TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY

C2020/9259, C2020/9260, C2022/219

s.739 - Application to deal with a dispute

Australian Maritime Officers' Union
and
Smit Lamnalco (Towage) Australia Pty Ltd
(C2020/9259)

Smit Lamnalco Towage (Australia) Pty Ltd and AMOU Gladstone Enterprise Agreement 2016

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s.739 - Application to deal with a dispute

The Australian Institute of Marine and Power Engineers
and
Smit Lamnalco (Towage) Australia Pty Ltd
(C2022/219)

Smit Lamnalco Towage (Australia) Pty Ltd and AIMPE Gladstone Enterprise Agreement 2016

Brisbane
11.01 AM, THURSDAY, 14 SEPTEMBER 2023

Continued from 09/08/2023

PN1

THE VICE PRESIDENT: Good morning. Could I start by taking the appearances, please.

PN2

MS T ELLIS: For the AMOU, you have Ellis, initial T, Laurenson, initial C and O'Dempsey, initial W.

PN3

THE VICE PRESIDENT: Thanks, Ms Ellis.

PN4

MR G YATES: If it pleases the Commission, my name is Yates, initial G, appearing for the Australian Institute of Marine and Power Engineers and we have Mr Mann also observing today but I just wanted to clarify that we're in matter No. C2022/219, not 217.

PN5

THE VICE PRESIDENT: Great, thank you.

PN6

MR YATES: Thank you. I think Mr Taylor inadvertently made an error, being the matter number.

PN7

THE VICE PRESIDENT: Okay, thank you.

PN8

MR K BROTHERSON: If the Commission pleases, Brotherson, initial K. I appear for the respondent company. I'm instructed by Ms Luker for Hall & Wilcox.

PN9

THE VICE PRESIDENT: Thank you, Mr Brotherson. Are there any preliminary matters before we start?

PN10

MS ELLIS: I think it might just be confirming the questions: so the AMOU maintains that the last the last two questions that were not agreed by the company are – they were in our original F10 application so we say that they should be accepted.

PN11

THE VICE PRESIDENT: Yes – just bear with me while I turn that up.

PN12

MS ELLIS: So I think it's the question in relation to if a permanent part-timer is considered to be on leave whilst they complete their obligation of eight days – eight or three days per month and then if a permanent part-timer is considered to be on leave, what payment are they entitled to once they work more than their three or eight-day obligation.

PN13

THE VICE PRESIDENT: Okay.

PN14

MR YATES: If it pleases the Commission, in the Institute's submissions we made brief submissions about the evidence that the respondent seeks to admit from matter number – from the Vice President's decision in PR763583.

PN15

THE VICE PRESIDENT: Yes.

PN16

MR YATES: We've objected to that being relevant to these proceedings.

PN17

THE VICE PRESIDENT: Well, I guess – on what basis, Mr Yates, because – so you're not objecting to it on the grounds of fairness, you're just saying it's not relevant?

PN18

MR YATES: Well, on the basis of the two grounds: on the basis of fairness - - -

PN19

THE VICE PRESIDENT: Well, how is it unfair if you're already aware of it from those proceedings?

PN20

MR YATES: Vice President, I wasn't the advocate in those proceedings. There has been some time passed since that evidence was presented. We got notice of this last week. I was on leave, have had no time to go back and revise the evidence. But essentially in terms of relevance, the evidence was presented in a completely different set of proceedings about a completely different set of matters. One was, as we say in our submissions, the question for determination in the Vice President's decision in PR763583 was to do with the scheduling of work and duty and the consequences or the outcomes when those things don't go to the schedule or plan, whereas this is specifically about the parameters.

PN21

These proceedings are specifically about the parameters for how casuals and PPTs are to be compensated for when they're required to work beyond the parameters of what we say are the defined dates.

PN22

THE VICE PRESIDENT: Don't they touch on the same clauses?

PN23

MR YATES: No.

PN24

THE VICE PRESIDENT: All right, well, perhaps we'll hear from the respondent why they say the matter is relevant, why the evidence is relevant. Mr Brotherson,

what's your position and what is the evidence you want to call and why do you say it's relevant?

PN25

MR BROTHERSON: Yes, thank you, Vice President. We're not proposing to call any evidence and in fact I think there's a total misunderstanding by my friends on the other side. If you look at paragraph 7 of the company's updated outline, which appears to be what's drawn such sensitivity - - -

PN26

THE VICE PRESIDENT: Just bear with me for one minute while I turn it up. Just bear with me. Okay, hang on – sorry, I won't be a second. Have you got the page of the court book, Mr Brotherson?

PN27

MR BROTHERSON: It's page 82.

PN28

THE VICE PRESIDENT: Great, thank you.

PN29

MR BROTHERSON: Sorry – I'm told that's wrong.

PN30

THE VICE PRESIDENT: That's Mr Sedgwick's statement.

PN31

MR BROTHERSON: Page 72, I'm told it is.

PN32

THE VICE PRESIDENT: That's all right – yes, got it.

PN33

MR BROTHERSON: If I can just take you to the first sentence there because this is what appears to have drawn all the sensitivity from the other side – the company takes the view that as necessary, the Commission may in these proceedings draw on the submissions of the parties and evidence for the work time decision and the knowledge derived from that matter. Now, we say that what we define as your earlier decision, the work time decision, is relevant in this matter and it's relevant from the point of view that already we've seen one of the questions drop away as a result.

PN34

But, Commissioner, the company is not trying to seek to avert procedural fairness or any such thing as has been alleged in what it submits there. But it is asking the Commission to draw on its accrued knowledge from an enterprise agreement and provisions of that agreement and the operations of the company which have been before you multiple times before and if one looks at the work time decision there's actually an agreed statement of facts and next to that is annexure A. All bar three paragraphs of that we say are accumulated knowledge that you have that would

form part of the information you have before you or the knowledge you already have in this matter. I'm not sure if you have access to that decision - - -

PN35

THE VICE PRESIDENT: Yes, I've got it in front of me.

PN36

MR BROTHERSON: So if I could take you to page 52 of the decision where you've annexed that agreed statement of facts, if one looks at that, paragraphs 1 to 12 are all matters – non-contentious, one would think – that (indistinct) form part of the basis or background by which you are informed in this matter. The paragraphs that perhaps would not be applicable would be 13 to 15, which deal specifically with the dispute in question, although even that potentially is otherwise. Then from 16 through to 24, again, we're dealing with provisions which, as you've indicated, are already, Vice President, touch on the sort of issues that may arise today.

PN37

I'd also just take the opportunity to point out it's been alleged that we erroneously defined – even though it's our right to define a decision as we'd like – your earlier decision as the work time decision. Well, if we look at paragraph 16 of those agreed statement of facts – and it wasn't as I said an agreed statement of facts from May 2022 – the dispute includes issues of scheduling of hours, what constitutes work time for the purposes of the entitlements to a rest break pursuant to clause 7 of appendix 1 of the agreement and time in lieu, pursuant to clause 7.2.

PN38

It was about work time and it is still relevant to this matter as you may see the need to draw on it. That's all we're saying.

PN39

THE VICE PRESIDENT: Mr Yates is – yes, there's nothing – I'm sorry. There's nothing unusual, Mr Yates, about an advocate in proceedings going to cases that are years old and saying, 'In proceedings here this was submitted or there was this evidence', and it's analogous in this case. I don't know what stops Mr Brotherson from doing that – on what basis you could possibly do that?

PN40

MR YATES: Certainly – I wasn't talking about whether he can raise it as a precedent. I'm just saying whether the evidence could be admitted as part of the decision.

PN41

THE VICE PRESIDENT: You're not seeking to admit the evidence. All you're saying is – it's not admitting the evidence. It's just saying – I do it all the time in decisions, even if parties don't raise it. They raise a case and I go to the case and say, 'Well, the evidence in that case said this', or, 'The party in that case argued that and these circumstances are the same or different'. I just don't see what we're arguing about, Mr Yates. It's like we're arguing for the sake of arguing.

PN42

MR YATES: No, no, no – we've clarified it now, thank you, Vice President. So - - -

PN43

THE VICE PRESIDENT: I don't know how it wasn't clear. You know, Mr Brotherson is not saying the statement of Mr Sedgwick in X case should be admitted in this case. But he's perfectly entitled to say, 'In this case Mr Sedgwick said this. Draw your own conclusions. We say it's analogous, you say it's not'.

PN44

MR YATES: Yes, I guess it's the phrase, 'draw on the submissions of the parties and evidence from the work time decision'. Now, that's a different statement to saying, well, we will provide some aspects of the Vice President's decision.

PN45

THE VICE PRESIDENT: But, Mr Yates, it's not. Even if none of you had raised it, I would be perfectly capable of saying, 'In these other cases, the union's evidence was this or the company's evidence was that and it seems to be analogous in this case'. I'd be perfectly entitled to raise that myself. I just don't see the issue.

PN46

MR YATES: Yes, yes, well, it's been clarified for us now. Thank you, Vice President.

PN47

THE VICE PRESIDENT: Okay, well, to the extent it needed clarification, I accept it's been clarified. How are we going to progress the matter?

PN48

MS ELLIS: From our perspective, I can make some submissions, just drawing the Commission's attention to what I see are the main issues.

PN49

THE VICE PRESIDENT: Okay.

PN50

MS ELLIS: Then I'm sure Mr Yates would want to do the same and from the other side.

PN51

THE VICE PRESIDENT: Okay, so there's a – are there any statements that the union is relying on? There was just a statement from Mr Sedgwick and he's now not required for cross-examination?

PN52

MS ELLIS: That's correct. So we will still rely on the witness statement of Mr O'Dempsey and Mr Laurenson.

PN53

THE VICE PRESIDENT: Yes.

PN54

MS ELLIS: And then we'll draw your attention to a couple of clauses – a couple of paragraphs in Mr Sedgwick's statement as well.

PN55

THE VICE PRESIDENT: Okay, so we should tender those statements at the outset.

PN56

MS ELLIS: Yes, I agree.

PN57

THE VICE PRESIDENT: Mr O'Dempsey and Mr Laurenson, yes?

PN58

MS ELLIS: And then – so that's the extent of the evidence that we're relying on that needs to be tendered and then obviously we just rely on the written submissions that we previously put forward.

PN59

THE VICE PRESIDENT: All right. So Mr O'Dempsey's statement appears on page 35 of the court book. That's the case?

PN60

MS ELLIS: Yes, I'll just double-check. That's correct – Mr O'Dempsey's statement is page 35 of the court book.

PN61

THE VICE PRESIDENT: And then taking into account the annexures it runs through to page 41 so, Mr Brotherson, you're not objecting to that statement being tendered?

PN62

MR BROTHERSON: I'm not objecting to the statement being tendered, Vice President, other than this – and these statements were of course prepared and filed well over 12 months ago and certain questions are no longer before you in this matter.

PN63

THE VICE PRESIDENT: Yes.

PN64

MR BROTHERSON: They've been discontinued. That's going to the question of what I'd broadly call work time and if you look at Mr O'Dempsey's statement, it strikes me that paragraphs 15 through to 19 of Mr O'Dempsey's statement deal with those matters which have already been decided and are no longer in contest this matter and shouldn't be read in these proceedings. I'm not trying to over-complicate it but I think we do need to accept there's been a significant evolution in this matter. I could say more about opinion evidence and so forth but that's for a later time, perhaps. But I think paragraphs 15 to 19 should be not read or deleted and that would equally then apply to certain paragraphs when we get to

Mr Sedgwick, where he replies to that and certain other matters would also come up when we deal with Mr Laurenson in a moment.

PN65

THE VICE PRESIDENT: Okay. Ms Ellis, what's your views about that?

PN66

MS ELLIS: I'm just having a quick look through the statement to double-check but I do agree that anything related to the work time – you know, what is work time – is not relevant because the decision has already been made that it's tug to tug. I was not seeking to refer to the Commission to – refer you to those clauses anyway.

PN67

THE VICE PRESIDENT: All right, well, how about we highlight 15 to 19 as being not relevant? We'll put the statement into evidence and I understand what you say about it, Mr Brotherson. But rather than striking parts of it out at this point, we'll just put the statement in on the basis that your position is paragraphs 15 to 19 were relevant to the previous dispute and not relevant to this one. Thank you. Then we have Mr Laurenson's – so I'll mark that as AMOU1.

EXHIBIT #AMOU1 WITNESS STATEMENT OF MR WARREN O'DEMPSEY

PN68

And then we have Mr Laurenson's statement, which starts at 42 of the court book and as I understand runs to page 49.

PN69

MS ELLIS: Yes, that's correct.

PN70

THE VICE PRESIDENT: Okay, any issues with respect to that statement, Mr Brotherson?

PN71

MR BROTHERSON: Vice President, the issue would be in respect to paragraphs 10 to 17 of this statement on the same basis as your earlier ruling. I should just clarify, obviously I think I mentioned this before, reserving rights as to what else we may say as to admissibility or relevance of various paragraphs.

PN72

THE VICE PRESIDENT: Okay, so, sorry – those paragraphs were paragraphs - - -

PN73

MR BROTHERSON: Ten through to 17.

PN74

THE VICE PRESIDENT: Ten through to 17 – yes, okay, thanks. All right, we'll mark Mr Laurenson's statement as AMOU2.

EXHIBIT #AMOU2 WITNESS STATEMENT OF CLIVE LAURENSON

PN75

Thank you.

PN76

MS ELLIS: So that's all the evidence from us.

PN77

THE VICE PRESIDENT: Okay, and do you want to speak to your submission, Ms Ellis?

PN78

MS ELLIS: Yes, I'm happy to do that. Essentially the dispute is about when an employee works past their rostered day into the next day. the company is currently paying an hourly overtime rate and not the day rate that we say they're entitled to. So I'll just break it down into a couple of things. Firstly, we need to work out what a day is and we say that clause 9.1.4 defines one day as having the same meaning as a rostered day for a full-time employee and we say that a day in that context is the shift that the employee is rostered on to as per clause 5 of appendix 1.

PN79

THE VICE PRESIDENT: Okay, just hang on one moment – so you're saying that in appendix 1 - - -

PN80

MS ELLIS: Yes – clause 5.

PN81

THE VICE PRESIDENT: Clause 5, yes.

PN82

MS ELLIS: Vessel roster.

PN83

THE VICE PRESIDENT: Yes.

PN84

MS ELLIS: It's saying that it defines what a primary and secondary tug is.

PN85

THE VICE PRESIDENT: Yes.

PN86

MS ELLIS: And it says that a primary day shift is 0700 to 1900 and a primary night shift is 1900 to 0700 and that a secondary shift is 0700 to 0700.

PN87

THE VICE PRESIDENT: Right.

PN88

MS ELLIS: And then because clause 9.1.4 defines one day as being the same as what is rostered for a full-timer, we say that is what a day is. But it also seems that we're not actually in dispute about this because paragraphs 19 to 22 of Mr Sedgwick's statement confirms that the company rosters full-time crews on the 12-hour prime or the 24-hour secondary shifts.

PN89

THE VICE PRESIDENT: Sorry – clause 9.1.4?

PN90

MS ELLIS: Yes, of the agreement.

PN91

THE VICE PRESIDENT: The agreement itself?

PN92

MS ELLIS: Yes, sorry – I should have (indistinct).

PN93

THE VICE PRESIDENT: That's okay. All right, so 9.1.4?

PN94

MS ELLIS: Yes.

PN95

THE VICE PRESIDENT: One day has the same meaning as a rostered for a full-time employee, yes, okay.

PN96

MS ELLIS: So we say that a rostered day for a full-timer is as per what we just looked at in appendix 1, 5.1. So it says that they're rostered on to these days. So that's what we say a day shift is – that's what we say a day is.

PN97

THE VICE PRESIDENT: Yes.

PN98

MS ELLIS: Then if you were to look at Mr Sedgwick's statement at paragraphs 19 to 22, we say that confirms that the company rosters full-time crews on those 12-hour prime or secondary – 12-hour prime or 24-hour secondary shifts.

PN99

THE VICE PRESIDENT: Yes.

PN100

MS ELLIS: And then at paragraph 24 of his statement he confirms that secondary crews are rostered to finish at 0700. So we say that just backs up our submission.

PN101

THE VICE PRESIDENT: Yes.

PN102

MS ELLIS: And then we also say that we're not in dispute that our crews are expected to work into the next day. So Mr Sedgwick confirms at paragraph 23 and 32 of his statement that crews are required to work beyond their 0700 or 1900 shift end and at item 2 of page 14 of his statement or Mr Sedgwick's statement he confirms that Mr Laurenson's evidence was correct and that he was rostered over into the next day on that occasion. So that's Mr Sedgwick confirming the current practice of the company is to on occasion schedule crews into the next day. So those are my submissions on what is a day.

PN103

Then if you'd like I can take you through our submissions based on what we think a casual is entitled to.

PN104

THE VICE PRESIDENT: Yes.

PN105

MS ELLIS: And then I can move on to what we think our (indistinct) is entitled to.

PN106

THE VICE PRESIDENT: Okay.

PN107

MS ELLIS: With regard to a casual, we say that according to clause 9.1.4 of the agreement again casuals can only be engaged by the day and then clause 15.3 of the agreement says that the only payment available to casuals is a day's pay and then a day's pay in lieu of leave. Then we say that Mr Sedgwick confirms at paragraph 37 of his statement that that is how the company pays casuals.

PN108

THE VICE PRESIDENT: Yes.

PN109

MS ELLIS: Then we say that if a casual works past 0700 or 1900 into the next day, then they must get a day's pay and a day's pay in lieu of leave. Then we also - - -

PN110

THE VICE PRESIDENT: (Indistinct words) part of the next day.

PN111

MS ELLIS: Sorry, can you please say that again?

PN112

THE VICE PRESIDENT: Even if the work only goes for part of the next day?

PN113

MS ELLIS: Yes, we say that's – they should get the full day's payment because the only payment that the agreement refers to is that day rate.

PN114

THE VICE PRESIDENT: So where's that clause about the day rate?

PN115

MS ELLIS: Fifteen point three – it says that: 'A casual employee's remuneration will be calculated per day at 1/365 per day of the annual rate applicable to a permanent full-time employee plus the 100 per cent day rate in lieu of leave'.

PN116

THE VICE PRESIDENT: Yes.

PN117

MS ELLIS: Then we say that because there is only one payment that's all that can be applied if you're doing another day or a part of another day.

PN118

THE VICE PRESIDENT: So you can't apportion – you can't pro rata the payment for the part of a day, is what you're saying?

PN119

MS ELLIS: That's correct. There is nothing in the agreement that provides for pro rata.

PN120

THE VICE PRESIDENT: Yes, I understand your submission.

PN121

MS ELLIS: Then we say that if a casual works beyond their shift end, that they can be financially disadvantaged. So Mr Laurenson provides an example at paragraph 20 of his statement that says because he was working standby duty which finished at 0700, and then on standby – after you finish standby it's a rule that crews have to go on a 12-hour break after that. He says his evidence is that he was disadvantaged because he worked past the 0700 and he didn't finish until 0800 in the morning, which meant that he couldn't start work again until after 8 o'clock at night and because the standby – sorry.

PN122

Because the secondary shifts and the night prime shifts start at 1900 he'd already gone past that start time so he couldn't, as a casual, have been offered those shifts. So we say that he was financially disadvantaged because the company worked him over shift. Then - - -

PN123

THE VICE PRESIDENT: But if he hadn't worked over the shift, if he'd finished at his normal time, would he have been able to be offered the shift?

PN124

MS ELLIS: He could have been offered the shift.

PN125

THE VICE PRESIDENT: Would he have had the break though?

PN126

MS ELLIS: If he finished at 0700 in the morning and had the 12-hour break then he would have been fit to work for when the shift starts at 7 pm that night.

PN127

THE VICE PRESIDENT: Okay, yes, the 7 pm shift – yes, okay.

PN128

MS ELLIS: Correct, correct – and then so Mr O'Dempsey's evidence at paragraph 20A of his statement, he also confirms that or gives evidence that the casuals are adversely affected financially and that is for the same reason as Mr Laurenson pointed out in his statement. Mr O'Dempsey's statement also goes on to say at paragraph 20B that his ability to plan things on his leave is compromised and that they're unable to plan appointments or activities or things outside of the work the next day. So if it's – he couldn't plan something for 8 o'clock in the morning on his – technically on his day off because the company could schedule him to work over his shift.

PN129

He also gives an example at paragraph 20C of his statement, about how working past the end of a 12-hour day is also a safety concern for him for fatigue reasons. I don't need to go into further detail on that. It's just that we say that the agreement by providing compensation for that, it's the company acknowledging that they are eating into another day of the employees and it should be compensated for, in our view. So essentially, we submit that the employees should be able to plan their activities on their day off and they shouldn't be financially disadvantaged or put at a higher risk of fatigue then necessary and we say that the day rate under the agreement is a disincentive for the companies to work the crews into the next day.

PN130

THE VICE PRESIDENT: Well, what do you say, though – you're asserting that these hours after the schedule end of the shift are scheduled? So is the company – does this raise the issue of scheduling employees to work more than 12 hours?

PN131

MS ELLIS: Sorry, I didn't mean to confuse the issue there. Obviously there is a possibility that the company could schedule it but we're not trying to raise that. It's just that it is possible for a company to schedule it and it is possible for the company – obviously if they're scheduling over 12 hours it has to be four extraordinary reasons or whatever. I'm not trying to muddy the waters. It's just saying that it's possible for the company to go over – to make the employees either work over or schedule them over. So we're just saying that there should be – if it happens, then there should be a payment.

PN132

THE VICE PRESIDENT: Yes. So you're not querying when it happens, you're saying if it happens, this is what they should be paid?

PN133

MS ELLIS: Correct.

PN134

THE VICE PRESIDENT: Yes.

PN135

MS ELLIS: So that's our submissions on what we think a casual is entitled to. Then with regard to what we think a permanent part-timer is entitled to, we say that apart from an employee who has completed their eight or three-day obligation, and then works past the 0700 or 1900 into the next day, should be getting a day's pay and a day's leave, plus their leave recredited as per clause 17.11 of the agreement and we say that that's because they're working beyond the end of their rostered work period and into their leave.

PN136

So Mr Sedgwick at his statement confirms at paragraph 41 that the company's practice is to pay full-time employees who work into the next day on the last day of their swing, they get paid a day's pay, a day's leave and then they get the original leave day recredited in accordance with clause 17.11 of the agreement. The applicant submits that this is no different for a part-time employee who has completed their obligation.

PN137

The company acknowledges at paragraph 35 of their updated company outline of submissions that the part-timers are employees and we say that clause 17.11 applies to employees and then further to that we say paragraph 44 of Mr Sedgwick's statement confirms that the company's practice is to pay part-timers an hourly rate after the shift ends and when they work into the next day, even if they don't complete the 12 hours of duty.

PN138

So that confirms that the company is already doing the practice. It's just that we say that the payment that they're applying in that instance is wrong. We say that the Commission can take from Mr Sedgwick's evidence that the company acknowledges that they are working into the next day from 1900 to – or from 0700.

PN139

THE VICE PRESIDENT: So is that because part-time employees – when you say they have pro rata leave, they have a full – their leave is taken in full-day periods but it is – there's less of those periods in a year because there's a proportionate number of leave days based on their part-time hours.

PN140

MS ELLIS: Yes – so we're just saying that the company has applied pro rata wrong. So if you're looking at pro rata for days worked, that would be 91 days. But the agreement specifically says, 'Days free of duty, 182 days free of duty', and then the agreement says part-time employees get that pro rata, so pro rata days for duty. We say that means – it just makes sense that a part-timer should get more leave than a full-timer because they work less. So we say that anything - - -

PN141

THE VICE PRESIDENT: Why should they get more leave? Shouldn't they get – isn't the issue whether – so the part-time employee will get an approved number of days of leave based on being required to work less so they must get less total accrued days of leave than a full-timer, mustn't they?

PN142

MS ELLIS: So if you're saying that you've got to work a day to earn a day of leave - - -

PN143

THE VICE PRESIDENT: I don't know what I'm saying. I'm asking you what you're saying. I don't know. I don't understand your submission – how a part-timer could get more leave than a full-timer when it's pro rata on the basis that they work less hours than a full-timer.

PN144

MS ELLIS: The agreement says – paragraph 3, the definition of rostered leave - - -

PN145

THE VICE PRESIDENT: Sorry – paragraph 3 of - - -

PN146

MS ELLIS: Clause 3 of the agreement.

PN147

THE VICE PRESIDENT: Okay, so clause 3, yes.

PN148

MS ELLIS: So the definition of rostered leave, which is near the end.

PN149

THE VICE PRESIDENT: Yes – means the 182 days free of duty as provided under this agreement.

PN150

MS ELLIS: And we say that you're either working or you're on rostered leave. We say that the agreement says that they're entitled to 182 days free of duty pro rata. So that means that just on that you've got a part-timer has got to be entitled to it. They're never going to be working more than a full-timer so they're entitled to – it's just work or leave. They're going to on leave more than a full-timer so it has to be - - -

PN151

THE VICE PRESIDENT: No. That can't be – for a part-time employee there is work, there's days that you don't have to work because you're part-time and then there's leave. I don't accept it's only work or leave. So a full-time employee has to work a maximum of so many days in a year. If you're a part-time employee your maximum is less and if there's 182 days of leave based on the full-time days worked then there's a lesser amount based on the days worked by a part-time

employee and the rest of the time they're just not working because they're a part-time employee. They're not on leave.

PN152

MR YATES: Can I assist, Your Honour?

PN153

THE VICE PRESIDENT: Sure, Mr Yates.

PN154

MR YATES: Just at appendix 1, clause 11.4 – I don't have the court book - - -

PN155

THE VICE PRESIDENT: Just let me get there, hang on a minute – clause 11.4, yes.

PN156

MR YATES: It goes through how both 50 per cent and 75 per cent are categories of (indistinct) of work.

PN157

THE VICE PRESIDENT: Yes.

PN158

MR YATES: It says there in the second paragraph that the pay has been (indistinct).

PN159

THE VICE PRESIDENT: Yes.

PN160

MR YATES: And over the year, this equates to 91 days worked plus the 91 days accrued leave. That leaves the 182 other days leaving the PPT without an obligation.

PN161

THE VICE PRESIDENT: Yes.

PN162

MR YATES: Yes, so there's - - -

PN163

THE VICE PRESIDENT: So there's three kinds of days, not two.

PN164

MR YATES: Yes.

PN165

THE VICE PRESIDENT: There's work, there's leave and there's days when you don't work.

PN166

MR YATES: The PPT issues get quite tricky in the towage sector, mainly because of – there's an expectation that when the PPT is not within their rostered work periods - that's the eight days per month or three days per month in the last month - that there's some level of availability that they remain, whether that's on one of the accrued leave days, one of the 91 accrued days or whether it's one of the other non-obligation days. No obligation days – I'll just call it that.

PN167

So it brings about a question and the practice of some other operators and if I may take – be bold and take this opportunity to express that in some ports the PPTs actually nominate what days they're going to take as one of the eight or three so the company knows that they're not available. That's their leave day and that's – they're not available to be recalled because under the order of PIC, which is the recall provisions which I don't have, didn't contemplate for this purpose but in the recall provisions I think it says that the first – for relief work the first order, first category of employee to make themselves available is the PPT. Then it goes casuals, then it goes to other - - -

PN168

THE VICE PRESIDENT: But, Mr Yates, the PPT on any given day when they're not at work they may be on their proportionate amount of – on a day of their accrued leave, which is a proportionate amount or they may just be on a day when they're required to work. Not every day that they're not required to work is a leave day. That's what I'm struggling with. I just don't accept that submission.

PN169

MR YATES: No, no, no – that's the tricky bit that I was alluding to. It's a much vexed sort of situation with the tug boat operators, regardless of whether it's Smits or one of the other operators, about how that order of call works. That's what I was saying, is that within – it doesn't prescribe it in the agreement but it says that in each month there's going to be eight days of work and eight days of leave per month. That leave is nominally nominated by the employee and agreed to by the employer, that they're on leave for those days and not available for recall.

PN170

THE VICE PRESIDENT: So if they're recalled on the – the issue really is that as long as in any month they've had X number of days of work and X number of days of leave, that's the obligation met, isn't it? So if they'd nominated a leave what stops them from swapping a leave day and working on it and taking the leave day on another day?

PN171

MR YATES: Nothing at all.

PN172

THE VICE PRESIDENT: So what's the issue we're dealing with here?

PN173

MR YATES: Sorry – not swapping. I think we're sort of going off track a little bit because - - -

PN174

THE VICE PRESIDENT: Well, I don't know what track we're on, Mr Yates. That's the difficulty.

PN175

MR YATES: Yes, yes.

PN176

THE VICE PRESIDENT: What is the issue? What's the issue?

PN177

MS ELLIS: So I think – I understand that the Commission doesn't accept my submission there but we say that it's just about what you correctly said: have their fulfilled their obligation or not? We say that once they've done their eight days, or their three days, they've fulfilled their obligation and any work into the next day should be paid at the higher rate, the rate in 17.11, which is the day's pay, day's leave, and to have the leave day recredited.

PN178

THE VICE PRESIDENT: What does the company say?

PN179

MS ELLIS: The company pays an hourly rate. The company actually acknowledges the practice, that you should get paid more if you're working over into the next day, but they just say that it should be an hourly rate and we say that it should be the day rate. Mr Sedgwick at 41 of his statement says that the practice is to pay the full-time employee – sorry, that's just about the full-time. So they do it for the full-timer. When the full-timer works into the next day they pay the day's pay, the day's leave and they get the leave recredited as per 17.11.

PN180

THE VICE PRESIDENT: But when the full-timer does it, they pay it because the full-timer is working into a day of accrued leave.

PN181

MS ELLIS: Yes.

PN182

THE VICE PRESIDENT: And therefore, has not now got a full day of accrued leave, whereas with a part-time employee, as long as they've had their eight days of accrued leave and whatever it is their days of accrued leave are, as long as they've had those days and they've had – have they worked their maximum days of work or not?

PN183

MS ELLIS: A part-timer, we say – because if we accept that – or we should accept that 91 days is the yearly obligation for a part-timer.

PN184

THE VICE PRESIDENT: Yes.

PN185

MS ELLIS: The agreement expressly provides for that to be smoothed over the year. So it's either going to be eight days per month for the first 11 months and then three days for the twelfth month. We say because the agreement specifically says that, each month is separate and once that part-timer has gone from – worked over that eight days then they are working into their leave.

PN186

Then Mr Sedgwick – the company acknowledges at paragraph 35 of their updated company outline of submissions that the – sorry. Paragraph 44 of Mr Sedgwick's statement confirms that the company's practice is to pay the part-time employees an hourly rate after the shift ends and they work into the next day, so - - -

PN187

THE VICE PRESIDENT: Yes, because on your argument – so pay has been smoothed and will be paid for seven days per fortnight, one for one, over the full 12-month period. Over the year this equates to 91 work days. So then it says any days worked above the eight guaranteed days per month will be paid at work day plus leave day on top of the fortnightly pay. But if the time that's worked above the guaranteed days per month is less than a full day, why can't the company pay it at an hourly rate? Is that what the company's doing?

PN188

MS ELLIS: Yes, they're paying it at an hourly rate and we say that's not the right one. We say that clause that you just read out, 11.4 of appendix 1 - - -

PN189

THE VICE PRESIDENT: Yes.

PN190

MS ELLIS: - - - we say that isn't enough. That's just your day rate. Because they're working essentially overtime, that doesn't compensate them for overtime. That's why it should also be referred to – that should be read in conjunction with clause 17.11 of the agreement.

PN191

THE VICE PRESIDENT: But when does it become overtime? Because all you're doing is smoothing the pay, doesn't it only become overtime after they've worked 91 days in the year?

PN192

MS ELLIS: We say that because it's provided for and it's set out – so ordinarily I would agree with you but because it is set out that they're guaranteed to be working eight days per month - - -

PN193

THE VICE PRESIDENT: Yes.

PN194

MS ELLIS: - - - you can assume that the rest of the month they're going to work that and then so anything over – in that month should be considered overtime. I mean, I guess the company is open to – in the twelfth month – looking back and

realising that they haven't actually fulfilled the 91-day obligation and potentially – although I don't know a clause of the agreement that says it but potentially they could do a reconciliation.

PN195

THE VICE PRESIDENT: But it doesn't say that if you worked – if your argument that a day is a day as defined, then a day above the eight guaranteed days per month is a whole day.

PN196

MS ELLIS: Yes.

PN197

MR YATES: Yes.

PN198

THE VICE PRESIDENT: Yes, so if it's not on a leave day, the work day plus leave day surely only applies when you work another day on a day that would be a leave day and then it's not a leave day so that's when you get it. But if you're already had your required number of leave days in a month and you work over your required number of work days it doesn't become overtime, surely, until the end of the year, and it might all bump up into December because they've only got three days left to work in December. But it might not.

PN199

MS ELLIS: It comes down to that it's rostered, and I can't concede my position that they should be getting 273 days of leave pro rata. I can't concede that. But if I was to agree with what you were saying, that 91 days – essentially they work 91 days a year and they get 91 days of leave, that means that if we're looking at eight days per month of work, then that's eight days per month or leave, the rest could be considered that other thing that is - you know, they're just not at work.

PN200

THE VICE PRESIDENT: And not on leave.

PN201

MS ELLIS: Correct – if they're working eight individual days and each day they work into their leave day – past – you can accept that – so day one, worked. They work into the next day, that's a leave day. Day two, worked – work into the next day, that's a leave day. You can do that for eight days straight or 16 in total. That's their work and their leave and then it doesn't matter what happens elsewhere. So unless the company has rostered – it's just about the roster. So if the company rosters – yes, if the company rostered that – day on, day off, day on, day off, day on, day off – you've got the argument about what's leave or not is irrelevant because you've got a day worked and it's actual leave, as if we were to agree on your proposition. Then if they were to work into that leave day then 100 per cent they're entitled to – they're working into their leave and they're entitled to the extra payment.

PN202

THE VICE PRESIDENT: The fact that you're smoothing hours over a month doesn't meant that becomes ordinary time and overtime. The hours are expressed on an annual basis so what the company is saying is, 'We are entitled to have them work on this, an amount that equates to this many days a year and we'll divide that amount by pay periods and we'll pay it the same regardless'. So at the end of the year they've gotten – the company could say, 'If they only work one day in this month and another day in the next month, we'll just pay them for that day as long as over a year we've paid them for 91 days'.

PN203

But they're haven't – they've smoothed it over by dividing the number of days by the number of months so the days of work by the number of months. So that doesn't mean it's ordinary time or overtime. It just means what they're paying.

PN204

MS ELLIS: So the part-time employees work that many days. It wouldn't matter if you paid it monthly or paid it over the year. They're still working extra days so - - -

PN205

THE VICE PRESIDENT: It would matter, because they'd get less pay in some weeks and more pay in other weeks and it would be a financial disaster. So over a year, part-time employees are required to work at least 91 days, which is half the days worked by a full-timer and then eight days of work are guaranteed per month, accruing eight days of leave per month and then the guarantee is three days. So that means your work will pay you and then if they work on a day - - -

PN206

MS ELLIS: I think it doesn't matter how they get paid. It's just that – or when they get paid or whether it's smoothed. It just says here for the first 11 calendars they get eight days of work, accruing eight days of leave per month. So if they're working those eight days and then working into a leave day, they should be getting paid for - - -

PN207

THE VICE PRESIDENT: But what is a leave - - -

PN208

MS ELLIS: - - - (indistinct words).

PN209

THE VICE PRESIDENT: But you what you're saying is every day in that month that is not one of the eight days they're working is a leave day.

PN210

MS ELLIS: That's our submission. It's clearly open to the Commission to find that that's wrong and it's just the eight days for that month is work and eight days is officially leave. But either way we say that they're working into it and - - -

PN211

THE VICE PRESIDENT: Well, how are the leave days to be apportioned in a month? So what does the clause about leave say? Sorry, just let me – leave is in the body of the agreement.

PN212

MS ELLIS: Yes, I think it's 17 - - -

PN213

THE VICE PRESIDENT: Yes, so - - -

PN214

MS ELLIS: And 17.3 says a permanent part-timer will be entitled to (indistinct) duty per year, at least 42 days of such leave will be predicted leave. So you can't read too much into predicted leave. It's just that they use the part-timers as casuals so they want to limit the amount of days that they have to – you know – let them know what's going on. But then, yes, the timing of that predictability will be determined – will be agreed - - -

PN215

THE VICE PRESIDENT: Okay. So in every month – they get 42 days leave per year and then in appendix 1, you've agreed that they get paid eight days of work guaranteed for the first 11 months, three days of work with three days of accrued leave. Then they get 42 days of leave over a year, which has to be determined by agreement between the employee and the company. So the employee and the company determine in each month what the leave days will be and there have to be X number of them, okay?

PN216

Now, if the employee works on a day that is not one of those agreed leave days and is not a work day, then I don't see why they don't get paid a pro rata amount. But if they worked on an agreed leave day – so the issue might be you're not agreeing on the leave days in advance.

PN217

MS ELLIS: That could be right. But putting that aside – so if that's what the Commission finds, there's the issue of leave and what is not leave. So that could be one issue. The other issue we say that when they can pay somebody the hourly rate is if you've got two days in a row. So on the first day you work over into the next day by a couple of hours. Because you're already being compensated for that second day they can pay the hourly rate then but if it goes over - - -

PN218

THE VICE PRESIDENT: How have you been compensated for the second day?

PN219

MS ELLIS: Because you're already getting paid because you're working. You've been rostered to work today and you've been rostered to work tomorrow and then today – so you're getting paid your normal day rate. That's part of your eight days. And then if you work today you're already getting paid and then you work into tomorrow – you're already getting paid for it so you just get a couple of hours on top. So that's the only way that we say the company can pay the hourly rate.

PN220

Then we say if you went into the third day, that's your leave and you should be paid as per clause 17.11.

PN221

THE VICE PRESIDENT: I'm sorry, Ms Ellis – I just don't understand your submission. You've lost me. Because I'm assuming – how are these days rostered? So for a part-time employee, are there eight days in a month rostered?

PN222

MS ELLIS: Yes, so it just depends. Sometimes they're rostered in advance but sometimes not. Sometimes their company wants to use them as a casual so basically they'll keep them on a string until they get the eight days and then the employee has no – they just get called in and they have no obligation after they finish their eight days. So just on that – if you've been scheduled – if you've been pre-rostered your eight days, then you can assume that your eight days follow that – your eight days of leave follow that.

PN223

THE VICE PRESIDENT: But aren't you going to be just rostered to work prime or secondary shifts?

PN224

MS ELLIS: Yes, you should be rostered (indistinct).

PN225

THE VICE PRESIDENT: That's right, so you're going to have eight days – according to the roster and the way that the roster runs you're going to spend so much time on primary shifts and so much time on secondary shifts. You're just going to do less total days because you're part-time, okay?

PN226

MS ELLIS: Yes.

PN227

THE VICE PRESIDENT: All right.

PN228

MS MANN: Kerry Mann speaking – with the roster, the casuals – the PPTs aren't on a fixed roster where they should be. They should be eight days straight, the same as a permanent employee where they don't get that. But the PPT can do up to 30 days straight in a month. So going by what you're saying, after they do their required days it could take three months and anything after that should be paid out (indistinct words) - - -

PN229

THE VICE PRESIDENT: I don't know, Mr Mann. I've got no idea what this dispute is about. I really don't, because if part-time employees are being rostered to work more than 91 days a year they're not part-time, are they

PN230

MS MANN: A hundred per cent – we've had this discussion before. They do more than they – they are permanent employees sometimes.

PN231

MS ELLIS: But that's not what we're – just to get back to the issue, we're saying that a part-timer is obligated to work their eight days and then we're saying that the company, by – say they worked eight days in a block. That's probably the easiest way.

PN232

THE VICE PRESIDENT: But they don't have to, do they?

PN233

MS ELLIS: No, they don't, but just - - -

PN234

THE VICE PRESIDENT: They don't have to work their eight days in a block.

PN235

MS ELLIS: No, they don't, but we're saying if they've worked their eight days and they're working past, into another day, then that should attract the higher – essentially overtime rate because they're working into their leave.

PN236

THE VICE PRESIDENT: But it might not be leave because the leave has to be agreed in advance. So if it's a just a day when they wouldn't be working how is it overtime until the end of the year, when they're worked more than 91 days? That's what I don't understand.

PN237

MR YATES: If I could try and assist: the agreement refers to rostered work periods and non-rostered work periods by default.

PN238

THE VICE PRESIDENT: Where?

PN239

MR YATES: In 17.11.

PN240

THE VICE PRESIDENT: Of the agreement proper?

PN241

MR YATES: Of the agreement proper.

PN242

THE VICE PRESIDENT: Right, so let me get there.

PN243

MR YATES: The clause - - -

PN244

THE VICE PRESIDENT: Hang on: 'During his or her rostered leave, and the employee undertakes that work'.

PN245

MR YATES: No, no, no – it's the final sentence: 'This clause is also applicable for any work required to be undertaken beyond the end of the rostered period of work'.

PN246

THE VICE PRESIDENT: 'Rostered work period,' yes.

PN247

MR YATES: Rostered work period – so with PPTs, if they're not on one of their eight days that they're obligated to work and they're on a non-rostered work period so what that 17.11 does is that says that if you undertake work on a non-rostered work period, regardless of any – well, regardless of the duration, it confers the entitlement above.

PN248

THE VICE PRESIDENT: But, Mr Yates, why isn't that clause about undertaking any other work during his or her rostered leave and then this clause is applicable for any work required to be undertaken beyond the end of the rostered work period when it's done on a rostered leave day? Because clearly the agreement – that clause relates to working on a rostered leave day. It's not - - -

PN249

MR YATES: No, it doesn't.

PN250

THE VICE PRESIDENT: Well, that's your argument and, look, we're meant to be having a hearing, not a conference. So I'm just trying to understand your submission. This is not some free-for-all debate. It's meant to be a hearing, okay? So as I understand it, your position is 17.11, the last sentence in 17.11 operates independently of the first one. That's really what you're saying?

PN251

MS ELLIS: Yes.

PN252

THE VICE PRESIDENT: And gives an entitlement. And the company's argument is 17.11 is confined to working on a rostered leave day. Is that the case, Mr Brotherson?

PN253

MR BROTHERSON: It is, Vice President, yes.

PN254

THE VICE PRESIDENT: Right, so the crux of the whole dispute is what that 17.11 relates to, because it's pretty clear you're meant to have – for part-timers, you've got to have days they're rostered to work and days there rostered on leave and they just have less days they're rostered on leave than full-timers because they

work – pro rata means downwards, not upwards. They get a proportion of the full-time rate. They don't get 150 per cent of the full-time proportion. They get less because they're part-time.

PN255

So they have so many rostered days of leave a month, which have to be agreed in advance. Just work with me here: so the issue is when they're working on any day of the month that is not a rostered leave day but it's just any day of the month above their eight days - - -

PN256

MS ELLIS: They should be paid as per 17.11 because it's applicable to any work required to undertaken beyond the end of the rostered period.

PN257

THE VICE PRESIDENT: And the company says it only applies if the work beyond the end of the rostered period is done on a day that is an agreed leave day. Right, okay – so that's the issue.

PN258

MS ELLIS: Yes, sorry – I should have said that clearer in the first instance.

PN259

THE VICE PRESIDENT: Yes, so your argument depends on – it's not really what the days are, when they're not rostered to work or rostered on leave. It's whether that last sentence applies independently to any day they're not working, whether it's a leave day or another day.

PN260

MS ELLIS: Yes, that's correct.

PN261

THE VICE PRESIDENT: And if part-time employees are being rostered to work more hours than they should be, that's another issue, isn't it?

PN262

MS ELLIS: Yes, definitely, yes.

PN263

THE VICE PRESIDENT: Which you need to deal with. Okay, so your argument is really a construction of clause 17.11 and whether the last sentence operates independently of the rest of the clause.

PN264

MS ELLIS: Yes, that's correct.

PN265

THE VICE PRESIDENT: Okay. Anything else you want to say?

PN266

MS ELLIS: Just that the company has the option to minimise the risk of having to pay that extra payment by rostering them in a block, because it can only happen

once. So that's essentially our submissions, based on what we think a part-timer should be paid, a casual should be paid and what a day is.

PN267

THE VICE PRESIDENT: Okay, thanks for that. Mr Yates, you have anything you want to add?

PN268

MR YATES: Not in relation to the principle dispute, that our matter is, which is 219 about the casuals. Just on that particular clause, 17.11, we'll have to say that when work is undertaken, regardless of duration – whether it's one hour or four hours – on a day that is not a rostered day, the number of units that are paid is by the day, and the (indistinct) accepted they're paid by the day. So if there's a recall for a - - -

PN269

THE VICE PRESIDENT: Mr Yates, we are not talking about the towage sector as a generic thing. We are talking about entitlements under an enterprise agreement and I'm not going to have another hearing where I sit here and get told all about the towage sector, because it's not relevant. What's relevant is this agreement and what it means.

PN270

MR YATES: And I was going to drill down to that - - -

PN271

THE VICE PRESIDENT: Okay.

PN272

MR YATES: - - - because for 17.11 – in the first part of that clause it talks about the – well, the employee agreement to undertake any other work during the rostered leave. Now the distinction to be drawn between that first part of that paragraph and the second part of the sentence is that the terminology changes significantly to, 'Beyond the end of the rostered period of work', as opposed to rostered leave. So one is applying to if – and we've used in three weeks on, three weeks off – and somebody is recalled during their three weeks off. Then that attracts the first part of 17.11. The second part addresses the part where – and it was because they finished at 0700, and the swings finish at 0700 at the end of the three-week swing, that is for a permanent employee, for a 100 per cent employee. They attract that entitlement because its' not part of their rostered work period. That's working beyond the end of their rostered work period – beyond 0700 on that last Tuesday of their swing. So - - -

PN273

THE VICE PRESIDENT: But, Mr Yates, why doesn't it just mean that if you work an hour into your rostered leave day or eight hours into your rostered leave day, it doesn't matter because it's mucked up your rostered leave day and that's what the clause is intended to do? It's meant to give you back a full, rostered day of leave. It's not meant to give you another day of rostered leave or another day of leave for every hour that you work into any day. It's intended to reinstate your leave on a day that's interfered with because you were required to work into it.

PN274

So that just picks up at the end and says the clause is also applicable – so if you work an hour into a leave day, you get the whole day back because it stopped being a leave day. That's really the argument against you.

PN275

MR YATES: Well, you get the entitlement in the first part of the clause of a day's pay and a day's leave in the recrediting. For when you want to take work into the – into a non-rostered work period, because so when a casual is engaged – whether it's one day, three days – and they're rostered, they become rostered to work on a particular shift, whether that's primary, secondary or primary or secondary tug. When that shift finishes and they're only on their last day that they're rostered there, that is the end of the rostered work period.

PN276

THE VICE PRESIDENT: But, Mr Yates, casuals don't even have leave other than when they're doing outside work and salvage.

PN277

MR YATES: And you've picked up on exactly the reason why the term, 'rostered work period', is used instead of leave in that last sentence.

PN278

THE VICE PRESIDENT: Okay, I understand your submission, Mr Yates. So somehow this clause operates in – the last sentence of the clause about annual leave operates independently and just gives everyone an entitlement to a day of leave when they work an hour past their rostered period into a day that may or may not be a rostered period of leave?

PN279

MR YATES: That's correct. It gets the full entitlement of 17.11 when they work into a non-rostered work period.

PN280

THE VICE PRESIDENT: Okay – because the way that the other side of the argument is, the way that it applies to casuals is they've accrued some leave days because they've done work specified in clause 28. They've scheduled a leave day on a particular day that they've accrued under clause 28, which is the only time they can accrue it and they work the day before and work into their accrued and rostered and scheduled leave day and then they get 17.11, because their leave day has been mucked up by having to work. That's the other, alternative - - -

PN281

MR YATES: So the casuals don't accrue leave.

PN282

THE VICE PRESIDENT: No, they don't, but they get – except as specified in clause 28 outside work and salvage. So in outside work and salvage, they do.

PN283

MR YATES: Sorry, which clause are you reading from?

PN284

THE VICE PRESIDENT: I'm reading from clause 17.5: 'Casual employees will not be entitled to leave except as specified in clause 28'. You go to clause 28: 'Outside work and salvage'. That – it's voluntary, blah blah.

PN285

MR YATES: The other aspects – I support the submissions in relation to the PPTs and the casuals but we would highlight that at 15.3 the casual engineers will be calculated per day over 365 per day of the annual rate plus 100 per cent of the daily rate in lieu of leave entitlements.

PN286

THE VICE PRESIDENT: Yes, but Mr Yates – I'm not reading words that don't exist in the clause. The clause clearly contemplates that there is some circumstance, when they're doing outside work and salvage, where casual employees do accrue leave because that's what the words say.

PN287

MR YATES: Yes, that's the exception.

PN288

THE VICE PRESIDENT: Okay.

PN289

MR YATES: That specifically applies to outside and salvage but we're talking about - - -

PN290

THE VICE PRESIDENT: Yes, so the point – I understand your submission, Mr Yates, and I understand what you're saying but the proposition I'm putting to you is that there is a – I'm giving you an opportunity to comment on my proposition, okay? The proposition I am putting to you is the other possible alternative interpretation is that 17.11 applies to a casual employee who has got a scheduled day of leave because they accrued it doing outside salvage work, scheduled it on a particular day and had to work an hour into it, or two hours into it. That's taken away their entitlement to a leave day and so I'm saying the clause has got some work to do on the alternative proposition. That's all I'm saying.

PN291

MR YATES: Yes, I understand. I understand what you're saying. If that was the scheduled leave day for the casual, but my understanding is that – and we don't have any evidence presented on this particular point – but the leave entitlements are generally paid out for the casual employees regardless. So - - -

PN292

THE VICE PRESIDENT: Well, as I understand it that they don't do outside and salvage work – it's highly unusual in Gladstone. But anyway - - -

PN293

MR YATES: They do relocate tugs for dockings and - - -

PN294

THE VICE PRESIDENT: Yes, okay.

PN295

MR YATES: - - - then (indistinct) for special voyages when the crews aren't available. Now I've lost my – if I can just take a second to refocus.

PN296

THE VICE PRESIDENT: But essentially, I understand your submission: 17.11, last sentence, applies to all work on any day regardless of whether it's a leave day or another day.

PN297

MR YATES: Yes – that's not rostered.

PN298

THE VICE PRESIDENT: Yes.

PN299

MR YATES: Yes, yes.

PN300

THE VICE PRESIDENT: Okay.

PN301

MR YATES: So if the casual or PPT is picked up for seven days and they're working into the next period during one of those seven days – obviously they're already being paid for the day that they're scheduled to provide relief but it's that last day and the same entitlement applies to 100 per cent permanent, 100 per cent employees, permanent part-time employees and casuals, that when they work into a non-rostered work period, that that entitlement in 17.11 is triggered. I just might have something to add with regard to the company's supplementary submissions. I've just lost my document. I think it's at paragraph 17 of the company's supplementary – updated submissions. They make reference that the rostered days aren't defined.

PN302

THE VICE PRESIDENT: Yes.

PN303

MR YATES: I'll just get to that. I'm just running through the court book at the moment. It's the statement of Peter Sedgwick. Yes, at paragraph 17 the company states: 'The term, 'rostered day', is not defined in the agreement, nor is it used anywhere other than clause 9.1.4'. We would say that the rostered days are clearly defined in appendix 1, item 5, and in respect of those paragraphs that rely on that particular submission, we say it should fail.

PN304

That is about the extent of our submissions. We support the submissions of the AMOU group and if it pleases the Commission, I'll leave it there.

PN305

THE VICE PRESIDENT: Okay, thank you. Mr Brotherson, did you have anything you wanted to say?

PN306

MR BROTHERSON: I think I have to, Vice President, but I'll try and be as efficient about that as I can be. But I do need to ask a question, I think, of the other side before I can properly respond and it's for this reason: as I understand what Mr Yates has been saying, the submission appears to be that the last sentence of clause 17.11 would apply to casual employees. In the AIMPE's supplementary response submissions, which didn't find their way into the digital court book and I think that was simply because they were filed late, he adopts the submissions of the AMOU. The AMOU at paragraph 23 of its reply to the company's updated - - -

PN307

THE VICE PRESIDENT: Confines it to part-timers – yes, I understand.

PN308

MR BROTHERSON: Yes. So I don't know whether they wish to consider that before I respond or I just respond in that light.

PN309

THE VICE PRESIDENT: Do you want to have a discussion, Ms Ellis and Mr Yates, before Mr Brotherson makes his submission and get a position about what your – because I noticed that straight away. Mr Yates' argument is that it applies to casuals too and yours doesn't seem to be.

PN310

MS ELLIS: Yes, I think there's two separate (indistinct) - - -

PN311

THE VICE PRESIDENT: Sorry, Ms Ellis, you're breaking up.

PN312

MS ELLIS: I think (indistinct words) - - -

PN313

THE VICE PRESIDENT: Ms Ellis, you're breaking up, there's something wrong with your connection.

PN314

MS ELLIS: Sorry – I think there's – you are right, (indistinct words). Is it still broken up?

PN315

THE VICE PRESIDENT: No, that's better.

PN316

MS ELLIS: Okay, perfect – yes, you're right, that there are two submissions. One is in regard to casuals. Technically we think that clause 17.11 does apply to them, to casuals, because it says, 'employees', and the company in their submissions have agreed that casuals are employees, but we say that's

irrelevant because it's already covered by the fact that a casual only gets paid the day rate and the day in lieu of leave – yes, day's pay in lieu of leave. So we can agree that – so technically I think it does apply, 17.11, but it just overcomplicates things and then you have to work out, are they on leave or are they not on leave. But I do agree with Mr Yates that the last paragraph of – the last sentence of that does say that where rostered into – on a rostered period and works into the next day, so you could argue that would apply - - -

PN317

THE VICE PRESIDENT: Well, are you arguing it, Ms Ellis? That's really what Mr Brotherson is asking. Am I dealing with two separate submissions: one union that says it only applies to part-timers and the other union that says it only applies to casuals? The proposition that casuals don't get leave is wrong. They do, on outside salvage work and – outside work and salvage work.

PN318

MS ELLIS: Apologies – I just meant in this context and that they just get their leave paid out. So essentially they do accrue leave but they get it paid out. With regard to whether we rely on it - - -

PN319

THE VICE PRESIDENT: They don't get leave. They don't get paid out leave. They get compensated for the fact that they don't get leave.

PN320

MS ELLIS: Yes, sorry, yes. We will adopt Mr Yates' submission because 17.11 says, 'This clause is also applicable for any work required to be undertaken beyond the end of the rostered work period'.

PN321

THE VICE PRESIDENT: Okay.

PN322

MS ELLIS: So if a casual is rostered and works beyond it, it is entitled to 17.11.

PN323

THE VICE PRESIDENT: So, Mr Brotherson, you're dealing with a unity ticket. Perhaps if we just have a break for five minutes and we'll come back and hear from you on your submissions, thank you.

SHORT ADJOURNMENT **[12.19 PM]**

RESUMED **[12.28 PM]**

PN324

THE VICE PRESIDENT: Thanks, Mr Brotherson.

PN325

MR BROTHERSON: Thank you, Vice President. The company relies on its outline of submissions which were filed on 6 September, and they replace an earlier outline so we don't invite you to look at the earlier outline, and I'll explain the reasons for that in a moment.

PN326

Could I ask you to look at the company outline because I want to just correct three typographical errors - - -

PN327

THE VICE PRESIDENT: Yes.

PN328

MR BROTHERSON: - - - which I don't think are of any great moment but because I'm going to rely substantially on them rather than oral submissions, I think I should get them identified up front. If I can ask you to go to paragraph 27.

PN329

THE VICE PRESIDENT: Yes.

PN330

MR BROTHERSON: There is a reference there to clause 14.2 of the award, that should now be to clause 15.

PN331

THE VICE PRESIDENT: Fifteen, yes.

PN332

MR BROTHERSON: Your Honour would be aware that the clause numbering in the Marine Towage Award changed last year. We referred to an earlier clause number, although I do note the award still cross references clause 14.2 in other places.

PN333

THE VICE PRESIDENT: Yes.

PN334

MR BROTHERSON: If I can go to paragraph 28 in line 5, it says 'clause 11.1 of the agreement,' that should be to clause 17.1 of the agreement.

PN335

THE VICE PRESIDENT: Yes.

PN336

MR BROTHERSON: And the final one is paragraph 49. There is a footnote 13 attached to that paragraph, you'll see in the second last line on page 8, 'footnote 13,' and at 13 it refers to the award at clause 19 providing for overtime; that should now be clause 20.

PN337

THE VICE PRESIDENT: Okay. Thanks.

PN338

MR BROTHERSON: I don't think that should have caused any grief to anybody but best to be done. Now, I mentioned that there is a change of position in the company that is set out in this updated submission, and it is referred to at paragraph 8 in the first instance. The updated submission takes a different

position in respect to the operation of clause 17.1 of the agreement than it did in the earlier version - and that actually relates very much to questions C and D now because of the changed position we've just heard from the union - but if I can explain that change of position in this way: in short form, in the earlier position and the way the company has applied this until now, it had taken the view that clause 17.11 did not apply to part-time employees and any question of part-time employees working beyond their guaranteed hours was dealt with by clause 11.4 of Appendix 1.

PN339

On reflection and in preparing for this matter, the company has come to the view that that was in error and that clause 17.11 of the enterprise agreement does apply to part-time employees in respect to their rostered leave and we'll say a little bit about that in a moment, but, Vice President, in short, I think we should share the observations you've been making as to what the rostered leave of a part-time employee is and certainly not any non-rostered day, as seems to be the submission of the unions.

PN340

What that will mean, of course, is that, at a practical level, the company will need to enter into some consultation at the workplace as to what that means and how it operates, and I understand that is already being commenced. The actual position the company now takes in relation to how clause 17.11 works for permanent part-time employees can be discerned from paragraphs 45 to 48 of the submissions in particular. I don't take you to those at the moment, I don't think I need to. I rely on what is set out there.

PN341

In terms of evidence in this matter, I should tender the statement of Mr Sedgwick and, in doing so, I do that on the basis that it is now only in relation to the factual matters because, obviously, Mr Sedgwick described in that statement – being filed back in May of last year – how the company was dealing with permanent part-time employees and that is no longer the position of the company. There is also some paragraphs in that including what we said in relation to Mr O'Dempsey and Mr Laurenson's statements and there is some matters there that no longer need to be attended to.

PN342

I would put to the Commission that paragraphs 53 to 57 under the heading 'start or finish of each period of duty' fall into the same category of not being relevant to these proceedings in the same way as we addressed the statements of Mr O'Dempsey and Mr Laurenson earlier.

PN343

Now, in terms of Mr Sedgwick's evidence and the earlier of Mr O'Dempsey and Mr Laurenson, if I can make this general proposition, and that is: that none of those witnesses, of course, were involved in bargaining for the 2016 enterprise agreement so, really, what they speak about is some practical observation and some – in the case of Mr O'Dempsey and Mr Laurenson – some personal grievances as to how matters have worked for them, and to that extent, we put it to

the Commission quite squarely that that is of little practical utility to you in determining the question of construction of the enterprise agreement.

PN344

Hall & Wilcox provided to your associate yesterday, Vice President, a comparison table document of what were titled 'key part-time and casual provisions' - - -

PN345

THE VICE PRESIDENT: Yes.

PN346

MR BROTHERSON: - - - and drawn from the 2012 agreement, the 2015, and the 2016 agreements. I'll deal with that more fully in a little moment but what that does show is that the key provisions have, in many respects, been unchanged across that period of time. We do see a lot more attention paid to part-time employees under the 2016 agreement.

PN347

Now, there is also, your Honour, before you an agreed statement of facts. It doesn't say a lot, but I think I need to at least identify that it is there and for the record, and we do refer to it in our outline of submissions, so I make the point that that is relied upon. We did come into today on the understanding that there would, in fact, be five questions before your Honour for determination, not six, but it seems it at least back now to six, and if I can address that in this way - if I can ask your Honour to turn to paragraphs 11 and 12 of our outline while I'm addressing that.

PN348

THE VICE PRESIDENT: Yes.

PN349

MR BROTHERSON: The six questions that we understood were being addressed are set out there. We had understood, upon receipt of the written replies of the AMOU and the AIMPE that the question at 11(c) and whether clause 17.11 of the agreements apply to casual employees – we came into today under the impression that that was resolved on the basis of 'no, it didn't.' It seems now that is not the case and, whilst the company says, 'no, it doesn't apply to casual employees,' as had the AIMPE until 10 or 15 minutes ago. We do need to obviously say that the answer is 'no,' but qualify it by the point that you have drawn out today that there would be the issue that could arise under clause 17.5 - - -

PN350

THE VICE PRESIDENT: Yes.

PN351

MR BROTHERSON: - - - where some leave may have been accrued by a casual in lieu, depending on the circumstances. So, I think for now we have to proceed on the basis there remain those six questions to be resolved, and in doing that – again, we rely on what is in our submissions, and I don't propose to read out what we have set out in those final few paragraphs of the written outline.

PN352

Now, we've spoken earlier today about your earlier decision which we described as the 'worked time decision,' and we say that that is a matter that is of some relevance to what is before you now because the unions do venture into the territory of anything beyond, effectively – in the case of a primary tug – the 12 scheduled hours of a crew or vessel roster or anything beyond the 24-hour mark of a secondary crew or vessel roster would be a second day, and we, obviously, disagree with that. We say that a day is something different to that and, again, I will come to that in a moment.

PN353

Now, the way, I think, it is going to be easiest, Vice President, to try to assist you in this matter is by reference to the comparison table rather than speak at length to what has been said. Before I do that, I would like to just mention clause 3 of the agreement which has not been included in this table, but it is the definitions provision. When we see the definition of 'rostered leave,' it relevantly says, 'means the 182 days free of duty as provided under this agreement.'

PN354

So, '182 days free of duty' – so, a day of duty is one of the other 182 or 183 days of the year. It is not a shift. It is not a 12-hour period. It is a day because a day of leave is a day off. A day of work must be the flip-side of that and be a day of work. It is a day on which you perform work.

PN355

So, I would ask that that be read and taken into account in what I'm now going to approach in terms of the comparison table - and I apologise if this seems a little bit laborious - but I think it is useful to try and step it out, and I propose to rely primarily on the third column and that is the provisions that are in the 2016 agreement. It, of course, is no controversy around the fact that a person can be engaged under the agreement at 9.1 as a permanent full-time, permanent part-time, fixed term, specific task, casual or trainee.

PN356

They are an employee for the purposes of the agreement. The fact somebody is an employee doesn't mean that you can cherry-pick every other provision where there is a reference to 'employee' and say it applies to you. You need to look at each provision in its proper context, and there are some provisions that clearly apply specifically to permanent employees, and there are others that apply only to casual employees, and there are some that apply only to part-time employees. There are others which apply to all employees.

PN357

We then see at 9.12:

PN358

A permanent part-time employee is an employee who is agreed for an agreed proportion of full-time employment.

PN359

I don't want to labour this because your Honour took this up with the other side earlier, but it shouldn't be controversial that a part-time employee works less than a full-time employee and the entitlements, accordingly, are less than a full-time employee, and, in this case – and we will see elsewhere in the agreement – permanent part-time employees are typically engaged on either a 50 per cent basis or a 75 per cent basis, and that becomes relevant when we look at the leave provisions and, particularly, what applies with clause 17.11.

PN360

Over the page, your Honour, we see clause 9.1.4 and the provision for casual employees and it is:

PN361

Somebody who is not regularly rostered to work but is engaged in single periods which will be not less than one day.

PN362

It is not limited to a day, but not less. Single periods not less than a day. For the purposes of this clause, 'one day' has the same meaning as a 'rostered day' for a full-time employee, and, of course, I mentioned a moment ago, leave is the 182 days free of duty, a rostered day of work for a permanent full-time employee is those other 182 or 183 days, and so one can take it that 'one day' would have the same meaning for a casual here as it would have for those permanent full-time employees, and then pro-rata for part-time employees.

PN363

If I can then take you towards the bottom of the second page, we set out there the remuneration provisions which are clause 15, and 15.2 is significant. It is:

PN364

A permanent part-time employee will be paid pro-rata the equivalent salary and leave to that of a permanent full-time employee in accordance with clause 11 of the appendix.

PN365

Now, we know from having looked at it earlier when Mr Yates took you there, that the salaries are smoothed out for the purposes of payment, but salary and leave under this agreement and - indeed, typically in this industry - go hand in hand. You work a day, you get a day of leave, and that is the pro-rata component of it. So when we have the 50 per cent employee, they're going to be working 91 days, the 75 per cent employee will work 136 days, and they will get exactly the same number of days of rostered leave which will, of course, for the part-time employee, has to be less than 365 - well less – and I think as your Honour put it, there is three types of days for a part-timer. I think in our submissions we say that the third category are, in fact, days to which the employment relationship doesn't even apply unless the parties choose for it to apply in some other way, but it is not a guaranteed work day and it is not a leave day.

PN366

Then we see at 15.3 the principal provision around casual employees' remuneration and Mr Yates referenced this but it is useful to see it:

PN367

Will be calculated per day at 1/365 of the annual rate applicable to a permanent full-time employee plus 100 per cent of the daily rate in lieu of leave entitlements.

PN368

Again, confirming clause 17 – apart from the exception – simply doesn't apply to casual employees, and that is the payment for the day. That is the payment for the day, and the only place where any other entitlement will arise, we will see, is where circumstances arise from clause 7 of Appendix 1.

PN369

If I can then take your Honour to clause 15.7 - and this was a new provision in the 2016 agreement – but it makes the point that the amounts payable to any employee, pursuant to this clause, shall constitute the whole of an employee's remuneration.

PN370

That is a provision that must be understood as applying to all employees - the amounts payable to any employee - and they take account of all aspects and conditions of employment unless otherwise provided for, and there is very few other circumstances where additional payments are provided for - you see them over the page in 15.8 - but in our submission, that 15.7 is a provision applicable to all employees, including casual employees. The important point is, at 15.3; the payment for a casual is the payment for a day. Not even the shift, and the shift is different to the day. It is the day.

PN371

If I can then take your Honour on to the leave provisions that are then set out beginning over the page, towards the bottom of the next page. We see the key entitlement for a permanent full-time employee is to 182 days free of duty within his or her roster. Now, it might be expressed as 'free of duty,' but it is the rostered leave that we saw in the definitions, and it is leave that they are paid for, not a day that you are not paid for, and we see the components of that at clause 17.2 as to how those 182 days are made up.

PN372

If somebody is getting a pro-rata amount, as your Honour was pressing to the other side, it has to be less than, it can't be more than. The leave must be less than this 182, because you cannot contend sensibly that a permanent part-timer is getting more than the components that are put there. Simply, with great respect, it's a nonsense.

PN373

We deal with permanent part-time employees at clause 17.3 which confirms the point they will be entitled days free of duty per year of continuous service on a pro-rata basis. That's the point we've been making, which, for a 50 per cent employee – I'm sorry, this is laborious, but I think it is important to set it out – for a 50 per cent permanent part-time employee will be 91 days, for a 75 per cent part-timer – which seems to be the other key way that this is done in this workplace – that would be 136 days, and when you put those together with the

corresponding guaranteed days of work, it is well less than 365, so we clearly get to that third category of days that your Honour has been speaking about.

PN374

That becomes relevant when we go to clause 17.11 which is over a page and on to the next page.

PN375

Where an employee has requested and the employee agrees to undertake any other work during his or her rostered leave, it can only be one of the leave days provided for in this clause,

PN376

which would be one of the 182 days for a permanent full-time employee, or one of the less than 182 days for a permanent part-time employee. It can't be anything else, and we had that third category of days that - and we share the proposition you've been putting to the other side, Vice President – that there is, for permanent part-time employees, that third category that are days that are, for them, neither work days nor leave days. But they may be offered work and we accept that, and that becomes the question, and we will deal with that shortly as to what they would be paid on those days.

PN377

But if it is one of their rostered leave days then this clause applies and they then get the day recredited, and then, in addition to that, they get the applicable daily rate plus a bank day, and that is because they are losing a leave day. It doesn't apply if it not one of your rostered leave days because you are not losing a leave day, it was never a leave day.

PN378

As for the suggestion that the final sentence of clause 17.11 could all of a sudden jump out of being a leave entitlement to some overtime provision for casual employees and permanent part-time employees, I struggle to comprehend that submission, Vice President, but that is not something that you can rely on. But it doesn't work to be able to say this clause – being a clause all about leave – all of a sudden becomes an overtime clause of some sort. It just doesn't fit the context of the enterprise agreement and, you'll see in a moment, what does apply, certainly for permanent part-time employees and shortly casuals.

PN379

Our submission – and we set this out in our written outline – that sentence, really, simply, means the end of the rostered block of work. You have a rostered period of work, when that ends you have a rostered period of leave, and if you have continued working beyond the rostered period of work into your day of leave then clearly clause 17.11 would apply. We accept that, and we also accept that is different to the way the company has been operating but that will change, I am instructed, and consultation is starting about that.

PN380

We then come to the appendix - and we haven't put in clause 17.2 of the appendix, which your Honour is well aware of, and nor have we set out there those earlier

provisions in the appendix dealing with crew rosters and vessel rosters or crew utilisation – but, really, they just set out the fact that you have primary shifts and you have secondary shifts, in large measure. The important provisions are the final ones in the comparison table under the 2016 agreement, your Honour, clause 11.4 of the appendix.

PN381

These were included in the 2016 agreement, so they were new. So, attention was being paid to it. Clause 17.11, in large measure, stayed unchanged other than for the addition of the final sentence – and I'll address what we say that means – but the construction, we contend now, we say - for permanent part-time employees - is perfectly compatible and in sync with the nature of part-time work and the fact that people work more than their guaranteed hours, and clause 17.11 applies where they have rostered leave attached to their guaranteed hours, and what this clause 11.4 of the appendix deals with is: what would truly be regarded as overtime days – and not necessarily overtime in the sense of beyond 38 hours because that is not the way this works – but hours not otherwise contemplated in the remuneration.

PN382

So, we say, for a permanent part-timer, there is two streams at play. There is the stream of clause 17.11 that applies where they agree to work on a rostered leave day; if they agree to work on a day that wasn't a work day, but they otherwise agree to work it and it is not a leave day, clause 11.4 applies. If I can draw that out, perhaps, by reference, simply, to the 50 per cent permanent part-time employees, you'll see that this provision confirms the point we've been contending for.

PN383

They're required to work at least 91 days per year which is half the days worked by a full-time employee. There is then the identification of how that is attributed each month to bring the full year's total to the required 91 days of work. Interestingly, it then goes on:

PN384

Pay has been smoothed and will be paid for seven days per fortnight, one for one over the 12-month period. Over the year, this equates to 91 days work plus the 91 days accrued leave.

PN385

Plus accrued leave. So, the permanent part-timer has the entitlement at 50 per cent, 182 days are taken care of. 91 days of work, 91 days of leave. The clause then goes on:

PN386

Any days worked above the guaranteed days per month will be paid out - work day plus leave day – on top of the fortnightly pay.

PN387

Now, the fortnightly pay provides for a day of leave, so what they receive here is an additional payment with a penalty – the penalty being an extra day of leave or a

100 per cent loading. That is different to the 17.11 provision where they actually agree to work on their accrued or rostered leave day, they get the day recredited then they get the penalty payment. Here, they don't get anything recredited because there is nothing to recredit. That is the difference, and we say clause 17.11 and 11.4 work in perfect synchronisation.

PN388

Now, has it worked that way in practice? We would have to say no, but the company is going to address that and it will require a more meticulous attention to rostering of leave for part-time employees, and perhaps a narrowing of opportunity for availability of work on other non-work days. But that, we say, is the proper construction for these agreements in relation to permanent part-time employees.

PN389

As to what occurs for a permanent part-time employee where a shift they're working on extends: we say that is all addressed by clause 7 of the appendix, and that is, you've already recognised, Vice President, in the worked time decision, that shifts can extend and that is hardly controversial in this industry. It is consistent with the operational objective that we've referred to on many occasions in these construction arguments, and it is consistent with clause 7.2 of the appendix, it makes clear 'where operational reasons require' people to work beyond the twelve hours. The language is all about extension, it is not an additional guaranteed day or a day in addition to the guaranteed day, it is an extension of the shift that you are already working on, and all that is provided for in the appendix by way of payment for where that extension occurs - and if I can ask your Honour to look at clause 7 of the appendix: 'Where an Employee'- and for some reason, the word has a capital E, although we accept the term is not defined.

PN390

Where an Employee works beyond 12 hours to meet operational requirements the employee shall be entitled

PN391

And the entitlement becomes to TOIL, or time off in lieu, at the rate of one hour for every hour or part thereof. At the rate of one hour or even part thereof. It is clearly considered what the entitlement is, and that is it. It doesn't become another day because a day is one of the not 182 days of rostered leave, it is one of the other days. We're talking shifts here.

PN392

This really is applicable whether primary or secondary because this is where you get extra amounts where the shifts you're on requires you to work beyond 12 continuous hours. It is quite separate to the day question.

PN393

Now, the question is, the argument has been put that there is no provision for an hourly rate to be payable to a casual. Well, there is a daily rate for a casual, and there is an argument – and I'm not trying to make it – that that is all that a casual gets, whatever happens on that day, even where the shift extends. We don't press

that argument, we say an employee, in this context, is all employees, and it is an amount equivalent to time off in lieu.

PN394

If we don't take an 'employee' for the purpose of 7.2 as being all employees – be they permanent full-time, permanent part-time or casual – then there becomes a very strong argument and what the unions are saying, clause 7 of the appendix doesn't apply to casuals or part-timers at all, and we don't think that is what they're saying. But if you are an employee for one part of this clause then you are going to be an employee for other parts.

PN395

Your Honour, they were really the key points I wanted to draw out. I probably am compelled to say that the submissions made on behalf of the unions conflate many different concepts where it suits them, they break away from that where it doesn't suit them, there are confused submissions, their position has changed again this morning.

PN396

I submit that what we have put to you is a considered contention for the proper operation of the agreement where everything works in synchronisation, and it may require some adjustment at the workplace because of the position the company now takes in respect of clause 17.11, but otherwise, the evidence as to complaints by Mr Laurenson and Mr O'Dempsey really take it nowhere in terms of determining the meaning of the enterprise agreement. Thank you, Vice President.

PN397

THE VICE PRESIDENT: Thanks, Mr Brotherson. Ms Ellis, anything in reply?

PN398

MS ELLIS: Is it okay if we just take five minutes and - - -

PN399

THE VICE PRESIDENT: Sure.

PN400

MS ELLIS: Perfect. Thank you.

PN401

MR YATES: That would be great.

SHORT ADJOURNMENT **[1.06 AM]**

RESUMED **[1.16 PM]**

PN402

THE VICE PRESIDENT: Thank you. Ms Ellis.

PN403

MS ELLIS: Thank you. So, we would just like to thank Mr Brotherson for pointing out the contradiction, and I would like to correct that. So, I was trying to narrow the issues in dispute and Mr Brotherson said - in regard to our amended

outline of submissions at 23 – I think he was talking about their reply to the company's updated outline of submissions where I have said that clause 17.11 does not apply to casuals, and he is correct in saying that I said 'no' there. I would like to change that to 'yes,' it does apply to casuals, and that is in line with the applicant's amended outline of submissions at 23 where I said:

PN404

For the reasons set out in paragraphs 17 to 25 of our outline of submissions, we submit that casuals and permanent part-time masters are employees for the purposes of clause 17.11.

PN405

So that is just to clarify that statement. Then, with regards to his submissions about clause 15.7 saying, 'unless otherwise expressly provided for in this agreement,' so the employee's remuneration takes into consideration all aspects and conditions 'unless otherwise provided for in this agreement,' we say that the agreement does expressly state our position, and in item 3 on page 15 of Mr Sedgwick's statement, he confirms that the company do apply two personal leave days if they're scheduled to work past 0700 as was the case in Mr Laurenson's example. So, that means that the company do acknowledge that working past the end of a shift into the next day is effectively working two days. With regards to - - -

PN406

MR BROTHERSON: Sorry, I need to just say something there. That is not what Mr Sedgwick has confirmed because Mr Sedgwick responds to that in his table and he deals specifically with Mr Laurenson. Mr Laurenson had two days of leave deducted because he was unavailable for work for two days.

PN407

MS ELLIS: We say that he could - - -

PN408

MR BROTHERSON: It is not even a matter arising. I didn't address that.

PN409

MS ELLIS: It doesn't even come down to whether he is available for the second day. The fact is he was rostered into the second day, so that made it – the fact that the company took the second day - - -

PN410

MR BROTHERSON: That's the fundamental argument, isn't it? As to whether beyond 12 hours is another day or not.

PN411

MS ELLIS: It is into the other day, whether it is beyond twelve hours or not - - -

PN412

MR BROTHERSON: You say another day – You say it is another day, we say it was the extension of the shift.

PN413

MS ELLIS: Well, that is our position, and then, with regards to Mr Brotherson's submissions about 14.4, compensating employees correctly for the days that are not leave days: it doesn't take into consideration if a part-timer works 220 days that year, what happens to their extra leave? They're not getting an extra day on top of the 182. So, that goes back to our proposition that leave, for the purposes of this, can't just be your ordinary rostered leave.

PN414

THE VICE PRESIDENT: But if a part-timer works more than their maximum number of days they're allowed to work in a year, it is overtime, isn't it? You don't get extra leave for it, it is overtime, that is what the company says.

PN415

MS ELLIS: If you are – according to 17.11 – working into the next day, then yes, you would get the extra. You would get your leave recredited.

PN416

MR BROTHERSON: How many days worked (indistinct).

PN417

MS ELLIS: Yes, and then obviously, so - but that is the normal - - -

PN418

MR BROTHERSON: (Indistinct).

PN419

MS ELLIS: So, that is essentially all I have to say about Mr -sorry, other than the fact that he has called into question the witness statements. We say that anything that we have relied on today is just talking about the facts and how the company has applied the provisions, so we say that the witness statements that we have tendered are acceptable for the Commission to take into consideration.

PN420

THE VICE PRESIDENT: Thanks. Mr Yates?

PN421

MR YATES: Thank you, your Honour. Just advising, I'd highlight that, in our supplementary response submissions, paragraph 7 was written in context looking through the prism of what Mr Brotherson refers to as 'extensions of the shifts,' through the prism of looking at the entitlement under 7.2. That is not intended to contemplate the entitlement referred to with regard to special voyages being the outside work and salvage.

PN422

THE VICE PRESIDENT: Okay.

PN423

MR YATES: Okay. They were written very quickly and unfortunately, that particular piece of detail, I'd appreciate if I can highlight it. But just, with regard to the issue to do with PPTs – and casuals, for that matter. We also, sort of, look

at those final three words in 17.11. It is that the flip-side – to use Mr Brotherson's term – the flip-side of 'rostered work period' is a non-rostered work period, and that can consist of either the days that are free of obligation to the company or a day of leave.

PN424

So, in terms of encapsulating that entitlement of that applying to a non-rostered work period, we say that 17.11 applies to those non-rostered work periods because – I go back to what I highlighted earlier on; is that: 17.11, the first part of it talks about 'rostered leave,' then the final sentence deliberately changes the terminology to 'rostered work periods,' and that referring to work required to be undertaken beyond the end of the rostered work period. That is the emphasis I seek to make on the completing stages. Thank you, your Honour.

PN425

THE VICE PRESIDENT: Thank you, and, Mr Brotherson, it just strikes me that we didn't tender Mr Sedgwick's statement, so if I mark that as SLTA1.

EXHIBIT #SLTA1 MR SEDGWICK'S STATEMENT

PN426

MR BROTHERSON: Thank you, Vice President. I apologise for not doing that.

PN427

THE VICE PRESIDENT: All right, thank you. Well, I'll indicate that I will reserve my decision and issue it in due course. On that basis, I'll adjourn. Good afternoon.

PN428

MS ELLIS: Thank you.

PN429

MR YATES: Thank you.

ADJOURNED INDEFINITELY **[1.24 PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs