TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT CROSS
DEPUTY PRESIDENT SAUNDERS

C2023/3984

s.604 - Appeal of decisions

Appeal by Svitzer Australia Pty Ltd T/A Svitzer
(C2023/3984)

Sydney

10.00 AM, WEDNESDAY, 20 SEPTEMBER 2023

PN1

VICE PRESIDENT CATANZARITI: Yes. I will take the appearances. Thank you.

PN2

MR NEIL: If the Commission pleases. I seek permission to appear for the Svitzer Australia Pty Limited, the applicant and proposed appellant.

PN3

VICE PRESIDENT CATANZARITI: Thank you, Mr Neil.

PN4

MR FAGIR: If it pleases the Commission. I seek permission to appear for the respondent. I'm instructed by Ms Carr of the MUA.

PN5

VICE PRESIDENT CATANZARITI: Thank you. Permission to appear given to Mr Neil and Mr Fagir. Now, before we start I just want to make the following statement as regards this matter.

PN6

The Full Bench has been appraised of the fact that there are currently reserved decisions on matters C2023/435, C2023/437 and C2023/438 before a differently constituted Full Bench which may be of significant relevance to today's appeal.

PN7

The Full Bench has been advised that the parties wish to proceed with the oral hearing today and then to file further submissions after the reserved decisions are published. Whilst this is a somewhat unsatisfactory approach, we will allow the matter to proceed as requested by the parties; however, we will put in place the following directions.

PN8

After the decisions in C2023/435, C2023/437 and C2023/438 are published the appellants in the respective matters should file written submissions within two weeks. The respondents, two weeks thereafter, and the appellants one week further to reply. In the event that any party wants an oral hearing they should advise the Full Bench as soon as is practically possible.

PN9

Thank you, Mr Neil, we will now proceed.

PN10

MR NEIL: Thank you. If the Commission pleases. There is one - insofar as we apprehend it - one particular point of intersection between the present appeal and the other matters, and that is the proper construction and operation of clause 41.2 of the enterprise agreement. As to that matter, if it pleases the Commission, I had proposed in this appeal simply to state Svitzer's position on that issue, without developing any argument on that point, reserving that until - - -

PN11

VICE PRESIDENT CATANZARITI: Yes, that is satisfactory.

PN12

MR NEIL: To be dealt with as the Full Bench has indicated. If that's a convenient course, may we proceed along those lines?

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VICE PRESIDENT CATANZARITI: Yes. Absolutely.

PN14

MR NEIL: Now, as the Full Bench will be aware, Svitzer and its employees are subject to port operating procedures, rather engagingly known as POPs, in every port in which Svitzer operates. Sydney is one of those ports.

PN15

The first four grounds of the proposed appeal turn on the construction of the Sydney POPs, their interaction with the enterprise agreement, and the jurisdictional consequences of that interaction. In our submission, as the Full Bench has seen in our written submissions, they are all issues that warrant permission to appeal. Each of those four grounds of appeal fall to be determined according to the correctness standard. That is an accepted position in the present appeal.

PN16

The fifth ground of appeal, as the Full Bench has seen, is constituted by an appeal against several findings of fact. It, alone, would not warrant permission to appeal - we accept that - but together with the other four grounds it does.

PN17

That aspect of the appeal falls to be determined according to House v The King test. Unless the Full Bench has anything in particular of us in relation to that fifth ground of appeal, we had not proposed to say anything to add to what we put in writing in relation to that fifth ground.

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VICE PRESIDENT CATANZARITI: We're satisfied with that background.

PN19

MR NEIL: Now, this is then, if it pleases, is the scheme of the submissions we wish to make this morning by way of supplementing what we put in writing in connection with the first four grounds of appeal. We had wished to begin by saying something - - -

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VICE PRESIDENT CATANZARITI: I'm sorry, just before you start.

PN21

MR NEIL: Yes.

PN22

VICE PRESIDENT CATANZARITI: We have not received any authorities from either side. Are there no authorities coming to us?

PN23

MR NEIL: We had not proposed to refer to any, or to invite the Full Bench to read any authorities today. We will mention Berri.

PN24

VICE PRESIDENT CATANZARITI: Yes.

PN25

MR NEIL: But without, of course, asking your Honours to actually look at it today.

PN26

VICE PRESIDENT CATANZARITI: Thank you.

PN27

MR NEIL: Now, first, we propose to say something about the salient aspects of the Sydney POPs and their interaction with the enterprise agreement. Then to make some short submissions about what we contend are the salient facts. Then to address the proper construction of the Sydney POPs, or at least the relevant aspects of the Sydney POPs, and then to turn to each of the four grounds of appeal in the order in which they appear in the notice. The first four grounds of appeal in that order, the order in which they appear in the notice of appeal. So if it pleases, that's the structure of the submissions that we propose.

PN28

We start then by saying something about the Sydney POPs and their interaction with the enterprise agreement, but before we do so, may we inquire this. It appears that the printed numbers, page numbers in the appeal book are, in each case, one less than the electronic number. Would it be convenient for me to refer to the electronic page number or the printed page number?

PN29

VICE PRESIDENT CATANZARITI: Speaking for myself, I'm using the electronic appeal book. I think we all are.

PN30

DEPUTY PRESIDENT CROSS: Yes.

PN31

DEPUTY PRESIDENT SAUNDERS: Yes.

PN32

VICE PRESIDENT CATANZARITI: Yes.

PN33

MR NEIL: Yes. I will use the - - -

PN34

VICE PRESIDENT CATANZARITI: You will be surprised we actually understand technology these days.

PN35

MR NEIL: Yes. I will use the electronic number and if a difficulty arises would your Honours be good enough just to let me know.

PN36

Now, we start with clause 41.1 of the enterprise agreement, and that appears on page 310, and we start with the first sentence in clause 41.1:

PN37

There will be a set of Port Operating Procedures in each port.

PN38

POPs. That's the subject matter. POPs are not certified under the Fair Work Act, but by clause 5.3.1 of the enterprise agreement, they are incorporated as a term of the agreement for the particular port concerned, except - and this is important - except to the extent that they're inconsistent with the agreement. The Full Bench will find clause 5.3.1 on page 269 of the appeal book.

PN39

Going back to clause 41 at 41.4. That's on pages 312 to 313. Although, on one view, it does not strictly say this, clause 41.4 is conventionally regarded as being the source of a requirement that POPs are to be made by agreement following consultation between Svitzer and the unions that are party to the agreement.

PN40

Then we go up to clause 41.2. That appears on pages 310 to 312 of the appeal book, and we just draw attention to the chapeau by way of indicating the purpose of clause 41.2.

PN41

Now, this is the point of intersection with the other appeal. Svitzer's position is that clause 41.2 is a prescriptive and exhaustive stipulation of the subject matters with which any POPs may deal. Of importance for the present matter is clause 41.2.1(ii). Now, if we could just invite the Full Bench to look at that.

PN42

VICE PRESIDENT CATANZARITI: Yes. We have that.

PN43

MR NEIL: And our submission is that the subject matter of clause 41.2.1(ii) is manning. Now, then would the Full Bench be good enough to go to page 329 of the appeal book. That's the first page of the Sydney POPs - - -

PN44

VICE PRESIDENT CATANZARITI: Yes. We have that.

PN45

MR NEIL: - - - as it relevantly was, and of course, for present purposes, what's important is clause 1. The heading identifies its subject matter, Current Crewing Complement, in other words, manning. That lines up with clause 41.2.1(ii), and of particular importance within clause 1 is the second full paragraph. Now, an LIR crew is what is otherwise called a leave in running crew.

PN46

Now, Mr Campbell. Could we then turn to the salient facts against that background. Mr Campbell was initially engaged as a member of a leave in running, or LIR crew, in September 2021 for a fixed term of six months. His contract begins at page - his first contract begins at page 661 of the appeal book where the fixed term is described as a maximum term in the second paragraph.

PN47

Now, on 28 March 2022 that contract, Mr Campbell's first contract, came to an end by effluxion of time in accordance with its fixed or maximum term. Mr Campbell was then offered and accepted a new contract. The new contract appears at page 6, or begins at page 683 of the appeal book. I'm going to draw particular attention to the, with respect, to the first two paragraphs at page 683.

PN48

Now, this, on our submission, this new contract was just that. It was a new contract. It was not an extension of the first contract. Now, when this new contract expired, according to its term, Mr Campbell was not offered a third contract, although other members of the crew of which he had been a part were offered new contracts.

PN49

That circumstance gave rise to the dispute which was the subject of the proceedings below. The relevant page of the originating form is at page 18 of the appeal book and the subject matter of the dispute is identified in section 2.1. Put simply, the subject matter of the dispute was that Mr Campbell had not been offered a new or third contract when other members of the crew, of which he had been a part, were. The dispute was resolved by an order made in the primary proceedings, which appears at page 95 in paragraphs 248 and 249, and it's against that order which the proposed appeal is brought.

PN50

Now, I wonder if we could then turn from what we contend are the salient facts to the third topic we wish to address, which is the construction of the Sydney POPs, and for that purpose may we ask the Full Bench to go back to page 329 and to the second full sentence, full paragraph in clause 1.

PN51

Contrary to the case propounded below, and here by the respondent and accepted in the primary decision, in our submission, the second sentence of the second paragraph of clause 1 of the Sydney POPs expressly provides or allows for the exercise by Svitzer of not just one, but two different discretions. (1) a discretion to extend the fixed term contracts, and (2) a discretion to appoint any fixed term employees from time to time similar to casual employment.

PN52

In our submission, each of those two discretions is separate, distinct and independent, and it was the latter discretion, not the former, that was, in this case, exercised by Svitzer so as to give rise to Mr Campbell's second fixed term contract.

PN53

The second discretion, the discretion to appoint any fixed term employees from time to time similar to casual employment, that second discretion is not limited. Not limited, in our submission, in three important respects.

PN54

It's not limited as to the period for which any discretionary fixed term contract can be offered. (2) it's not limited as to the number of successive fixed term contracts that can be offered to and accepted by the same employee, and third, it is not limited as to whether the discretionary fixed term contracts - which is the subject of that discretion, the second discretion - it is not limited as to whether those discretionary fixed term contracts can be offered individually to particular members of a crew or collectively to every member of the crew as a group.

PN55

Now, we draw those three propositions from the text in which the second discretion is articulated. Textually that discretion, in our submission, is perfectly straightforward. (1) the word 'any' is critical, and it is the antithesis of the concept of limitation. The antithesis of any limitation. (2) the expression 'similar to casual employment' is a reference to, or an articulation of, a discretion to appoint employees pursuant to discretionary fixed term contracts, which is essentially the same in character and incident as the discretion to appoint casual employees.

PN56

The latter is expressly dealt with in the enterprise agreement, in clauses 16.1.2 and 16.2 at pages 280 and 281 of the appeal book. We attach particular significance in this regard to clause 16.2.2, which appears on page 282. 281; I'm sorry.

PN57

That's what we wish to say about the third topic, the construction of the relevant aspect of the Sydney POPs, and that really, if it pleases, crystallises the position for which we contend in the proposed appeal.

PN58

DEPUTY PRESIDENT SAUNDERS: Mr Neil, is there any evidence of surrounding circumstances that might assist us to better understand what's objectively meant by those words:

PN59

and a discretion to appoint any fixed term employees from time to time similar to casual employment.

PN60

MR NEIL: There's evidence of surrounding circumstances, but it's of no assistance. It's of no assistance for two reasons, and we have dealt with this substantially in our written submissions, of course, as your Honour has seen. It's of no assistance for two reasons. (1) it doesn't satisfy the test of notoriety that would make it relevant and admissible for that purpose, for it amounts to nothing more than evidence about what was said in the course of negotiations for the making of the enterprise agreement, and there's no evidence about the extent to

which, if at all, the content of what was said in those negotiations was made known to other parties to the enterprise agreement; namely, the employees.

PN61

The second reason why it is not helpful is that, when it is carefully examined, it's a critical in content, even if admissible or relevant.

PN62

Now we have - if it pleases, your Honour - said what we wish to say about each of those two propositions, particularly the second, in our written submissions and may we just adopt those?

PN63

DEPUTY PRESIDENT SAUNDERS: Yes.

PN64

MR NEIL: Could we then turn to ground 1 of the proposed appeal, and that that ground involves the proposition that the order that was made in the primary proceedings, the order that appears in paragraphs 248 and 249 of the primary decision, is inconsistent with the agreement, and that involves simply these short propositions.

PN65

It is an order that Mr Campbell be further employed from 1 January 2023 to 31 December 2023; that is, that he be offered further employment after the expiration of his second discretionary fixed term contract.

PN66

Our submission is that that order directly conflicts with the discretion conferred on Svitzer in the Sydney POPs to appoint employees pursuant to discretionary fixed term contracts, and for that reason we contend the order is inconsistent with the Sydney POPs and thereby the agreement within the meaning of subsection (5) of section 739. That's ground 1.

PN67

Could we turn then to ground 2. Ground 2 involves the proposition that the dispute did not arise under the Sydney POPs, with the result that the order by which the dispute was determined was, accordingly, beyond jurisdiction.

PN68

Now, we should just remind the Full Bench of the salient provisions of the dispute resolution provisions in the enterprise agreement. They appear at page 272 of the appeal book, and it was to clause 10.1 on that page that we had particularly wished to invite the Full Bench's attention. That defines the subject matter assigned by clause 10, ultimately, to the Commission for resolution by arbitration, and that process is the subject of clause 10.3.

PN69

Now, it's in this ground that the point of intersection with the other proceedings really arises. As the Full Bench, this Full Bench will have seen, it is our contention that one construes the relevant aspects of clause 1 of the Sydney POPS

having regard to clause 41.2.1(ii) because that's the source of authority for the making of the Sydney POPs. For that reason one construes clause 1 of the Sydney POPs as being confined to the subject of manning, a subject which, in our submission - and this is the final proposition in ground 2 - a subject which, in our submission, has nothing at all to do with the question of whether any individual employee should or should not be appointed to a particular crew.

PN70

That subject matter is wholly extraneous to the Sydney POPs, having regard to their proper construction when construed in the light of clause 41.2.1(ii), and it follows that a dispute such as this dispute, which was only about whether an individual employee should or should not be appointed to a crew pursuant to a new contract, was a matter that answered the description in clause 10.1 of the enterprise agreement. That's ground 2.

PN71

We turn then to ground 3. Ground 3 has, as its subject matter, the construction of the Sydney POPs. There are, essentially, three points of construction that we wish to articulate in that ground. The most important of them, for present purposes, in our submission, the MUA so contends and we accept, the most important of them is in subgrounds (c), (d) and (e). They all involve this proposition, or they all involve a challenge to this proposition, that the Sydney POPs required that under normal circumstances the LIR crew must have all of their contracts extended or terminated together as a group.

PN72

Just excuse me for a moment. One finds that, or that subject matter is dealt with in paragraph 225 of the primary decision at pages 89 and 90 of the appeal book, and by this part of ground 3 Svitzer seeks to challenge that wholly.

PN73

The heart of the dispute below was the MUA's contention - repeated here in its written submissions in paragraph 7 - was that the Sydney POPs do not permit Svitzer not to offer a new fixed term contract to a single member of the crew. There is no textual support for that proposition or contention; indeed, in our submission, it is contrary to the ordinary and natural meaning of clause 1, contrary to the ordinary and natural meaning of the words 'in which the second discretion' is articulated, contrary to the ordinary and natural meaning of the word 'any'.

PN74

The MUA relies on the fact that the language of clause 1 is plural in many respects, but in our submission, that is a neutral consideration. It's a neutral consideration because the plurality of expression is a natural incident of the fact that the subject matter of clause 1 is manning, not the selection of individual members of the crew.

PN75

At bottom - as the Full Bench will see in paragraph 225 of the primary submission - at bottom the Commissioner's conclusion that the Sydney POPs required that, under normal circumstances, the LIR crew must have all of their contracts extended or terminated together as a group was based entirely on the evidence of

Mr Garrett, a witness called by the MUA. That evidence was or concerned Mr Garrett's subjective understanding that he had taken from precontractual negotiations about the operation of clause 1 of the Sydney POPs.

PN76

As the Full Bench will have seen in our written submissions, there are two things we say about that. (1) it's an impermissible use of the content of precontractual negotiations, contrary to Berri - and we reminded the Full Bench of the passage in Berri at paragraph 114.11. (2) the Commissioner's conclusion is not supported by the actual content of the evidence about the precontractual negotiations, and we have developed our submissions about that in detail in paragraphs 39 and 40 of our written submissions which we here adopt.

PN77

So the conclusion, or the holding that the Sydney POPs required that the LIR crew must have all of their contracts extended or terminated together as a group is, in our submission, textually incorrect and not supported by the precontractual negotiations upon which the Commissioner and the MUA here relied.

PN78

We make this further submission, that such a construction is not industrially sensible; in fact, it's not industrially workable. In order to make it work one has to invent a host of exceptions, and we say 'invent' advisably because none of these exceptions appear in the text of the Sydney POPs. Those exceptions might all come under the heading of Performance or Conduct Issues in relation to an Individual, and we take the language of that heading from paragraph 225 of the primary decision, the first line on page 90. Now, nothing at all in clause 1 about any of those matters, but they have to be invented in order to make the proposed construction work.

PN79

So that's the first of the construction issues that we wish to advance in ground 3, and it is central to the resolution, was central to the resolution of the dispute and, thus, central to the present appeal.

PN80

Subground (a) is a challenge to the finding in the primary decision at paragraph 232, page 92 of the appeal book, that Svitzer was not permitted to issue new contracts, any new contracts in March of 2022. In that paragraph the Commissioner found that having conducted the review required by clause 1 of the Sydney POPs, Svitzer was only permitted by the Sydney POPs either to extend the initial contracts or bring them to an end. The Commissioner wrongly held that there was no option for new contracts. We have addressed that holding in our written submissions at paragraphs 28 to 31 which we here adopt.

PN81

Then the third aspect of ground 3 is a challenge to the holding in paragraph 233 of the primary decision, appeal book page 92, to the holding that the Sydney POPs did not allow for a second extension of the fixed term contract issued to Mr Campbell. That's the subject matter of subground (b). We have dealt with that in

our written submissions at paragraphs 32 to 36, and if it pleases, that's what we would wish to say about ground 3.

PN82

Could we turn then to ground 4. Ground 4 is a challenge to the Commissioner's holding that Mr Campbell had an entitlement, an entitlement to be treated fairly in relation to a decision about whether to offer him a new fixed term contract, and that the holding in that respect is to be found principally, or perhaps in two places one looks. First, paragraph 244 on page 95 of the appeal book, and then one might also look at paragraph 228, which is on page 90 of the appeal book.

PN83

Now, the holding below that is challenged by ground 4 seems to be founded on the premise that the Fair Work Act imports obligations of fairness into every aspect of the employment relationship. Now, of course - of course it must be accepted that fairness is an important element of the Fair Work Act, but it applies only where and when the Act says it does. It remains the case that the general law of employment is that obligations of fairness do not qualify an employer's right to decide whether and to whom to offer a new contract of employment.

PN84

In our written submissions we have reminded your Honour, the Full Bench, of Byrne 185 CLR. The relevant passage is at page 443, and we have also mentioned Malik in that regard, and that general law is unqualified by any aspect, any provision in the Fair Work Act.

PN85

In this case, of course, one has clause 16.2.2 of the enterprise agreement, page 281 of the appeal book - which the Full Bench saw a little earlier - which expressly confirms the unfettered discretion that Svitzer has in that regard.

PN86

Now, if it pleases. That's what we had wished to say by way of supplementing our written submissions in relation to grounds 1 to 4. We don't wish to add to what we have said in writing in relation to ground 5, and we also addressed shortly the question of permission to appeal orally and in our written submissions. Unless the Full Bench has anything more of us, then those are the submissions we wish to make.

PN87

VICE PRESIDENT CATANZARITI: Thank you.

PN88

MR FAGIR: One of the dubious pleasures of appellant advocacy is that one sometimes understands a case to be about one thing and then discovers at the start of the hearing that the case is about something else, and that's the position that we're in today.

PN89

The first point and the only point that was really fleshed out before your Honours today was the proposition that the words of clause 1 of the POP that referred to

Svitzer's discretion to appoint fixed term employees in a similar way to casuals is decisive. That seems to be the point that's taken today.

PN90

If your Honours go back to the submissions filed in this appeal, go back to the submission made below, and you might find some passing reference to this issue, but what you won't find is any point where it was said to the Commissioner that the answer to all of this is right here. It's this one sentence that gives us complete discretion to reappoint, fire, do whatever we want, and the effect of those words is to neuter the rest of the clause, including the provisions that refer invariably to crews, to the 16th and 17th crews together.

PN91

Normally you find a point where it's said to the Commissioner the effect of those words is to neuter the quite detailed and specific requirements that there be a review of operational requirements, the purpose of which was to assess whether, based on those requirements, Svitzer needed to extend - not reissue or hire someone else - extend those contracts, or alternatively, bring them to an end.

PN92

Now, I can deal with it. I'm not suggesting that the bench wouldn't hear the points, but there is perhaps some unfairness to the Commissioner in the proposition that his decision should be overturned on the basis of the point that, if mentioned at all, was mentioned in passing. In any case, the point goes nowhere, in my respectful submission.

PN93

The purpose and effect of those words, as their author explained to the Commission, was to make clear that setting aside the 15 full-time crew, required by paragraph 1, and the two additional leave in running crews, required by paragraph 2, Svitzer had the entitlement to appointment effectively supernumerants for these. As long as you have met the manning, the staffing crewing requirements that are prescribed, if Svitzer wished to go out and hire additional fixed term employees or casual employees it was free to do so.

PN94

I'm sorry, I will have to jump around a little bit in the court book, but if your Honours wouldn't mind turning to page 171 of the PDF, 170 of the printed numbers, your Honours will see, at the top of the page, this was some supplementary evidence-in-chief at PN570 where Ms Kirdar True - I'm sorry, Ms Faraj, the author of the language, was asked what those words mean.

PN95

Now, it's something that wasn't really dealt with in her evidence-in-chief, but came at the heel of the hunt on the day of the hearing. She was invited to explain what they mean and she says something about it that doesn't really answer the question, but if your Honours look to PN575:

PN96

This is the situation, isn't it, the POPs will tell you you have got to have this many permanent full-timers and this many permanent part-timers and

sometimes fixed term crews, but that's a minimum? So you have the discretion to go out and hire as many fixed term employees as you want on top of what the POPs provide for?---Yes. I think so. Yes, you can.

PN97

Over the page:

PN98

That's the same with casual as well?---Yes.

PN99

And that's what this provision is making clear is, although there's a specification of two fixed term crews, that doesn't stop you from going out and bringing in a third fixed term crew if you want?---Yes, or permanent or anything. Yes.

PN100

DEPUTY PRESIDENT SAUNDERS: Mr Fagir, how is the subjective understanding of this witness assisted in the construction of the provision?

PN101

MR FAGIR: Well, it only goes so far, but it goes some way that the person who drafted these provisions, who was involved in the communications with the union and the workforce, understood it this way. Now, that, in itself, isn't a complete answer, but in the context of the material that I will take your Honours to in just a moment, it is relevant and it is setting aside the arid legal dimensions of this. This is an industrial tribunal and one would think that some sense of industrial fair play is relevant.

PN102

We have, in this case, as in the Full Bench matter that your Honour, the Vice President, referred to earlier, the case where Svitzer proposes something on one basis, applies it on that basis, and then sometime later, in the context of a hearing, in this case in the context of an appeal, comes along and says we all had it wrong. We have had these POPS for years and years and years. We have had fights about them. We have complained about them. We have said the agreement should be terminated because they are so restrictive. Surprise. Invalid.

PN103

DEPUTY PRESIDENT SAUNDERS: Mr Fagir, speaking for myself, I have spent half my life dealing with arguments like that, where parties think something means something and later there's a dispute about it and we need to interpret it according to principles which are well-established.

PN104

MR FAGIR: That must be in Newcastle.

PN105

DEPUTY PRESIDENT SAUNDERS: Perhaps that's right.

PN106

MR FAGIR: Now, of course, this happens all the time, but I'm rather suggesting that this is an extreme case, where someone comes along - and this is the person's understanding on the day of the hearing, not two years earlier. At the point that the Commissioner was asked to determine it this was Ms Faraj's understanding of this. Now, at the end of the day, it's not a complete answer to the question, but it is relevant in the context of some of the other things that I wish to say.

PN107

We said in our written submission that our case below was short, and to the extent that there was evidence of surrounding circumstances that was relevant to it, that there were only three pieces of evidence that mattered, and these are the ones that we have identified at page 9 of our written submission on this appeal.

PN108

The first is that the stated purpose of Svitzer, accepted by the unions and the workforce, was to assist Svitzer in dealing with a very specific operational challenge, which is a difficulty in assessing future crewing needs in the context of having won a new Navy contract, but COVID uncertainty about crewing needs in the context of COVID and shipping disruptions - and I'm going to have to take your Honours to some of the evidence about that in light of the submission that was made this morning.

PN109

The second relevant point is that there was no suggestion at all that there was no need for the 16th and 17th crews; that is, the uncertainty which existed at the point Svitzer proposed the variation was well and truly disappeared by the time Mr Campbell was cut loose.

PN110

The third relevant point is that Mr Campbell was not jettisoned based on any issue with his performance or conduct that had ever been raised with him, that it reflected the report manager's impression that he was not a good cultural fit, and of course, port management kindly gave some evidence about this which the Commissioner rejected on the basis that Ms Connolly was not a witness of truth, and there's no challenge made on this appeal to that conclusion, nor could there be in light of the content of her evidence.

PN111

Now, I would ask your Honours to turn to some of the evidence going to the first issue, and would your Honours mind turning to page 591 of the PDF, page 590 on the printed numbers. This is a letter from Svitzer to all Sydney crew. No question here of this being some idiosyncratic or private communication. This is Svitzer telling everyone what it proposed to do. Paragraph 1:

PN112

Svitzer is proposing changes to the Sydney POPs in order to facilitate the potential Navy work due to commence in Sydney ports from 1 October if we're awarded the contract. Please note we have been nominated, but we have not yet been awarded the contract, and awarding the contract, including the implementation date, will be dependent on whether we are able to implement, including by making the necessary changes.

PN113

Something is said about the value of the Navy work in the next paragraph, and then:

PN114

We ask that all unions and employees help us demonstrate to Defence our reliability and ability to deliver the potential Navy work by agreeing to the changes we believe are needed to the Sydney POPs.

PN115

The next heading, Changes, and attaches a marked up version of what was then proposed:

PN116

In summary, to support the business case, Svitzer will be, at this stage, recruiting 250 per cent PPT roles for a fixed term of six months. Leaves will be leave in running.

PN117

and just relevant to the first issue that I touched upon -

PN118

Svitzer may recruit additional crew members from time to time, including on a casual or fixed term contract basis.

PN119

Now, I'm sorry to jump around like this, but relevant to your Honour, the question that your Honour, Saunders DP, raised with me as to what difference does it make what one individual thought of it, well, here is Svitzer's public statement to the entire workforce that what it was proposing was two additional crews, at that point 50 per cent, ultimately, after negotiation, 100 per cent, and it noted that it might, under the heading of Changes to the Sydney POPS, it noted:

PN120

Svitzer may recruit additional crew members from time to time, including on a casual or fixed term contract basis.

PN121

There's some clarification of what the changes include. There's some statements about consultation, and over the page your Honours will see the whole process was kicked off on 3 August with this letter and the answer was required some 13 days later - and I won't ask your Honours to go to the evidence about all of this - but as the letter itself makes clear, Svitzer's position was:

PN122

We need to do this so we can deal with this specific challenge that we have. We want you to please work with us to make this happen and we can make it happen quickly, in 13 days.

PN123

At appeal book 609 of the printed pages, 610 of the PDF, is an email. I'm sorry, the page before. 608 of the printed numbers from Mr Sheehan, who was a witness below, to a large group of people. Again, effectively setting out that which was later said in the letter, and again, 'To support the business case the changes are' and they were all listed.

PN124

There were then some Q & A beginning on page 611, which I won't ask your Honours to pause to read, but they deal with, among other things, the question of why a hire crew only on fixed term contracts.

PN125

Now, Svitzer's evidence itself was to similar effect. Appeal book 668, printed 669 of the PDF. This was, again, the author's, Ms Faraj's understanding of why this was all happening - and could I just, in anticipating a question again, why does Ms Faraj's view matter? Well, this is Ms Faraj's understanding, Mr Sheehan's understand and Mr Garrett's understanding.

PN126

Now, the fact that everyone had the same view of what this was about, in the context of the clear broadcast statements by Svitzer of what it was about, would lead to the conclusion - and this, it wasn't resisted at all below and we will find out if it's resisted here today – that the publicly stated purpose of the variations was to meet a specific operational need, not that we want to be able to hire fixed term employees and cut them loose at the end of the contract at will. We have, we think, a need for additional crews to service the Navy contract. We're just not sure about it, and that's what Ms True says at 22:

PN127

Considered it unlikely Svitzer would be able to service the Navy work with the reduced staffing levels in place. I did not want to commit to the Navy contract with the staffing levels in place at this time and later find that Svitzer had over promised and underdelivered.

PN128

It was determined by me and others that employees would be employed on fixed term contracts because it was unclear how much work would come out of the Navy contract and there was still uncertainty in relation to the non-Navy work.

PN129

Now, Mr Sheehan said something very similar at paragraph 9 of his statement. I don't think I need to ask your Honours to turn - well, in fact, it is useful. I'm sorry. At page 693 of the printed numbers, a response to Mr Garrett. It extracts there, helpfully, Mr Garrett's understanding of what this was all about. It's extracted at paragraph 6. At paragraph 7 Mr Garrett makes clear that this understanding was based on things that Svitzer had said to him.

PN130

Now, at 8 there's some sort of disagreement of what Mr Garrett said he understood based on things he was told, but at 9, Svitzer's position at the time was

clear, presumably the position that was communicated to the unions given the context of the paragraph:

PN131

> *The recent reduction in workload and uncertainty of additional work that would arise and that Svitzer could not guarantee that the positions would be required on an ongoing basis. As a result, Svitzer was only willing to engage additional crews on a fixed term basis.*

PN132

Now, one could go on. We have footnoted all of this evidence in our written submissions. Mr Garrett gives his perspective, from the other side of the bargaining table as it were, and it's all consistent. There was some disagreement as to what exactly - how many six-month terms there could be, but in terms of what this was all about, everyone was of absolutely the same understanding, and that is that it was all about the things that were set out in Svitzer's letter to its workforce on 3 August 2021.

PN133

Now, as I say, in the case below, and our submission here today is that the three pieces of evidence that I have referred to are all that is required. The matters that I have just identified are plainly admissible on a question of construction, and to the extent that there is, if there is some ambiguity in the language of the clause, it should, of course, be construed in a way which gives effect to the manifest purpose.

PN134

I'm not talking about something in someone's own mind, some subjective purpose. We're talking about the clearly communicated purpose which was accepted by the unions. I have said what I wish to say about the industrial merits of Svitzer's approach here and elsewhere. I don't need to keep going on about it.

PN135

Could I then come to the text of the provision. It appears at paragraph 16 of our submissions, and beginning at paragraph 19 and following we make a series of points about the text. I should emphasise that, on our view of things, the effect of the clause is tolerably clear on its face and the surrounding circumstances, the objective background to the negotiations which I have referred, really merely buttresses the conclusion that your Honours would otherwise come to based on the text itself.

PN136

As it was pointed out, your Honours will firstly note that the clause invariably deals with crews, not workers. It authorises Svitzer to hire two additional crews, not six additional employees. It refers, in each case, to extension of the contracts or bringing the fixed term contracts to an end, and a review of operational requirements to assess whether, based on those requirements, it needs to extend the contracts, plural.

PN137

Now, it is said that there are circumstances in which the plural might be read as singular. It is not a point which alone would carry the day, but it's a pretty good starting point in aid of a submission, ultimately, that the clause contemplated that the crews would be dealt with as crews, not as individuals, such that Svitzer could chop and change in their composition, effectively, at its whim.

PN138

Secondly, and as a matter of text only, as a matter of pure grammatical effect, we say the clause specifies that there are two permissible possibilities at the end of the fixed term. One is that the contracts would be extended, either on a similar percentage or lower percentage, or they would be brought to an end, and the author of these provisions accepted readily that which is obvious, that when one talks about extension, one is talking about something which exists as opposed to something new, and it makes no sense at all to speak of to attempt to accommodate, within the concept of extension, termination of one contract and entry into a new one.

PN139

DEPUTY PRESIDENT SAUNDERS: Mr Fagir, is it your contention that these two options you say, or two possibilities that arise at the end of the fixed term, arise at the end of each set of fixed term contracts? If they're extended more than once, for example, there's an obligation then to conduct a review et cetera?

PN140

MR FAGIR: Yes.

PN141

DEPUTY PRESIDENT SAUNDERS: So it's not just after the first six months or just prior to the end of the first six-month set of contracts? You say there's obligations to review, continue on in any subsequent fixed term contracts that are offered?

PN142

MR FAGIR: Yes, and that's perfectly consistent with the stated purpose, which is to deal with the uncertainty as to crewing needs in the future.

PN143

Now, this, again, is a point that was ignored below and it's ignored today, that the fact that the text of the clause deals with extension is a matter that is simply not grappled with, and that is, in my respectful submission, critical in circumstances where the language itself is intractable. One cannot sensibly read references to extension as contemplating anything other than extension of employment of the existing crew members.

PN144

Thirdly - and again as a matter of text - what is clear, we say on the face of the clause, is the decision about extension for ending is to be made following a review of operational requirements to assess whether, based on those requirements, it needs to extend the contract.

PN145

Again, there's no mystery to this. It's clear on its face. It's even clearer in the context of the background exchanges to which I have referred, that the decision is to be made not on any basis, but it's Svitzer's decision. It has a discretion to decide whether to extend or end, but the discretion is to be made on the basis set out in the clause. Clear as a matter of language. Utterly consistent with the parties' stated common purpose.

PN146

The effect of what Svitzer says today and said below is that all of the rigmarole about a review and the specific language requiring a review and a decision, an assessment whether, based on the requirements reviewed, it needs to extend the contracts, all of that language we put to one side, because forget about any review. Forget about operational requirements. We form a view that one fellow, Mr Campbell - who happens to be the vice-president of Sydney branch or whatever - for whatever reason isn't a good cultural fit. He's out. We don't need to identify any reduction in work. We don't need to suggest that there's no need for his crew. We just cut him loose.

PN147

We, in our written submission, identified that the common purpose was that which I have spoken about - and I would simply add this - that there is abundant evidence that this was about dealing with a particular operational challenge. Conversely, your Honours have not been taken to one jot of evidence to suggest that part of the purpose of the exercise, where a matter of someone's subjective understanding is still less than some communicated objective purpose, was flexibility for a port manager to decide that an individual was not a good cultural fit and to be rid of him or her in that way.

PN148

Fifthly, the variation was made in the context of this objective fact. It is that job security is a constant concern and priority for the MUA. It was during the negotiations, and that was a matter well-known to Svitzer. Mr Garrett gives evidence about this which was unequivocal and which is unsurprising, and the relevance of all of that is that, at the end of the day, Svitzer's submission is that the unions were in a position where they didn't have to agree to anything.

PN149

Svitzer had an operational need. It asked for cooperation. It proposed language which dealt with an operational review and an assessment of that, on that basis of whether contracts needed to be extended, but it said this union, for which job security is a constant concern and a constant battleground, signed up to a provision which allowed its members to be treated in the way that Mr Campbell was dealt with in this case, and it is a perfectly sound constructional technique for your Honours to ask yourselves whether it is objectively likely that the MUA or any other union, but the MUA in particular, is likely to have signed up to this sort of deal.

PN150

Finally, last but certainly not least, it is worth pausing for a moment to consider the facts of this case. Mr Campbell worked six months. At the end of six months he was sent a letter - and I won't ask your Honours to go to this evidence, but I can

go to if I need to - a letter indicated to him that Svitzer highly valued his work and would be delighted if he continued. He accepted a nine-month extension. It doesn't matter whether it was an extension or a new contract. Continued in his employment and a few days before Christmas is told, 'We're keeping the other five. You're going.'

PN151

No reason given at that stage. Later really a ridiculous reason that the Commissioner justifiably rejected, that Mr Campbell didn't chat long enough or enthusiastically enough to Ms Connolly. That's really what the evidence was, that the other ratings would proactively speak to Ms Connolly, but not Mr Campbell.

PN152

DEPUTY PRESIDENT SAUNDERS: Why do you say it doesn't matter whether it was an extension or a new contract?

PN153

MR FAGIR: The question is what the agreement required. Now, if, as a matter of contract - setting aside the effect of the agreement - if, as a matter of contract, what sits with it was offer a fresh contract, if that was not permitted by the agreement it matters not.

PN154

The Commission was entitled to enforce the terms of the agreement or to resolve the dispute in a manner consistent with the agreement in the way that it did, and the fact that Svitzer may have breached the agreement by purporting to offer a new contract, at the end of the day, it doesn't make any difference. It doesn't undermine the validity of the Commissioner's determination that the dispute should be resolved on the basis that Svitzer is required to abide by the terms of the agreement.

PN155

The contractual analysis isn't irrelevant, but it's secondary to the real question which is what did the agreement require and what protection or job security did Mr Campbell have under the agreement? When that question is answered the final question is what should we do about it if we accept that what Svitzer has purported to do is contrary to the agreement, and the obvious answer is that which the Commissioner gave.

PN156

Now, coming back to the question of the gross unfairness. The relevance of that is this isn't some free floating normative statement. It is a very well-established cannon of construction that results which produce unfair or arbitrary results are to be avoided in all context. Statutory construction, interpretation of contracts, and certainly in the construction of industrial instruments, and of course, it is very well-established in the meanings which have already (indistinct) meaning justice may reasonably be strainful.

PN157

Now, there may be many cases where that principle doesn't take us very far because the question of whether the result is unreasonable or arbitrary or unfair is, itself, contestable and it merely begs a question.

PN158

This is in a small category of cases where the unfairness of the result is self-evident, and there's some debate as to whether Svitzer accepted that the result here was unfair or not. What is clear is that there was never any real attempted defence on the merits. The position always was, 'Forget about all of that. We can do this. It might be unfair. It might unattractive, but we're entitled to do it and that's the thing that matters.'

PN159

Now, they're the points that we wish to make about the text of the clause and they really don't leave a great deal to say. There are a variety of errors alleged in the notice of appeal, setting aside the final throw-in, the criticism of various particular findings and so on. It all makes no difference.

PN160

We accept the standard to be applied on this appeal is the correctness standard. The Commissioner's particular steps are really irrelevant. It does us no good to say this is the way the Commissioner approached it and that was within reasonable bounds. Conversely, it doesn't really take the matter anywhere for the appellant to say there was a wrong turn here or there in the analysis below.

PN161

It's for your Honours to decide, in your own views, what the correct construction of the agreement was. If that corresponds to the Commissioner's conclusion, corresponds sufficiently to found the relief that was actually given, then the appeal must be dismissed.

PN162

If your Honours conclude that the Commissioner approached it, the Commissioner's construction was wrong, without identifying any particular misstep, but simply that the ultimate conclusion was wrong, then the appeal should be upheld. There then may be a question as to whether the matter should be remitted or whether the Full Bench can deal with the dispute to conclusion itself.

PN163

Now, that really leaves the vexed question which Mr Neil said he would prefer not to deal with today; that is, the question of whether all of this is academic because these POPs that were proposed by Svitzer, negotiated and thought about, were all a thing writ in water.

PN164

We have said something about that in our written submissions, and the question of whether the relevant clause is exhaustive or otherwise is a question that arises in the other appeal.

PN165

The complication is that appeal can be decided without answering the question because my client's submission there was that, firstly, the list of matters is not exhaustive, but even if it is, in that case the composition in terms of full-time fixed term casual is a matter that falls within either the concept of port rosters and associated matters, in the context of this particular enterprise, or other operational requirements relevant to the port.

PN166

It may be that the other Full Bench accepts the fallback position and doesn't need to determine the larger question, and your Honours here are in the same position, as we say, not exhaustive, but even if it is, clause 1 falls within the four corners of the matters which appear at clause 41.2 of the agreement. As I say, we dealt with that in our written submissions, but I just want to reiterate the point because it's a little bit factual intensive.

PN167

The Sydney roster appears on page 540 in the printed numbers of the appeal book and it's extracted, although in microscopic print, in our submissions.

PN168

Might I just ask your Honours to note that this is not the roster that one would see in a café or a shop or an office. It's not person A is on the day shift this day and the others on afternoon shift. It is a carefully constructed document that deals with, effectively, fixed, an indefinite roster. It identifies particular workers, particular crews, and then the members of the crews by names. Your Honour will see there, on the 17th crew, Mr Campbell. There are some casuals identified, and then there's a roster which sets out what crew is working when.

PN169

Now, the point that should be understood about Svitzer's operation, about the agreements, is that there is an incredible degree of flexibility in terms of rostering under the agreement. There is no daily span of hours. There are no maximum ordinary hours of any kind. There's a maximum of 91 hours to be worked in a week. There are no shift loadings. There are no weekend penalties. There are no public holiday penalties.

PN170

There's, effectively, no concept of overtime. There are a maximum number of days to be worked in a year. There are some limits on the hours to be worked in a particular period, but that's about it, and it's the roster which regulates the working hours and it does the work that otherwise would typically be done by things like spans of ordinary hours, shift penalties and so on, and when one considers what is involved in the subject matter of port rosters it's relevant to bear those matters in mind, and that is why, in clause 41.2.1, it says, for example:

PN171

Rosters will, as far as practicable, include the detail of work days, the component of predictable leave days, and the number of crews on duty and on leave required to man the roster.

PN172

Specifically, at (iii), it deals with off-duty periods for permanent full-time employees and deals with leave in running arrangements, LIR - which is what the 16th and 17th crew were - off-duty periods for permanent part-time employees and so on and so forth.

PN173

So relevant to the question of whether - if we're wrong about the anterior question - of whether this is an exhaustive list, even if we're wrong about that, the crewing levels, the number of permanent crews, the number of LIR crews, are a matter that falls squarely within the concept of the subject matter of port rosters, bearing in mind that the rosters are required to be constructed in a way that ensures that people can take their leave, including by dealing with LIR and other relief arrangements.

PN174

Now, there's perhaps more that can be said about that. It may be that a short note is to be filed dealing with some of these issues, but I just wanted to flag it now, lest it be said that a note that really should just be directed to the effect of the Full Bench decision, if any, on the outcome of this appeal, travels beyond into other matters that haven't been - - -

PN175

VICE PRESIDENT CATANZARITI: Well, if you wish to file the note either now or wait for - on this point - wait for the other Full Bench decision, we're in your hands in relation to how you want to approach that.

PN176

MR NEIL: Yes, and we would never make that criticism. So we would accept that the whole subject matter of the operation of clause 41.2 would properly be the subject of any post, any note delivered as a consequence following the decision in the other matter.

PN177

VICE PRESIDENT CATANZARITI: Yes. Well, that will be the pivotal course.

PN178

MR NEIL: So we're perfectly relaxed about that.

PN179

MR FAGIR: I'm grateful to my learned friend that in that context I need not say any more. If your Honours will just give me a moment. Unless I can assist your Honours further, they're my submissions.

PN180

DEPUTY PRESIDENT SAUNDERS: Mr Fagir, there are two matters I wanted to raise with you.

PN181

MR FAGIR: Yes.

PN182

DEPUTY PRESIDENT SAUNDERS: One is what's your response to the submission by Mr Neil that your construction would give rise to a need to invent a number of exceptions which aren't in the provision?

PN183

MR FAGIR: I had one note, and I put it red at the top of the lectern to make sure I didn't forget it and, of course, I did.

PN184

The first point to be made is that if this is an issue, it's not an issue that's confined to the fixed term crews. It's an issue that arises with respect of the whole workforce because in the first paragraph it's 15 times full-time crew. So this is not an issue that arises.

PN185

If it is an issue, it's not one that relates specifically to these two crews, and the submission simply is that - with the greatest of respect to Ms Faraj - it's clear, on the face of this drafting, that it is not of perfect precision. If this were drafted, the way we put it to the Commission, was by a team of lawyers in a skyscraper somewhere, it would be different and it might deal with these contingencies.

PN186

History suggests - and the fact that this has not been an issue, and is something that's put merely as a hypothetical as opposed to there being examples - suggest that this is not a real issue, that it is well understood that this is about mode of hiring in relation to, well, all of the above - the full-time crew, the casuals and the fix termers - and that although there are restrictions on the bases on which the decision to extend or end, that is quite carefully prescribed that there are, of course, other bases on which people might be dealt with. There is the matter of performance or conduct, and as I say - - -

PN187

DEPUTY PRESIDENT SAUNDERS: Or resigning.

PN188

MR FAGIR: Of course. Yes. Though it's a clever point, but it really, seen in context, goes nowhere, and particularly in circumstances where these POPs are not set in stone.

PN189

There's a capacity for either party to effectively propose a variation to take effect within 28 days subject to an application to this Commission to vary, and that is relevant to two things. One is that explains why these really self-evident things don't need to be dealt with it because in the worst case there can be a variation. Well, that's really the point.

PN190

Secondly, if this were a real issue, if someone seriously came along and said, 'You cannot sack this person' - they might have just punched their manager, stolen a tug or whatever - if someone seriously came along and suggested that to Svitzer, and even if that were true, absolutely worst case, it would be a matter of a variation to

the POPs which one would imagine would be endorsed without any hesitation by the Commission if it were challenged.

PN191

DEPUTY PRESIDENT SAUNDERS: The second matter that I wanted to ask you about arises from a document you took us to at page 590 of the appeal book, Communication to All Sydney Crew'.

PN192

MR FAGIR: Yes.

PN193

DEPUTY PRESIDENT SAUNDERS: This is while the amendments to the POPs was being proposed. Under the heading, Changes to the Sydney POPs, the second paragraph you took us to, the final sentence in that paragraph says:

PN194

Svitzer may recruit additional crew members from time to time, including on a casual or fixed term contract basis.

PN195

MR FAGIR: Yes.

PN196

DEPUTY PRESIDENT SAUNDERS: Just to make sure I understand your submission about that, does that sentence to which you refer and rely on to say that gives some assistance in understanding what's intended to be meant by the provision in the POPs, which talks about the discretion to appoint any fixed term employees from time to time, is talking about additional crew members?

PN197

MR FAGIR: Yes.

PN198

DEPUTY PRESIDENT SAUNDERS: I see.

PN199

MR FAGIR: Yes. I think the word I used was 'supernumeraries'. That might not quite be the word, but the requirement is 15 full-timers, suitable casual employees and the two leave in running. Construct the roster, make sure leave is covered et cetera, but that would not prevent Svitzer from going out and hiring additional crews if it so chose. It would be a matter for it.

PN200

DEPUTY PRESIDENT SAUNDERS: And then if one goes over to the attachment to that document. It's the proposed amendment to the POPs. It's page 592, and we see in the marked up version there the proposed amendment to clause 1, and as you pointed out, this is talking about the 250 per cent LIR permanent part-time crew, later amended to 100 per cent, and then we see in the initial draft. There's none of the language we see in the final draft, the (a) and (b),

the one month prior to the end of the fixed term contracts et cetera. How did that come about, that amendment come about?

PN201

MR FAGIR: I should just go back and check this carefully. If I'm wrong I will be corrected, but as best as memory serves, the evidence was that this was proposed. The unions were, effectively, onboard with doing what needed to be done to make sure that the Navy contract could be landed.

PN202

Everything happened in a pretty compressed time frame, but the unions sought some level of protection and proposed - I'm sorry, I will withdraw that. I can't, standing here, recall who proposed the language of the operational requirements, but in any case, that was introduced in response to a union concern as an additional protection, and I will - perhaps while Mr Neil is saying what he wishes to say in reply - just go back and check the evidence to make sure that I have been precise about that.

PN203

Of course, that's a point I ought to have made, that it appears, objectively, that an additional protection was negotiated into the POPs to avoid this very scenario, on the basis that Svitzer said, 'Here's our problem. We're not sure if we're going to need them', and the additional protection was negotiated into the POPs to make sure that if you don't need them you don't have to keep them. You have got the discretion. It's a matter for you to decide. We can't tell you what your operational requirements are. You conduct the review. You make the assessment, but whatever the fate of these crews is, is to turn on that question and not, 'Mr Campbell wasn't chatty enough when I', you know, 'crossed paths with him onsite.' If the Commission pleases.

PN204

VICE PRESIDENT CATANZARITI: Yes. Thank you. Mr Neil.

PN205

MR NEIL: Yes. If the Commission, the Full Bench pleases, just seven short points we wish to make. First, although it doesn't much matter whether correctness standard applies, we do wish to remind the Full Bench that both below and in our written submissions we relied upon what we have characterised as the second of the discretions in clause 1 of the Sydney POPs, the discretion to appoint any fixed term employees from time to time similar to casual employment.

PN206

May we just give the Full Bench these references. First below, appeal book page 362, paragraph 5.2; page 369, paragraph 6.17 subparagraph (c); and, in our written submissions on the appeal, the following paragraphs, subparagraph 15(d), paragraphs 16, 17, 31, 33 and 43(b).

PN207

Second, and more importantly, when our learned friend came to address evidence of witnesses' subjective understanding of the way in which these provisions ought to be construed, the concession was made, 'It's not a complete answer.' In our

submission, it's not any answer. It is absolutely irrelevant on any conventional approach, an orthodox approach.

PN208

Third, insofar as the respondent sought to rely on precontractual, certain precontractual exchanges, we would say these things. The first exchange was dated 3 August 2021. That's the one that appears on page 591 of the appeal book. That was one month and very many negotiations before the actual content of the Sydney POPs was concluded.

PN209

(2) it is an error to do, as the respondent urges your Honours to do, and that is to construe the content of certain precontractual exchanges, rather than the content of the provision itself.

PN210

(3) one knows nothing about, relevantly, about all of the detail of the negotiations and exchanges that postdated the exchanges on which the respondent relies.

PN211

(4) It is evident, even when one looks at this letter of 3 August 2021, that the subject matter, the purpose that was addressed was manning, not selection of individual employees.

PN212

Fourth, your Honour, Saunders DP, asked our learned friend whether the respondent contended that the review that is the subject matter of subparagraph (a) ought to precede every extension. In our submission, it does not. The expression 'fixed term contracts', as it appears on the first line of subparagraph (a), appears in a form that suggests that it's a defined expression, although that expression is nowhere defined. It appears in connection - as an undefined expression - in connection with the first of the discretions, the discretion to extend the fixed term contracts.

PN213

In our submission, when one reads it as a whole, the correct construction is that the review referred to in subparagraph (a) is to precede the first, the extension of the first of the fixed term contracts, and thereafter subparagraph (a) has no work to do.

PN214

If we are wrong about that, our alternative submission is that, manifestly, when one has a look at subparagraph (a), the language of subparagraph (a), the subject matter of the review is manning. Once again, manning levels, not operational requirements in connection with manning levels rather than individual selection.

PN215

Then next, and last in this area, no matter what construction one adopts, in our submission, subparagraph (a) textually and syntactically does not apply to the second of the discretions, only to the first; that is, it applies only to the discretion to extend, and not the discretion to appoint fixed term employees. That's what we

wish to say about that point, and it leads neatly, we suggest, to the fifth point we would wish to deal with by way of reply.

PN216

Our position was criticised on the ground that we had not dealt with the concept of extension. We rather thought we had, and we thought we had done so by making the submission, which we repeat, that the concept of extension relates only to the first discretion, not to the second discretion. Again, textually and syntactically, extension plainly refers only to the first discretion. One aspect of the construction advanced by the respondent is that it gives no work to the words with which the second discretion is expressed. No work at all.

PN217

Now, the sixth point we would wish to make is this. The respondent puts considerable weight on the facts of this particular case. It is an error to reason backwards from the facts of a particular case to a construction of general application, universal application. The construction of the Sydney POPs, the construction of any provision in an enterprise agreement, applies according to its terms to every case that falls within its scope, not just to one case.

PN218

Then the last point we would wish to address by way of reply arises from the response that was given to the first of your Honour, Saunders DP's questions of our learned friend which addressed our submission that the construction for which the respondent contends - and it was adopted in the primary decision - requires, in order to make industrially sensible and workable the invention of a host of exceptions, and the answer given to that is essentially this. Well, those exceptions apply equally to every employee and, therefore, the point is neutral.

PN219

That, in our submission, misunderstands the proposition that is in issue here. It is contended that the Sydney POPs relevantly operated so as to both require Svitzer to deal collectively with every member of the crew as a group, and the converse of that proposition, the correlative of that proposition, to preclude it from dealing individually with any particular member of that crew or group.

PN220

Now, there's no other provision in the enterprise agreement that has that effect. No other provision. Every provision that deals with discretions about who should or should not be employed deals with employees individually, and so in order to make this provision, this construction work in an industrially sensible way as the MUA contends, what we have to do is to invent a host of exceptions that allow Svitzer to depart from the general rule that is contended for; that is, to allow it to deal individually with employees who can only be dealt with on that construction as a group. If it pleases, those are the submissions we wish to make by way of reply.

PN221

VICE PRESIDENT CATANZARITI: Thank you. Yes, Mr Fagir.

PN222

MR FAGIR: Look, in terms of the question that the Deputy President asked me, I should say that Mr Garrett gives some evidence about the process of negotiation. He says that the delegates really managed the discussion.

PN223

There is nothing that explicitly deals with the introduction of the review. In my respectful submission, it makes no difference. It's apparent that something was proposed, there was a negotiation, what we would characterise as a protection was introduced, and that's the language that was specifically introduced after discussion and must be given effect. If the Commission pleases.

PN224

VICE PRESIDENT CATANZARITI: Thank you. The Commission is adjourned.

ADJOURNED INDEFINITELY [11.40 AM]