It may be thought to be improbable that an underpayment could in fact be corrected within 24 hours, in the sense that it might be unlikely that an employee would actually receive rectification of the underpayment within 24 hours, and the language of 'taking steps' accommodates delays in processing payments that were nevertheless authorised by the employer within 24 hours.

PN240

I say that this construction should be preferred, because it sits most comfortably with the design of the scheme overall, and it would give effect to the evident purpose of the provision, that is, to ensure that larger underpayments, the subject of paragraph (c), are corrected more quickly.

PN241

As I've said, the structure of the provision is to create two distinct obligations relating to the correction of underpayments that are of varying onerousness, depending on the size of the underpayment. Paragraph (b) concerns the obligation to correct the underpayment where it is smaller, less than 5 per cent of the employee's fortnight pay packet. Paragraph (c) concerns an obligation to correct a larger underpayment where it amounts to more than 5 per cent of the total pay packet.

PN242

So I say that the evident purpose of having that distinction according to the size of the underpayment is to ensure that larger underpayments are repaid faster, and it makes sense that it would do so, that the agreement would seek to do so, and that the employer would be subject to a more onerous obligation to repay or rectify the underpayment, and that is because larger underpayments are of their nature more likely to impact on an employee's life.

PN243

Now, it can be seen in paragraph (b) that the language of 'taking steps' is not used. Rather, according to paragraph (b), the underpayment is required to be corrected in the next pay cycle.

PN244

Pay cycles at Mercy are fortnightly, so it should be thought that the language of 'taking steps' was not here necessary, because that time period was longer, thereby increasing the likelihood that a correction could be completed within that time, but also because Mercy has an established system by which it is able to reliably pay staff on a particular day each fortnight. That system is not generally subject to delays, and in those circumstances it would be expected that Mercy would be able to make a correction on a particular day.

PN245

Paragraph (c) concerning the larger underpayments is expressed as being more urgent, at least within 24 hours, and I say would make a nonsense of the scheme if 'take steps' could mean anything along the way to correcting underpayment, especially if it had the result that larger underpayments were not ultimately corrected until some time after the next pay period, in effect making the obligation

relating to larger underpayments less onerous than the obligation to rectify a smaller underpayment.

PN246

THE COMMISSIONER: So what would you say are adequate - in terms of taking steps?

PN247

MR WHITE: I say that the employer must do everything within its power to do, and that a combination of taking steps relates to matters that will be outside of the employer's power.

PN248

Now, with the union's construction of the - - -

PN249

THE COMMISSIONER: Sorry, can I just stop you there? The clause doesn't say that. It doesn't say the employer must do everything in its power. It says, 'must take steps.'

PN250

MR WHITE: Yes. Well, I've given my explanation for why the words, 'take steps', have been used, and that is to accommodate the fact that it is unlikely that an employee would actually receive that money within 24 hours. In a sense, if it required that the underpayment be corrected within 24 hours, that might be read as imposing a deadline on the receipt of the underpayment by the employee.

PN251

I say that that looser language of 'taking steps' accommodates delays that are outside the power of the employer.

PN252

So if the union's construction is accepted, it should follow that Mercy failed to comply with the provision. It's common ground that back-payment of allowances was not effected until late August 2022, and there is no question that Mercy did not effect or authorise payment within 24 hours.

PN253

Now, even if the union's construction is not accepted, the union also says that the Commission should not be satisfied that the particular steps in fact taken by Mercy amounted to taking steps to correct the underpayment. The highest Mercy's submission appears to rise is that it sent responses to the union's inquiries as to the status of back-payments.

PN254

Even this is incorrect. Mr Harika's evidence is that he received no response at all to a number of his emails asking for updates between May and July 2022, and in particular, the emails sent on 25 July 2022 and 9 August 2022 received no response. Those emails expressly referred to the allowances, the subject of this proceeding.

PN255

That first email of 25 July 2022 can be found at page 898 of the court book. In the third line down, Mr Harika says – well, the whole of that second paragraph:

PN256

A lot of the responses to items that we discussed in the meeting were responded by 'we need to get back to you', for example, when will the nauseous and educational incentive allowance be made.

PN257

And then at the bottom of that email:

PN258

All I'm requesting is an update to these points above.

PN259

Then in the body of his statement at paragraph 23 on page 884, Mr Harika says:

PN260

having not received a reply to my 25 July email.

PN261

At paragraph 24, Mr Harika also says that he 'did not receive a reply from Mercy to his 1 August email following that 25 July email up.' At paragraph 29, Mr Harika refers to not having received a response, at the time of preparing his statement in March this year, to the email that he sent to Ms Barrett on 9 August 2022.

PN262

In that email, which is extracted at paragraph 27, Mr Harika refers expressly to the nauseous work allowance and the educational incentive allowance, but moreover says in that email that if he does not receive a reasonable response then the union will enforce the penalty provision.

PN263

Nothing else in Mercy's evidence could found a conclusion that Mercy took any steps to correct the underpayment until July 2022 at the earliest. Ms Kingsley's evidence tells a story of persistent buck-passing between the HR team and the payroll team at Mercy between May and late July 2022, with no apparent progress being made on the payment at all until a list of eligible employees was prepared in late July 2022.

PN264

So I say that it should be concluded that nothing Mercy did satisfied the requirement to take steps to correct the underpayment within 24 hours, even on Mercy's construction of that phrase.

PN265

On the union's case, that is sufficient to establish the entitlement to a payment of a penalty, that is, the only condition that applied to the entitlement in 29.3(d) was the employer's non-compliance with paragraph (c), and as I have submitted,

Mercy not having complied with that paragraph, the entitlement to be paid the penalty accrues.

PN266

Mercy, on the other hand, asserts that clause 29.3(a) creates additional pre-conditions on the entitlement to be paid a penalty on the underpayment. It says that an employee must first comply with the terms of paragraph (a) before an entitlement to underpayment will accrue.

PN267

Can I take the Commission back to that paragraph on page 496:

PN268

Where an employee considers that they have been underpaid as a result of error on the part of the employer, the employee may request that the employer rectify the error, validate the payment.

PN269

So I first say that nothing in the grammar or structure of clause 29.3 or paragraph (a) of that clause in particular is indicative of paragraph (a) being a pre-condition on the entitlement to be paid a penalty on underpayment, and can compare the language used to the language in paragraph (d) where the entitlement is made clearly conditional on some prior compliance with a term of the agreement: if the employer does not take action required under clause 29.3(b) and clause 29.3(c).

PN270

Similar conditional language is used throughout the agreement. I can give examples. In the dispute resolution clause at 17.4(c), there are two separate conditions in relation, first, to conciliation, and second, to arbitration. I won't take the Commission to that clause, but I refer to it. And I say that no conditional language of that sort is used in relation to clause 29.3(a). On the contrary, 29.3(a) says that:

PN271

Where an employee considers that they have been underpaid, the employee may request the employer rectify the error.

PN272

In other words, it is optional that the employee make the request. It can't be supposed, I say, that if an employee does not submit a request, he or she would forego an entitlement to be back-paid amounts that have been underpaid.

PN273

So I say that the provision in paragraph (a) is facilitative. It provides an employee with a power or an entitlement to seek rectification. It is not compulsory, and it has no bearing on the completely separate entitlement to be repaid, and the completely separate entitlement to be paid a penalty if he or she is not repaid.

PN274

In its submissions Mercy says that clause 29.3(a) imposes three separate sub-conditions on the entitlement to pay underpayments – penalties on underpayments, and I'll quickly address each of those in turn.

PN275

The first sub-condition submitted is that the words, 'as a result of an error on the part of an employer', require that the underpayment be caused by some mistake of the employer, and I say three things in response.

PN276

The first is that the submission taken to its end exposes its own absurdity, in the sense that Mercy say that it knew of the entitlement to the allowance, and that rather than being the result of some mistake that it deliberately paid the entitlement late.

PN277

I say that the Commission should not countenance a construction of the scheme that would exempt deliberate underpayments from the penalty scheme. On the contrary, it should be thought that the purpose of discouraging underpayment would be best served where the penalty provision also captured deliberate underpayment.

PN278

The second point that I make in relation to the submission of Mercy is that the context surrounding that paragraph suggests that the reference to an error does not require there to be a mistake per se.

PN279

In clause 29.3(e) there are a number of exceptions to the entitlement to be paid penalties, and one of those in paragraph (iii) is where:

PN280

> *the underpayment is the result of employee error, which includes but isn't limited to circumstances where the employee hasn't complied with the employer's policies dealing with the completion or approving of timesheets.*

PN281

So in this context I say that it should be understood that the purpose of the words, 'as a result of error on the part of the employer', is to specify that the penalty is only attracted where the employer is at fault. That stands in contradistinction to that exception in paragraph (e)(iii).

PN282

The third point I make in relation to Mercy's submission is that, in any case, the deliberateness of underpayment was not borne out by the evidence. At paragraph 34 of her statement, Ms Kingsley gave evidence that the payroll team was understaffed during the relevant period and that that understaffing contributed to Mercy's difficulties in paying the allowance earlier, and so in other words, the failure to pay, at least to pay sooner, was a result of some inadvertence of Mercy which would bring the underpayment within even Mercy's definition of the word, 'error.'

PN283

Mercy also submitted that it was a precondition on the penalty accruing that an underpaid employee had made a request for rectification under paragraph (a). As I've said in the primary submission on this point, the grammar and structure of the provision do not suggest that paragraph (a) should be seen as being a precondition.

PN284

I must accept though that the only evidence before the Commission of any request being made by an employee directly on their own behalf is Mr Hodges' unchallenged evidence that he made an inquiry about the allowance in June 2022, paragraph 7 of his statement, and Mr Barbuntay's unchallenged evidence that he made an inquiry in July 2022, which was the exhibit A6.

PN285

However, if the union's submission concerning the construction of 29.3 is not accepted, the union says that requests made by the union on behalf of eligible employees is sufficient to meet any condition.

PN286

Between them, Mr Harika and Mr Riley sent emails to Mercy requesting updates on back-payments on 5 May, 12 May, 26 May and 31 May. Mr Harika asked Mercy when it would be making payment of the allowances specifically during meetings on 11 July and 8 August, and in emails dated 25 July, 1 August and 9 August. Mr Harika's final request made on 9 August, as I've already taken the Commission to, expressly adverted to the penalty provision in clause 29.3(d).

PN287

So I say it should be accepted that in the context in which those requests were made, including the direct reliance on the penalty provision in the 9 August email that communications chasing a date for back-payment were in substance seeking rectification of the underpayments, and it should also be accepted that reference to the allowances not having been paid on a global basis was sufficient to capture all of the employees who were owed the allowances.

PN288

So, for those reasons, I say that the union's communications to Mercy were sufficient to meet any requirement for there to have been a request for rectification, even on Mercy's construction of the provision.

PN289

Finally, Mercy submitted that it was a precondition on any penalty accruing that an underpaid employee had a relevant state of mind under paragraph (a), effectively that he or she considered that they had been underpaid.

PN290

Again, the primary submission is that nothing in paragraph (a) is preconditional on the entitlement in paragraph (d), but I say additionally that the submission that paragraph (a) imposes a state of mind requirement is really the prime example of Mercy approaching this interpretative exercise through an overly legalistic lens.

PN291

The opening words of clause 29.3(a) are clearly not intended to generate legal consequences. They are informal words, they set the scene and the set out circumstances in which an employee may need to take advantage of an entitlement to seek rectification.

PN292

It should be regarded as improbable in the extreme that drafters of the agreement would have intended there to be any independent state of mind condition attaching to either an obligation to repay an underpayment or an obligation to make a penalty payment.

PN293

The final point of dispute between the parties is the method by which a penalty is to be calculated. Again, this falls to a construction of clause 29.3(d). The union's position is that an amount of 20 per cent of the underpayment should be paid for each day that the underpayment is not paid after it fell due.

PN294

That is for three reasons. The first is the plain words of the provision support that construction. The words, 'calculated on a daily basis', need to be given some significance, and there is no other plausible way to read those words other than the union's preferred construction.

PN295

The second reason to prefer the union's construction is that the purpose of the provision of discouraging underpayment and encouraging swift rectification of underpayment is only served by the union's preferred interpretation. A contrast may be made with Mercy's proposed construction which would have the clause interpreted to mean that the penalty should be 20 per cent of the underpayment per annum, then calculated on a daily basis. So effectively a penalty interest rate.

PN296

First I say that there's no textual indication that the percentage referred to has any relationship to an interest rate, but in any case a penalty calculated in that way would carry no effective incentive at all, and it is best illustrated by the example given in the reply submission. On an underpayment of a $350 allowance such as the nauseous work allowance Mercy's proposed penalty would be 19 cents per day. A penalty of that size is utterly incongruous with the requirement to effectively make repayment of the underpayment within 24 hours. It provides no incentive to make repayment within that time, or even within days afterwards.

PN297

In circumstances where the obligation to make rectification is given in time scales measured in days, that is one day for a large underpayment and 14 days for smaller underpayments, or up to 14 days for smaller underpayments, it should be thought that the penalty provision would provide incentive to actually make repayment within that timeframe. The union's proposed construction would do that, but Mercy's would not.

PN298

And the third reason why the union says that its construction is to be preferred is because it is consistent with evidence of practice within the industry. Mr Sharp's two statements provide examples. In his first statement he refers to a case in which Eastern Health paid a penalty using the union's methodology. In his second statement Mr Sharp referred to a case in which Alfred Health paid a penalty using the union's methodology. I have referred to and cited the Full Court in (indistinct) authority for the proposition that that's a relevant interpretation, and I say that the only evidence of industrial practice or custom is supportive of the union's case. So for those reasons I say that the calculation of the penalty should be conducted on the basis proposed by the union, and unless the Commission has any further questions they're the submissions of the applicant.

PN299

THE COMMISSIONER: Thank you, Mr White, not at this point. I may in reply. Considering the time I thought we may take a somewhat brief adjournment until 12.30 if that suits the parties.

PN300

MR WOOD: I'm ready to go now and I won't be terribly long, or we can have a break now.

PN301

THE COMMISSIONER: All right, if you're happy to proceed that's fine.

PN302

MR WOOD: I'm very happy to proceed.

PN303

THE COMMISSIONER: Okay, that's fine.

PN304

MR WOOD: It's up to you, Commissioner.

PN305

THE COMMISSIONER: No, that's fine. If you're happy to proceed, Mr Wood, we will go.

PN306

MR WOOD: Perhaps we could deal with the preliminary point, the question of jurisdiction, and we can summarise the point in this fashion. In the period before 1993, and especially before 2007, the constitutional anchor upon which the instruments of the predecessor to this tribunal were based was section 55.35 of the Constitution and not section 51.20.

PN307

The importance of that was that that constitutional underpinning required that the Commission in effect settled industrial disputes extending beyond the limits of any one state in one of two ways; conciliation or arbitration. And the way the jurisprudence developed during the first few decades of last century was that it became clear that a party to an industrial dispute of an interstate character would not necessarily have to require something, or be interested in something for their

own benefit, and that's the Metal Trades case that we referred to in our submissions; that is a union would be entitled as party principal to initiate a dispute with an employer on behalf of members and non-members, because the obligation that was extracted in the settlement, whether by conciliation or arbitration of the industrial dispute, was for the employer to pay to a class or persons, members and non-members. And the basis upon which the system operated more or less thereafter as a matter of practice was that registered organisations became the parties to industrial disputes.

PN308

Generally speaking individual employees did not become parties to industrial disputes. There were some examples to the contrary, but by and large registered industrial organisations were the parties to the industrial dispute and therefore parties to the industrial awards that were made in the settlement or part settlement of those industrial disputes.

PN309

The private arbitration case is one example of that process whereby an agreement was made in settlement or part settlement of the industrial dispute between a union and an employer. The interesting aspect of it was at a time at which the Commission's role was being reduced, partly by legislation passed at the back end of the Hawke and the start of the Keating government, and then particularly by the Howard government, the question was raised as to whether or not a process that allowed a dispute to be settled embedded in an industrial agreement was one that empowered the Commission to go beyond the terms of the statute, and the statute at that time started to limit what the Commission could do.

PN310

And the way the High Court determined the question was to say, well whatever the scope of those provisions you have there underlying the industrial agreement, which has been certified by the Commission, the words used by the High Court were an underlying agreement, which of course there was. There had to be an underlying agreement because there were two parties to the industrial dispute that gave jurisdiction to the Commission, both of whom had to make an agreement between themselves to be certified by the Commission.

PN311

So the issue that is raised now never came up then in 1998, whether it was 1998 or 2000, but it arises now because the constitutional basis upon which these agreements are made are such that there is no need for an underlying agreement. In fact there is none. If one looks at the way in which the statute operates, and I'm not going to take the Commission through the various provisions in part 2.4, this instrument does not at any stage manifest any underlying agreement. It is a process by which an agreement is made with statutory effect governed by sections 172 through to 183 of the Fair Work Act.

PN312

There is no requirement for there to be an agreement, an underlying agreement. It just doesn't exist. Sometimes there is, sometimes there isn't, but there's no requirement. This is why Justice Jessup in the Toyota case, which is referred to in our submissions, refers to the fact, and as it turned out Justice Jessup was the

counsel for the respondent in the private arbitration case, refers to instruments made under the current head of power as being a mere statutory artefact. He says you can't draw an analogy with contract, the very analogy the High Court drew in the private arbitration case. You cannot do it under this system, and as a result you can't fashion upon any underlying agreement to authorise the Commission to exercise a power of private arbitration in relation to this instrument.

PN313

Now, the consequence of that submission is in some senses profound and some senses of no moment. All it would mean if it was correct is that the Commission would continue to operate its dispute settlement procedure in relation to these agreements by way of conciliation, but any determination of the dispute would go off to a court, presumably the Circuit Court, or whatever it's called now, the Family and Circuit Court of Australia, which didn't exist at the time of the private arbitration case.

PN314

That in a nutshell is the point we make about why the Commission doesn't have the power - section 739 doesn't authorise the Commission to exercise a power of private arbitration in relation to this instrument. I would like to say it's a point that we came up with as we were cogitating on this case, but it's really a point that Justice Snaden identified as part of obiter in the Airservices case. His comments on this as it being a possible argument are at paragraphs 148 to 149 that's referred to in our submissions. I wasn't intending to take the Commission to that, but merely to note that that's without - there's no intellectual property in an idea, but I don't want to claim the credit for the idea.

PN315

But I would like briefly to take the Commission to the private arbitration case - this is at our authorities - just to finalise the point, at pages 153 to 154 of our authorities. There's a part of the High Court's decision in the private arbitration case which is often quoted, and that part is at - it starts just above paragraph 32 on page 658 of the Commonwealth Law Reports which is at page 154 of the authorities book.

PN316

As already indicated the Commission cannot by (indistinct) require the parties to submit to binding procedures for the determination of legal rights and liabilities under an award, because Chapter 3 of the Constitution commits power to make determinations of that kind exclusively to courts, i.e. whichever court would have jurisdiction. However, different considerations apply if the parties have agreed to submit disputes as to their legal rights and liabilities for resolution by a particular person or body to accept the decision of that person that is binding on them. Where parties agree to submit their differences for decision by a third party the decision-maker does not exercise judicial power, but a power of private arbitration. Of its nature judicial power is the power exercising the penalty with consent of the person against whom the proceedings are brought and results in a judgment or order that is binding with its own force. In the case of a private arbitration however the arbitrator's powers depend on the agreement of the parties, usually embodied in contract

and the arbitrator's award is not binding of its own force. Rather its effect, if any, depends on the law which operates on the law with respect to it.

PN317

And then down to 34:

PN318

The parties to an industrial situation - - -

PN319

Remember an industrial situation was a statutory definition of the constitutional limits that there could be a pending industrial dispute. It didn't have to be an actual industrial dispute.

PN320

The parties to an industrial situation are free to agree between themselves as to the terms in which they will conduct their affairs. Their agreement has effect according to general law.

PN321

There is no such agreement in this case. There's no such agreement that has to meet the preconditions of the constitutional framework that existed in this case.

PN322

If their agreement is certified it also has effect as an award.

PN323

There's no agreement in this case.

PN324

To the extent that an agreement provides in a manner that exceeds what's permitted even by the constitution or the legislation which gives agreement effect it cannot operate to that effect, but the underlying agreement remains.

PN325

There's no underlying agreement in this case.

PN326

And the validity of that agreement depends on the general law, not the legislative provisions which give effect to it as an award.

PN327

That's the proposition we advance.

PN328

That then leads to the second question about who the parties, assuming that section 739 does authorise the Commission to exercise a power of private arbitration, who the parties to this dispute are. My learned friend is quite right to say it's not for us to determine the scope of the dispute. The parties on the other side of the Bar table are free to define the dispute in any way they like, and Asciano says they can even come to the Commission and amend the scope of the

dispute at the Bar table, they've got that much flexibility. But they do have to choose at some point.

PN329

They have to say, as was required of them, of the parties in the Asciano case, whether the union turns up here as party principal of its own right bringing a dispute against one of the employers named in schedule 1A to the agreement, or whether it turns up merely as a representative of persons, and if so which persons, because that characterisation determines who the award is binding upon.

PN330

If a union turns up here merely as a representative of a class of people, and we don't have any issue with the point of being able to identify a class by reference to the class rather by name, the Asciano case says you can do that, but we need to know who's in the class, and my learned friend says, rightly, reflecting the submissions, that they are the party principal, the orthodox way in which you would normally initiate a dispute. But when one looks at the Asciano case it's not a case that's limited to the suggestion that it's merely about identification of whether someone continues as a party principal, or seeks to represent a class of persons.

PN331

It goes beyond that, and this is in our list of authorities at page 530 - I'm sorry, I have given you the wrong number there - at 523 is where the decision starts. It was the correct number, sorry, Commissioner, at 530. My learned friend said he didn't want to read paragraph 15 to you. Well, he should have read paragraph 15 to you, and particularly paragraphs 15 through 18, because it's very important to understand what paragraph 15 is talking about.

PN332

There is no requirement in the FW Act for every section 739 application filed in the Commission to identify by name each employee who was a party to the dispute at the time the application was filed. In some circumstances the employee parties to the dispute may be identified with sufficient particularity by reference to a class of employees; that is the employee parties to the dispute may be identified with sufficient particularity by reference to a class of employees. If there is some uncertainty about who belongs to that class further information is required to enable the employees a matter of natural justice to understand the case it has to meet. The names(?) circumstances of employee parties to the dispute then directions can be sought made by a member of the Commission dealing with the dispute. In the event that a party to a dispute is directed to provide such additional information it might provide a foundation for the Commission to exercise its discretion.

PN333

This is paragraph 16:

PN334

We consider with dealing with disputes in that manner it would be contrary to the obligations of the Commission for applications to be automatically dismissed.

PN335

And we embrace that proposition.

PN336

In the present case we accept that the parties to the dispute, the subject of the application, were specific national - - -

PN337

And I interpolate on the one hand.

PN338

- - - and members of the RTBU who are impacted by the removal of planning unit positions.

PN339

And it's very important that that's noted, because the basis upon which the RTBU appeared, and notwithstanding as the Commission says, the Full Bench says, some of the submissions put below and the fact that the RTBU nominated itself as the applicant in the application, just as the union does here.

PN340

The RTBU now accepts correctly in our view that it is not a party to the dispute before the Deputy President. The RTBU notified the Commission of the dispute in its capacity as the representative of its members. It follows that the requirement under section 739(6) that there would be an application of the party dispute was satisfied in this case.

PN341

At 18:

PN342

The RTBU did not identify by name the employed parties to the dispute in the application. The dispute settlement procedure does not require such persons to be named, and during the conciliation of the dispute the RTBU provided specific national with the names of its members who were at that time seeking further assistance with redeployment training and/or the recognition of prior learning. The fact that specific national was not provided with the names of the employed parties in the dispute at or prior to the time the application was filed with the Commission does not in our view mean that the Commission did not have jurisdiction to deal with a dispute, which on any view of it fell within the scope of disputes that the agreement requires or allows the Commission to deal with.

PN343

Now, here the union says it is party principal to the dispute, and it says the agreement as approved by the Commission, and my learned friend took you to certain textual markers, suggests that the union can be a party principal to a dispute, and there's quite a bit of force in that argument, that there are markers within the agreement that suggest it can be a party principal.

PN344

Now, that's a strange thing given that the statute no longer talks about parties, but talks about the coverage of an agreement and the application of agreement. Yet for reasons associated with the constitutional heritage of these instruments the term 'parties' is still used, but that's just a question of construction about whether or not a person named in an agreement can be regarded as a party sufficient to ensure that the jurisdiction conferred by section 739 is activated. But it has to determine, it has to elect whether it is a party principal, or whether it sits here today as a representative of certain persons, and if it wants to say it's a representative of certain persons tell us who they are.

PN345

Now, those persons, it seems, it would be relatively easy for the union to tell us that it represents the three employees who gave evidence, or their members, and there would be very little evidence that the union would require, because having regard to the union rules, and if there was some evidence of membership in the same way there was in the Asciano case, it would be very easy for the union to prove it was here as a representative of its members, a very easy evidential case to make. But there are a whole lot of employees on our understanding, and it's not in evidence, but on our understanding about 210 or so. We don't know who's a member of not, but about 210 who are not members, and there's no basis upon which the union in the absence of any evidence can say that it stands here today as the representative of those 210 people who authorised it to come and raise a dispute on behalf of them making them parties to the dispute. There's just no evidence of that. And one thinks, one would assume, that part of the reason that that process has not been adopted or embraced is because that would present some difficulties in terms of the overall approach the union wants to take, and I don't want to be more - I don't want to make that submission in a fairly opaque way, and I don't mean it in any critical sense, but there are good reasons not to do that.

PN346

So having heard from my learned friend he hasn't asked you to amend the application to make any class of employees, any person within that class a party to the dispute, and at the end of his oral final submissions the position maintained as the primary position in the submissions is maintained that the union is party principal, and that position is one that we accept. It's entirely a matter for the union to do that. It's not for us to tell the union the way in which it should explain to the tribunal who the parties to the dispute are. We take it at face value in full knowledge of what Asciano said and what our submissions say, and we accept frankly there are some good textual markers to allow the union to make the submission that it is a party principal. That then leads to - - -

PN347

THE COMMISSIONER: Mr Wood, so you're waiting, are you saying, for the union to clarify that position, or you say that you're accepting that the union at the very least is representing those three employees, or what's your position?

PN348

MR WOOD: I'm just making a submission about - when one resolves by private arbitration a dispute you make an award, but the Commission does make industrial awards, and a private arbitrator makes an award, and it binds the party to the dispute. So the binding effect of the award that's made, if one is ultimately

made, has effect only on the parties who are before the Commission who have raised the dispute.

PN349

So if the party is the union then the award binds the union. If the party is three employees then the award binds the three employees. If the party is 210 others then it binds them, and if it's 220 it binds them. At the moment, and it's not a criticism of the union for doing this, at the moment the dispute is between, if you look at the Form F4, the union as applicant, as party principal, and the employer Mercy. So any resolution of the dispute binds those two persons, and that is simply the consequence of the way in which this dispute has been created, and that that may well have consequences down the track.

PN350

THE COMMISSIONER: All right.

PN351

MR WOOD: Can we come then to the arguments that govern this resolution of the dispute, and there's a lot that we have in common. We do accept that the main issue was clause 29.3(d). My learned friend has accepted that there is a gateway in 29.3(d); that is if you look at the way in which 29.3(d) operates there's a precondition, a gateway. If the employer does not take the action then there's a mandatory requirement. The first mandatory requirement the employee will be paid a penalty payment of - I will come back to that. And the second mandatory obligation, in addition the employer will meet any associated banking or other fees, penalties incurred by the employee.

PN352

So it's accepted there's a gateway into 29.3(d), and it's accepted that that gateway is 29.3(c). My learned friend has said we have satisfied the requirements under 29.3(c); that is he says we have proved that the employer did not take the action required under sub-clause 29.3(c). That then leads you to ask what's the gateway to 29.3(c). What triggers the obligation to take action when you look at that clause? Where the underpayment exceeds 5 per cent of the employee's fortnightly wage the employer must take steps.

PN353

Well, what's the trigger, what's the notification, what level of knowledge does the employer need to have, what's the understanding? It can't be that simply a strict liability obligation that as soon as you underpay you're immediately then under an obligation to take steps to correct the underpayment. There must be some lead in to 29.3(c), and that's simply the point we make.

PN354

THE COMMISSIONER: Why can't there be?

PN355

MR WOOD: Why?

PN356

THE COMMISSIONER: If a payment is an entitlement and there's an underpayment of it why can't it give rise to those obligations in 29.3(c)?

PN357

MR WOOD: Irrespective of any notification or a knowledge by anyone at all that just stands alone, 29.3. It could, it's possible you could construe it that way. It just seems unusual to us that when you look at 29.3 as a whole it seems to be predicated on 29.3(a), both as a matter of textual analysis and common sense, that there's something that has to be done to trigger the obligations in (b) and (c), that is (a), (b) and (c) are there in order because there must be a request which then triggers the obligation in (b) or (c).

PN358

THE COMMISSIONER: Would that mean that taking your interpretation where 29.3(a) is a precondition, that if there's no request from the employee - and I have read the submissions, I'm just - then there's no obligation to pay the underpayment?

PN359

MR WOOD: That's quite correct. You just don't get to 29.3(c), that that is the trigger for 29.3 - you can't jump without a request straight to 29.3(d). There has to be some knowledge. That may not be correct. It may be that a more rounded construction says you don't have to go through that process, but we're trying to give voice to all the words in the clause, reflecting that it's an individual right, and we of course don't say that an employee has to make the request themselves. Of course it can be made on their behalf.

PN360

My learned friend says in the submissions that the request, this is what he says in the written submission, he said today, they must request their own underpayment. We're not saying that, but nor that they have to individually notify. It's simply that any request that is made must be made by the employee, by the employee themselves, or by someone who's authorised to do so; that is it's just a question of evidence whether the employee has made the request.

PN361

A particular employee out of this class of 220, have they made a request in circumstances where they're not a member of the union and they haven't authorised the union? The evidential basis is not made out. But if someone is a member has that person made a request? Well, the argument might be they have, because their union of which they're a member has made the request on their behalf.

PN362

Even in a very sort of casual or group basis it may well be the request is satisfied, but the employee has to make the request, and there's good reason for that. It might be that for whatever reason employees in the system are content, depending on the circumstances, with being less vigilant about requiring things to be done strictly than employees who are members of unions. It might be the case. I don't know, there's no evidence of that either way, but that might be the case, and of course the employee has to consider that they've been underpaid. Easy to

prove. These are not very difficult obligations to get through. The consideration is proved by making a request. Once you make a request it's of course you consider that you've been underpaid.

PN363

And lastly as a precondition has there been an error on the part of the employer, and that question is a question of fact, and there's quite a bit of force in what my learned friend says, that there's two constructions available. An error could mean a transgression or a wrongdoing, or it could mean something done incorrectly through ignorance or inadvertence. There is some strength in my learned friend saying, well you mustn't allow deliberate inadvertence to escape from the clutches of clause 29.3, and there's some force in that.

PN364

But the very things that show the steps that were taken to correct the error tend to suggest that there wasn't an error at all, there was merely a delay, and those steps that were taken under 29.3(c) may well, certainly in an evidential sense they suggest that what was going on was not an error at all, not in the sense of a misunderstanding or something that required correction, but simply a failure to carry something out. But assuming we're wrong about all those things, and we are completely on board, we're at one in terms of having to give a sensible, common sense practical construction - - -

PN365

THE COMMISSIONER: Because to accept the submission that there was no error, merely a delay, the applicant says it would result in a situation where there's no punishment for bad behaviour of deliberately delaying, but there is if you make a mistake.

PN366

MR WOOD: Yes. We can see the attraction to the way that the union puts the case, and some of the suggestions that it might be too literal an approach that are thrown at us in terms of the construction of 29.3(a) we will come to when the boot's on the other foot, when it comes to 29.3(d). And so we accept that this could be construed as perhaps too literal an approach, and the same might be said about what we say about what is agreed should be the precondition to 29.3(d), that is 29.3(c), this question of taking steps.

PN367

My learned friend answered a question from you, Commissioner, and says, well what does it mean. I think his answer was, if I have got it right, do everything in its power that it can do, that's what taking steps mean, and he also described it as to take steps means effect or authorise the payment within 24 hours. Now, that's plainly not the words say. So the question is what do they mean in context, particularly when 29.3(b) doesn't include those words. This is both a factual question and a question of construction, and what it probably means is take sufficient steps or reasonable steps or appropriate steps, or the sort of qualification that courts always use in obligations of this type, introducing a concept of reasonableness, so that the clause operates fairly and practically. That you are not obliged to correct the underpayment within 24 hours, but you've got to take reasonable steps, sufficient steps, appropriate steps, whichever way you want to

phrase it, and that, in our respectful submission, is a much better way of construing 29.3, and then there's a factual question of whether Mercy did that in this case.

PN368

Some of the submissions that were made in relation to the facts are justified and some of them were overstated. The evidence of Ms Kingsley is that for what you would say the three and a half months at the broadest between the earliest of the obligations arising and the payments being made, there were some periods of intense activity and some periods where that activity was more lackadaisical, and I think that's a fair analysis of the evidence.

PN369

But on the evidence from the period from 6 May through to at least the start of June, and including the second week of June when the dispute was notified in the Commission, there was activity at a very high level involving lots of people within Mercy and the VHIA and the union, and when you look at it the evidence was there was a lot of confusion, not only within Mercy, but within the industry as a whole, or the sector as a whole, culminating in, and it's uncontested, culminating in an application by consent between the VHIA and the union on 27 May to vary the agreement to remove ambiguities. Some of those ambiguities were ambiguities that affected the way in which these allowances should be calculated. That's in the evidence, it's uncontested.

PN370

All right, that gets us to the end of May. Those steps were reasonable. They were appropriate. There was really nothing you could do in the face of ambiguity. So then what happened between June and July, 11 July when the first agreement implementation committee meeting occurred. Well, what happened was there was an industrial arrangement between the VHIA and the unions, and it's reflected in Mr Pullin's evidence, it's also accepted by the unions, that each of the hospitals that were respondent to the agreement could have until the end of June. Mr Pullin says the union has made this request or gave this extension for tax reasons for their employees. He's not in a position to give his opinion about what the union's motivations for doing so, but it makes sense that that might have been a motivating factor.

PN371

THE COMMISSIONER: Some would say it would be un-Australian not to.

PN372

MR WOOD: Exactly. And there was an agreement between Mercy and the unions facilitated by this Commission to try to do so by the end of June, consistent with the broader agreement within the sector. And the criticisms that my learned friend makes about, whether you call HR or ER and the payroll function not being totally in sync between the start of June and the middle of July, seems to be a fair criticism on the evidence, that there was obviously on the evidence an attempt to deal with the back pay of the wages, and that was processed. And then you read what Ms Kingsley says, she says, look, the payroll were half staffed overall, they were half staffed in this area, there were 5,000 employee processes that we had to go through every week, and there was also another agreement we had to deal with.

PN373

But when you get onto from 11 July, and the evidence is uncontested to the payments being made from 24 to 31 August, things are well back into action. The evidence is clear, that things were being prosecuted at a fast rate by HR and ER and payroll, ending up in the list of employees my learned friend refers to on 26 July, some 400 pages of evidence dealing with a great deal of complexity about how employees should be paid in a separate piece of software.

PN374

Now, from that period there were some minor modifications about who's in and who's out, and you see again on the evidence almost every day something is happening to try to fix this, and particularly before and after the agreement implementation committee meetings on 11 July and 8 August, and by 8 August it's almost done and then the payments are made the week after. That acceleration from 11 July through to the middle of August in effect gives voice to the fact that the steps that are required by clause 29.3 were being taken during that period, and they were reasonable steps and they were appropriate and they were responsive, and there were efforts made to do it.

PN375

Now, were they perfect? No, they weren't, they weren't perfect. Could they have been done better? Yes. Could it have been processed in a more timely manner? Yes. All those things are true, the criticisms are true. But in the circumstances that Ms Kingsley gives of all the other things that were going on the only real criticism can be made between about 3 June or perhaps 10 June and 11 July, a period of a month, and the explanation for that is given by Ms Kingsley about the capacity of payroll to handle this. Now, is that reasonable, is that adequate, is that appropriate, is that sufficient? Whichever way one reads clause 29.3(c) that's really a factual question for the Commission and one can see both sides of that argument. That's the proper way we would say to read it. You just can't read it as if it doesn't exist.

PN376

Then moving to 29.3(d), which is really the crux of the matter to be fair, there is as I have said an introductory precondition, a gateway, and if the Commission is against us then that gateway has been satisfied and requirement to pay, mandatory requirement to pay arises, and it's two-fold, and my learned friend didn't ever refer to the second aspect:

PN377

> *The employer will meet any associated banking or other fees or penalties incurred by the employee as a consequence of the error where those fees exceed the 20 per cent penalty payment.*

PN378

That is the employee will never be out of pocket for any failure on a fair construction of this clause. The employee will be compensated by receiving the funds by reference to the value of money, and also for any losses incurred, any other fees or penalties incurred by the employee.

PN379

So it is a complete internal compensatory regime, and that is without having to go to the Commission or the court, this is just a way of compensating within the agreement for things that should have been done and weren't done. And my learned friend says in his criticism of our construction that there is no other way, he says - I'm just getting a note - no other way to recalculate it on a daily basis. Well, calculating it on a daily basis has got a well known meaning. You put any money in a bank or borrow money out of a bank and the percentage that is required to be earned or paid on a per annum basis on the capital - delete capital, put in underpayment - means that the percentage amount required to be paid on the capital or on the underpayment is calculated on a daily basis; that is it compounds.

PN380

That is a completely reasonable approach to construing this clause in the sense that it fully compensates any employee for the failure to be in receipt of their entitlements, their moneys in time. So they get the value of the money at an excessive rate, at 20 per cent. They get it at 20 per cent and they get any other fees or penalties incurred by the employee as a consequence of the error where those fees exceed the 20 per cent penalty rate. Now, one has to be conscious of the fact that in this clause one has to do exactly what my learned friend criticised us for doing in 29.3(a), and to an extent in 29.3(c), take a practical not a literal approach. One has to take a practical approach to this clause. Having regard to what the courts have said, as Justice Madgwick said in the Cutts case, 'You have to reach for meanings which avoid inconvenience or injustice.' As Justice Callinan said in the Amcor case, 'You have to ensure that a construction, if reasonably available, is one that operates fairly towards both parties.' And then Justice Kirby, 'An interpretation that contributes to a sensible industrial outcome.'

PN381

On the rough maths of 220 employees, who although not parties to any award that might be made in settlement of this dispute would be perhaps interested in a sense that more than a bystander would, if those employees were all parties here the figure would be in the order of millions and it would be between $3m and $4m on our calculation, just averaging out the evidence in relation to three employees and then multiplying it over 220 employees.

PN382

Now, you ask yourself, okay, for being a few days late for payments of - sorry, it's more than that, a few months late, for payments of $350, $500, another $350, another $250, and the $250 and the $350 second ones are actually only slightly late, for 200 employees there's a windfall gain of between 3 and 4 million.

PN383

That construction is available on the text, but is it likely, is that the best, because you're not seeking perfection here, you're just trying to work out what is the most likely construction, what's the better construction, what is, in the words of the High Court, what's the one that will operate most fairly, what's the one that gives the most sensible industrial outcome, what's the one that avoids inconvenience and injustice.

PN384

And on our view the construction that the union advances fails on that test. It cannot be the case that a delay of the type that we're talking about in this case generates the windfall gains of orders of magnitude, three orders of magnitude greater than on our construction, and which compensates the employee for being not in funds at two or three orders of magnitude more than the compensation that they would get through normal means. It just can't be the case that the clause should be construed in that manner.

PN385

In one sense that's all you need to do. All you need to do on one sense without even going to the third sentence in clause 29.3(d), without even going to that, you just have to look at the outcomes and know this construction that the union advances can't be correct.

PN386

THE COMMISSIONER: And you're saying it can't be correct because it would be an unfair financial burden on the respondent?

PN387

MR WOOD: Completely disproportionate to the purposes that the clause should be construed to be trying to achieve. It's completely disproportionate.

PN388

Now, my learned friend says you should look at what other hospitals have done in relation to this clause. Firstly, what any other hospital has done is of no relevance. Secondly, even if Mercy had made payments of the types referred to are of no relevance to the construction. You can't look at things that happened post the making of an agreement as an aid to construing an agreement. The reason is simple, because sometimes people keep their bargain and sometimes they don't, and you can't look at what happened after a bargain is struck and say, look, that's what you did, therefore this is the meaning of the contract, because what you did afterwards could be in compliance with the agreement or it could be in breach of the agreement. It's of no relevance at all.

PN389

Here it is worse. We have got what happened after the agreement, not even by the employer, Mercy in this case, and in circumstances where the very issue that is going to attract attention doesn't arise, because we're talking about a couple of hundred dollars, where it's just as easy for the employer, Eastern Health and Alfred Health, to deal with the complaint and pay the money. They're not confronted with this sort of issue where they have to actually think about, well what does this mean. They can just pay the money, and it is of give in to the union demand and the issue goes away, and it is just simply not of any relevance to the way in which one can construe an industrial agreement.

PN390

My learned friend is correct in a sense that his construction does provide an incentive to pay quickly. He's correct in that regard. But one has to look at the size of the incentive and ask yourself was it truly the agreement of the parties that incentives of these completely disproportionate types were agreed, were understood that the agreement should be interpreted in this fashion, and that's

really the question, and on a fair reading, we would say, a common sense approach, it just can't have been the case that it was agreed that these outcomes were intended. You can't construe an agreement like that.

PN391

THE COMMISSIONER: Accepting that submission would that necessarily mean parties engaged in reaching these sorts of agreements always know what they're agreeing to?

PN392

MR WOOD: No. In many times people don't. This is one of the things the authorities refer to all the time. Many times parties agree to leave something ambiguous and leave it for a later issue to arise or someone else to resolve or just hope it never arises.

PN393

THE COMMISSIONER: For me to resolve you say.

PN394

MR WOOD: For you to resolve, Commissioner. Sometimes they've got completely different views of what a clause, what a term means. Sometimes a party has an honest view the clause means this. Another party has an honest view what the clause means, and it's up to the tribunal. Not that they're deliberately - not that they're at agreement that they disagree, simply they've got honest views that they mean different things and they leave it for determination. But the task of construction is trying to come up with a practical construction that operates fairly and sensibly, notwithstanding that the language of the parties leaves room to be desired.

PN395

And in the same way that my learned friend has criticised our construction of the introductory clauses, 29.3(a) through to clause 29.3(c), and implores the Commission not to be literal, but to take a practical approach, the same has to be done in relation to 29.3(d). You can't have it both ways. You can't say just ignore 29.3(a), read these other words as if they don't exist, and then I want you to read 29.3(d) without any regard to the context, the purpose and what a sensible or fair industrial outcome is. It just doesn't pass muster.

PN396

THE COMMISSIONER: But what about the applicant's argument that a penalty has to be - I don't want to misquote - but at paragraph 97 of their submission on page 951 of the court book they say:

PN397

To the effect that the penalty should be fixed with a view to ensure that the penalty is not such as to be regarded by the (indistinct) or other as an acceptable cost of doing business.

PN398

So I want your response to - so the applicant is saying if it's 19 cents a day - do you accept that, is that the calculation, 19 cents?

PN399

MR WOOD: The calculation is two or three times what one would get from a court when a court is saying - if a court had to deal with an underpayment claim it says you should be compensated for the full amount plus interest. But the amount that we are talking about here in our construction is way beyond any interest, including penalty interest, that a court might order. It's at the level of 20 per cent, and a court just orders the current cash rate plus 4 per cent, sometimes a penalty on top of that, sometimes, getting sometimes towards 10 per cent. This is double what a court would order to fully compensate someone for an underpayment. It's well within, our submission is well within the range of what the Act and the courts identify as the appropriate recompense for someone who has not been paid.

PN400

That's a very important contextual marker, because it indicates that the overall system doesn't allow someone who is not being paid to get a windfall gain, and where a windfall gain of a hundred or a thousand times more than one would be entitled to if one went to court to recover wages, get interest, and obviously subject to whatever rules apply, subject to legal costs, but just dealing with the monetary amounts, to talk about something that's a thousand times higher than that as being an appropriate way of compensating an employee for an underpayment, it's out of all proportion to the statutory context in which one operates. That figure when one looks at one employee, the figure is just a simple application of what the employee would be entitled to in terms of putting them in the exact position they're in, including any losses they've suffered by not being in funds, and additional amounts up to this very large amount of 20 per cent.

PN401

THE COMMISSIONER: Just to clarify are you accepting that 19 cents per day?

PN402

MR WOOD: For the - - -

PN403

THE COMMISSIONER: The calculation of the penalty?

PN404

MR WOOD: Well, our calculations are set out at 973 of the court book, and our calculations - do you have that?

PN405

THE COMMISSIONER: Yes.

PN406

MR WOOD: Our calculations are slightly more precise, but you're talking about - our calculations are reflective of what - look at Mr Hargreaves who's been out of funds for three months for two small payments. Two months he's been out of funds - sorry, three months, I beg your pardon, he's been out of funds, and those amounts because he worked part-time were $276; $276 he's out of funds, and then another short period, a month, $276. So less than $1,000. The total penalty payable is $17,000 for being out of funds between one and four months for less than $1,000. It just can't be the construction, that that quantum is the result of -

sorry, the construction the union prefers if it gives that level of quantum for underpayments of that length and that amount cannot be correct.

PN407

Now, our construction is in accord with the statutory regime for recovery of underpayments. It does not include in our calculation any additional losses that the employee might claim and has suffered, and none are identified on the evidence, and it is, we would say, the appropriate, indeed overwhelmingly appropriate approach to the construction of this clause that the Commission should take. My learned friends don't run away from this.

PN408

If you look at the next one, the next one is Mr Barbuntay who's a theatre technician, is out of funds for $350 for 133 days, another 133 days, $350, and then a month of $350. That's just on $1,000, $1,050. His penalty is $21,000 for being out of funds on $1,000. And then look at the third one. This is Mr Hodges who was out of funds for four months for $350. He gets almost $10,000 on their construction. It just can't be right.

PN409

And one must bear in mind, and it might be sort of coming to appreciate why I'm so careful about nominating who the parties to this dispute are, that once you deal with the persons who are not parties to this dispute you're up into the millions in relation to payments of hundreds of dollars which were delayed for between one and three months.

PN410

It's not likely that in a regime concerning public hospitals with the obligations which are understood by all and the restrictions on the employers in that sector that an agreement like this generating these sorts of huge windfall gains is an appropriate way, having regard to all the context of who the parties to the agreement are, is an appropriate way to approach the penalty clause.

PN411

Even if one was in the mining industry one wouldn't construe the clause like this, but here we are in public health, we're talking about construing a clause which is susceptible of different meanings, susceptible of more than one meaning, in a way that's purely fanciful, in our respectful submission. Was there anything further I can help the Commissioner?

PN412

THE COMMISSIONER: I want to go back to this issue of parties. I'm not sure I'm clear. Are you saying that the union is the party? Are you saying that the union is the party, this is a collective dispute and that only relates to the three individuals concerned? I just want to understand what your position is.

PN413

MR WOOD: Our first position is it's not for us to tell them, and I'm saying that in a respectful way. It's not for us to define the scope of their dispute and who the parties to the dispute are. On the way in which this dispute has been notified the

union is the party to the dispute. It is entitled, generally speaking, to identify what the scope of the dispute is.

PN414

There's another party that's been called before the Commission to resolve the dispute. That party has made submissions about persons who are identified, three of them. It's then also made submissions about a whole range of people who are unidentified, who are not before the tribunal, and those submissions or any award that's ultimately made must reflect the fact that the only party to the dispute on what you might call the other side is the union. That's just where we're at.

PN415

There's no binding determination that could be made in relation to persons who are not parties to the dispute, and that's just the nature of private arbitration, in the same way might I say, in exactly the same way that none of the other hospitals will be bound by the resolution of this dispute. They're not here before the tribunal. They've got the same interests. They're not a party to the dispute. They're not going to be bound by the result, in a legal sense. In an industrial sense of course there's other considerations, but in a purely legal sense it's just the parties to the dispute who are bound. That's all we're trying to say.

PN416

THE COMMISSIONER: Okay. I think this is a convenient time to adjourn.

PN417

MR WOOD: I'm sorry I went over past 12.30.

PN418

MR WHITE: My reply is only going to be very short, only about three points. I'm in the Commission's hands, but I mean (indistinct) I could get it done before 1 o'clock certainly.

PN419

THE COMMISSIONER: Okay.

PN420

MR WHITE: In relation to that last point about the party to the dispute I mean it's evident that my learned friends - the significance that my learned friends attach to that question is based around the extent to which any award made in this dispute is arbitration would bind others, at least according to the terms of the agreement. The submission made that this arbitration binds only the named parties is not exactly accurate. Clause 17.7 in the dispute resolution clause provides for arbitration in these circumstances, and on page 478 of the court book your Honour will see at clause 17.7(c):

PN421

Subject to clause 17.7(d) below a decision of the Commission is binding upon the persons covered by this agreement.

PN422

So in circumstances where this dispute really is about the interpretation to be given to the words of the agreement we say that any issues Mercy has fall away.

PN423

In relation to the question of taking steps, at least on Mercy's evidentiary case, my learned friend said that from July almost every day there was something happening. I simply emphasise that something happening is not the test that taking steps must be construed in view of the requirement in relation to lesser payments that they be corrected at the next pay period, and that something happening that results in correction of the underpayment extending beyond the less onerous test in paragraph (b) just would not fit with the scheme of the underpayment provision.

PN424

The final point in reply relates to the question posed by the Commission to my learned friend in relation to the cost of doing business in relation to the calculation of the penalty. The response given revolved around the appropriateness of an amount of compensation to each of the individuals involved or concerned here. Now, my submission is that the purpose of the penalty provision is not merely of compensation, it is to provide an incentive for the swift rectification in accordance with the plain terms of paragraphs (b) and (c), and a penalty that provides that incentive to do that is appropriate in this case.

PN425

There was reference to authorities which insist that a practical and not literal approach be taken to interpretation and one which avoids inconvenience or injustice. To the extent that there is any inconvenience to Mercy here that has been caused by the extreme lateness of Mercy's rectification. As I have said in-chief the scheme for rectification is measured in a scale of days. Mercy's delay in the nature of months is orders of magnitude longer than what the agreement requires, and it would be expected that a penalty would reflect that. They're the points in reply.

PN426

THE COMMISSIONER: Anything else, Mr White?

PN427

MR WHITE: No.

PN428

THE COMMISSIONER: Anything from Mr Wood?

PN429

MR WOOD: No, Commissioner.

PN430

THE COMMISSIONER: Thank you for the very concise submissions, and I am not surprising going to reserve my decision on this and give written reasons to the parties in due course. So it's an appropriate time for us to adjourn.

ADJOURNED INDEFINITELY **[12.49 PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs