TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT CATAZNARITI
DEPUTY PRESIDENT ANDERSON

C2023/5279

s.604 - Appeal of decisions

Appeal by BHP Coal Pty Ltd
(C2023/5279)

Sydney

10.02 AM, THURSDAY, 19 OCTOBER 2023

Continued from 14/09/2023

PN1

JUSTICE HATCHER: All right, I will take the appearances. Mr Neil and Ms Kumar, you appear for the appellant.

PN2

MR I NEIL: We do, if it please, to seek permission to do so.

PN3

JUSTICE HATCHER: Mr Walkaden, you appear for the CFMMEU?

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MR A WALKADEN: I do, your Honour.

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JUSTICE HATCHER: But when does the MEU attend?

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MR WALKADEN: Well, that's a moving feast, your Honour.

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JUSTICE HATCHER: All right. I won't go into that then.

PN8

MR WALKADEN: But we very much hope it to be 1 December of this year.

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JUSTICE HATCHER: All right. Mr Saunders, you appear for the AMWU and the CEPU, intervenors?

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MR L SAUNDERS: That's right.

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JUSTICE HATCHER: All right. Mr Walkaden, do you oppose any party being granted permission for legal representation?

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MR WALKADEN: No, your Honour.

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JUSTICE HATCHER: All right, that permission has been granted.

PN14

Mr Neil, can I just raise one issue before we start, and this is for the attention of all parties. The question which the Deputy President, now the Vice President, answered in the decision and in her reasons - let me just turn it up again - now I can't find it - was expressed in fairly broad terms, that is: 'Can BHP lawfully cease the deduction?' It is actually in paragraph 7 of the decision.

PN15

MR NEIL: Yes, there's a copy behind tab 3 of the appeal book on page 18.

PN16

JUSTICE HATCHER: Yes. I am just wondering whether that question, in the way it is expressed, goes beyond the Commission's proper role in the private arbitration and whether the true question was - I can't remember the clause number - 'Could BHP cease the $60 per week deduction under the terms of the relevant accommodation agreement?' Is that a better way to express the question?

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MR NEIL: If it please, I think our position would be that was intended and that was the way the matter was argued at first instance.

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JUSTICE HATCHER: Yes.

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MR NEIL: And we would not be suggesting that the question should be construed in any wider sense than that.

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JUSTICE HATCHER: Do you take any different view, Mr Walkaden, or Mr Saunders?

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MR WALKADEN: No, your Honour.

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JUSTICE HATCHER: All right. Well, I think we will proceed upon the basis - we might reformulate it slightly when we issue our decision - but we will proceed upon the basis that that is the question that the parties are addressing.

PN23

MR NEIL: Yes, in other words, the concept of lawfulness that the question addresses poses an inquiry about whether the cessation of the deductions was a contravention of the first sentence in clause 5.2 of the Moranbah Accommodation Agreement.

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JUSTICE HATCHER: Yes. All right. Thank you. Well, you go ahead, Mr Neil.

PN25

MR NEIL: We will proceed on that basis, if we may. Of course, so understood, the question being so understood, the answer for which we contend in the proposed appeal remains in the affirmative.

PN26

Just quickly, if we may, some short background. As the Full Bench will be aware, all of the parties to this dispute, including the intervenor, are covered by the BMA Enterprise Agreement 2018. There's a copy of that agreement behind tab 10 of our bundle of authorities. The provision to which we particularly wish presently to draw attention is at page 353 of the bundle of authorities - we are using the page numbers at the bottom of each page in the middle of the page, if

that's convenient - tab 10, page 353, clause 34, which the Full Bench will see is headed 'Accommodation and Commute Arrangements.' Clause 34.2 is the provision which is presently relevant. We particularly draw attention to the following aspects of clause 34.2. first, subclause (a)(1); next, subclause (b) and, finally, subclause (g), both (1) and (2).

PN27

By those provisions, the Full Bench will appreciate that the enterprise agreement incorporated, by reference expressly within the meaning and by the operation of section 257 of the Fair Work Act, the Moranbah Accommodation Agreement, to which BHP, the respondent and the intervenor are all also parties.

PN28

There is a copy of the Moranbah Accommodation Agreement in the appeal book that begins at page 85. Could we draw attention on page 85 to the Note for Employees that appears at the foot of the page. Then, on page 87, the Full Bench will see identified the parties to the Moranbah Accommodation Agreement. Next, still on the same page, could we draw attention to recitals 4 and 5. The purpose of the Moranbah Accommodation Agreement is the subject of clause 1. That's on page 88. We particularly draw attention to the first sentence in the second paragraph of that clause.

PN29

JUSTICE HATCHER: 'The purpose of this Agreement' sentence?

PN30

MR NEIL: Correct. The agreement, taking up the language of that sentence, deals with a number of accommodation options. It does so in clause 5. Clause 5.1 addresses the topic of 'Various Accommodation Types.' One of the accommodation types, as the Full Bench will see, is a so-called SPV, or a single person village unit. That is the focus of the present dispute and it is also the subject of clause 5.2, which appears on page 90 of the appeal book. The focus of this dispute is the first sentence in the first paragraph in clause 5.2.

PN31

While the Full Bench has the Moranbah Accommodation Agreement open, could we also draw attention to the following provisions: first, clause 6.2, which is on the foot of page 91; then clause 7, which deals with the variation of the Moranbah Accommodation Agreement, which is on page 93; next clause 8, which is one source of jurisdiction for the Commission to deal with the present dispute, and, finally, clause 9, particularly subclauses (b) and (c), read in light of the chapeau. They are all on page 93.

PN32

As the Full Bench will have seen, BHP has informed employees who are within the scope of the Moranbah Accommodation Agreement that it no longer insists on the payment of the subsidised rate of $60 a week that is referred to in the first sentence of clause 5.2 and, accordingly, it has ceased to make the deduction, which is also referred to in that sentence.

PN33

The respondent made an application under section 739 for the Commission to deal with a dispute. That dispute, as the President has identified at the beginning of this morning's proceedings, essentially involved, or turned on, the proper construction and application of clause 5.2 of the Moranbah Accommodation Agreement.

PN34

So understood and read in the way that it is agreed that the arbitration question should be read, the Vice President answered that question in the negative. Because the answer to that question, one way or the other, depends entirely on the construction of the legal effect of clause 5.2, it follows - and this is uncontroversial - it follows that the question fell to be answered either correctly or incorrectly. In the result, the correctness standard applies to the present appeal.

PN35

The central issue, or one of the two central issues, and the one that we wish particularly to focus our oral submissions on this morning, involves this question: can BHP waive its entitlement under clause 5.2 to be paid $60 a week by way of deduction without thereby contravening clause 5.2 of the Moranbah Accommodation Agreement and, by reason of the incorporation of that agreement in the enterprise agreement, without thereby contravening the enterprise agreement?

PN36

Can we take a moment just to set out the structure of our argument in relation to that issue. Our primary submission is that clause 5.2 of the Moranbah Accommodation Agreement was contractual in character and legal effect when it was made and it retained that character, its character as a contract, once it was incorporated into the enterprise agreement. If that is right, if that proposition is accepted, then it follows, in our submission, that the benefit conferred on BHP by clause 5.2 is capable of waiver by it in a way which does not contravene clause 5.2 or the enterprise agreement. That is our primary submission.

PN37

JUSTICE HATCHER: So if the agreement is contractual in character, it's the contracts between your client and the relevant unions?

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MR NEIL: Correct.

PN39

JUSTICE HATCHER: So what's the consideration provided by the unions that would render it - - -

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MR NEIL: Can we come to that in a moment, if we may? That is obviously an important question. Just for the moment, if we may just set out the structure of the argument. That's the primary submission.

PN41

Our secondary submission, which we haven't referred to in our written submissions, but which we make responsively to submissions made against us, particularly by the intervenor, our secondary submission is that, even if the Moranbah Accommodation Agreement, even if clause 5.2 of that agreement is not taken to be contractual in character, but, rather, to have a statutory effect by reason of its incorporation in the enterprise agreement, even then our submission is it is capable of lawful and effective waiver by BHP, lawful and effective in the sense that the waiver is not a contravention of the Moranbah Accommodation Agreement or the enterprise agreement.

PN42

Both the primary and secondary submissions depend on an anterior proposition, which is that clause 5.2 is relevantly for the sole benefit of BHP. The respondent and the intervenor both deny the correctness of that proposition on the ground, according to their case, that clause 5.2 gives rise to, or otherwise mandates, that BHP and the employees being provided with subsidised accommodation under the Moranbah Accommodation Agreement will enter into what is known as a rooming accommodation agreement under, and for the purposes of, Queensland's Residential Tenancies and Rooming Accommodation Act, and we say that is not correct, that there is no necessary connection between the Moranbah Accommodation Agreement, either generally or clause 5.2 in particular, and a rooming accommodation agreement under, and for the purposes of, the Queensland statute.

PN43

We have another submission. It is the second focus of the proposed appeal, which is that, putting to one side concepts of waiver that we have so far been addressing, the ordinary language of clause 5.2 does not require that the appellant make any deduction. As to that argument, we have said all we wish to say in writing and, subject to anything that the Full Bench may have of us, we didn't propose to supplement our written submissions on that issue by making any oral submissions this morning.

PN44

JUSTICE HATCHER: Just so I am clear on the factual basis of the dispute, in relation to the first sentence of 5.2, BHP - well, there seems to be two things in the first sentence: one is the - I will call it - I will say it's a requirement, but just take that as - - -

PN45

MR NEIL: An obligation or requirement in a neutral sense.

PN46

JUSTICE HATCHER: Yes. There's the obligation of employees to pay $60 per week and then, on one view, there's a further obligation on BHP to facilitate payment by deduction from salary.

PN47

MR NEIL: Yes.

PN48

JUSTICE HATCHER: You are, in effect, saying, 'If we waive any rights to payment from employees as step one.'

PN49

MR NEIL: Correct.

PN50

JUSTICE HATCHER: 'And then, as a consequent step, we won't deduct any more.'

PN51

MR NEIL: Correct. The Full Bench will have seen in our written submissions that we have characterised those two obligations, if I can use that again in a neutral way, the obligation of the employee to pay and the obligation of us to deduct as being inextricably connected. The authorisation to deduct - authorisation is the word we would use - is a machinery provision giving effect to the employees' obligation to pay.

PN52

JUSTICE HATCHER: And, again dealing with what is actually in dispute, you say BHP can do that without vitiating any of its obligations under the agreement to provide accommodation?

PN53

MR NEIL: Correct.

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JUSTICE HATCHER: So what do you say about the - - -

PN55

MR NEIL: And that the headline proposition - I'm sorry, I'm interrupting.

PN56

JUSTICE HATCHER: What do you say about the third sentence in 5.2?

PN57

MR NEIL: The reference to 'comply' in the third sentence we link back to the same word as used in the second sentence, so the subject matter of the second and the third sentences is different than the first. That's our answer to that question.

PN58

Still with the structure of the argument, if it please, we have addressed permission to appeal in writing and we do wish to say something more about that orally, but, if we may, we had proposed to do so at the conclusion of our submissions as the second-last topic.

PN59

Before we turn to shortly remind the Full Bench of where some of the salient evidence is to be found, could we just take a moment to note that yesterday we and the other parties to the proposed appeal filed and served updated outlines of submissions which really do no more than amend the footnotes to refer to the

updated appeal book. We hope the Full Bench has a copy of that version of the submissions.

PN60

Next, going just to the salient evidence, which we can deal with shortly, the Moranbah Accommodation Agreement was the subject of discussion and negotiation alongside bargaining for the enterprise agreement. Negotiations pertaining to the Moranbah Accommodation Agreement, so the evidence shows, took place between July and October 2012. The evidence is that the parties to the Moranbah Accommodation Agreement did not, during those negotiations, discuss the Queensland statute or rooming accommodation agreements under the Qld statute or Residential Tenancies as a concept.

PN61

We won't ask the Full Bench to go to this, but could we just shortly give these references. There's a statement of a Mr Stelmach behind tab 16 of the appeal book. The relevant passages are paragraph 12, 18, 22 and 28 to 30. Then there's a statement of Mr McGroarty. That's behind tab 17 of the appeal book and the relevant passages are paragraphs 15 to 19 and 24.

PN62

JUSTICE HATCHER: What can that evidence go to?

PN63

MR NEIL: To the extent that it is relevant, it is contextual; it provides evidence about the background facts and the context in which the Moranbah Accommodation Agreement was made. It is supportive of the proposition manifest in clause 1 of the Moranbah Accommodation Agreement that the purpose of the agreement was not the creation of rooming accommodation agreements under the Queensland statute, but rather the provision of subsidised accommodation by BHP to certain of its employees. It goes no further than that.

PN64

Separately, and subsequent to the commencement of the Moranbah Accommodation Agreement, BHP in fact entered into rooming accommodation agreements under the Queensland statute with at least some of the employees who were being provided with SPV accommodation under the Moranbah Accommodation Agreement. There's a statement by a Mr Piper, an employee, behind tab 14 of the appeal book. The relevant passages in that statement are paragraphs 31, 33 and 34. There is an example of such an agreement - it is the agreement that was in evidence in the primary proceedings - behind tab 12 of the appeal book.

PN65

The Full Bench will have seen, from the language of the Moranbah Accommodation Agreement and from the discussion of that in the decision of the Vice President, that the Moranbah Accommodation Agreement did not itself confer rights to the occupation of any particular room on any particular employee. The scheme of the Moranbah Accommodation Agreement contemplated that there would be posterior agreements made between BHP, as the provider of the accommodation, and individual employees who occupied the

accommodation whereby those employees had occupied the accommodation. That's a necessary consequence, obviously enough, of the structure of the Moranbah Accommodation Agreement to which BHP and the unions are party but not any individual employees, so there was necessarily going to be posterior individual agreements between BHP and individual employees. Some of those agreements, on the evidence at least, were rooming accommodation agreements under the Queensland statute.

PN66

The Vice President found at paragraph 167 of the primary decision, appeal book page 70, that that practice, the practice of entering into rooming accommodation agreements under the Queensland statute was 'widespread and standard'.

PN67

JUSTICE HATCHER: Widespread and what?

PN68

MR NEIL: Widespread and standard.

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JUSTICE HATCHER: Standard.

PN70

MR NEIL: That was the language used by the Vice President in that finding, but there is no evidence to support that finding to the extent that it matters.

PN71

In any event, any practice, one way or the other, as to the character of the posterior individual agreements made between BHP and individual employees was, and is, irrelevant as an aid to construction of clause 5.2. It is post-contractual conduct of the most obvious kind.

PN72

Next, in November - - -

PN73

JUSTICE HATCHER: Sorry, can I just pause there. Just remind me, what is the date of the current enterprise agreement?

PN74

MR NEIL: 2018.

PN75

JUSTICE HATCHER: So if, when that agreement was made, we can objectively attribute an intention to continue the incorporation of the Accommodation Agreement into the terms of the enterprise agreement - - -

PN76

MR NEIL: Yes, an explicit intention to do so, yes.

PN77

JUSTICE HATCHER: - - - does that then make what you call posterior agreements that were entered into before that time irrelevant?

PN78

MR NEIL: It - - -

PN79

JUSTICE HATCHER: That is, the parties, on one view, agreed to incorporate the accommodation agreement again with objective knowledge of the fact that these posterior agreements existed?

PN80

MR NEIL: The answer is it depends on whether one looks at the Moranbah Accommodation Agreement after its incorporation as being contractual or statutory or both. If, and to the extent, it is statutory, then obviously the relevant date for the purpose of your Honour's inquiry is the date of the enterprise agreement - we accept that - but, on the facts, it doesn't matter.

PN81

The next relevant event occurred in November 2021. The evidence is that, on that date, BHP told employees within the scope of the Moranbah Accommodation Agreement that, from 1 January 2022, employees occupying accommodation in the single person village would no longer be charged for that accommodation and the $60 deduction would therefore cease.

PN82

JUSTICE HATCHER: What was the reason that BHP did that?

PN83

MR NEIL: There is no evidence about that, except to the extent that one can infer from the terms of the notice itself, and the notice is at - there's an example of one notice at page 203 of the appeal book and we draw attention to the first sentence - the first paragraph is perhaps a better way to do it - the second paragraph, then, under the heading 'How will this affect you?', the first paragraph refers to the cessation of the deduction. Then, in the next paragraph, there is a reference to the termination of the rooming accommodation agreement.

PN84

JUSTICE HATCHER: Is that the purpose, to facilitate the ending of the rooming accommodation agreement?

PN85

MR NEIL: There is no doubt that, when one looks at this document, it is open to infer, and we would not suggest otherwise, that there was a connection between the cessation of the deduction and the separate termination of such rooming accommodation agreements as there were.

PN86

For completeness, could we just draw attention to the whole of the section under the heading 'How will this affect you?', which has the effect that we have accepted, and 'How will the change be made?', the three paragraphs that appear

under that heading. We cannot suggest that it would not be proper to infer from the terms of that notice that there was not a connection between the cessation of the deduction and the termination of such rooming accommodation as there were.

PN87

But, of course, we go on to say that that does not - that that circumstance says nothing about the construction of the Moranbah Accommodation Agreement and nor does it indicate that there is a necessary connection between clause 5.2 of the Moranbah Accommodation Agreement, or, indeed, any other provision in the Moranbah Accommodation Agreement, and a rooming accommodation agreement under the Queensland statute.

PN88

We have made the point in writing that, not only is there no reference in clause 5.2 to the Queensland statute or a rooming accommodation agreement under the statute, there is no mention of it in the Moranbah Accommodation Agreement at all. Perfectly silent about the character, the identity, character and legal effect of any of the posterior individual agreements that must necessarily have been entered into after the making of the Moranbah Accommodation Agreement and after its incorporation into the enterprise agreement.

PN89

There is evidence, too, of - I withdraw that. Before we leave this notice, one other feature of the notice to which we particularly wish to draw attention is the assurance given by the notice that there was no requirement for employees to vacate their accommodation as a consequence of the giving of the notice, and we draw attention to that feature of the notice by way of reflecting back to the stipulated purpose of the Moranbah Accommodation Agreement, which was the provision of subsidised accommodation.

PN90

So understood, the effect of the notice in the context of the Moranbah Accommodation Agreement was that, after the giving and coming into operation of the notice, employees would continue to have the benefit of accommodation of the kind identified in the Moranbah Accommodation Agreement with a subsidy of a hundred per cent, they would not be required to make any contribution to the cost of the provision of that - no longer required to make any contribution to the cost to BHP of the provision of that accommodation.

PN91

JUSTICE HATCHER: So what was the consequence for employees of the termination of the rooming agreements?

PN92

MR NEIL: As the intervenor in particular has pointed out, there are a number of provisions incorporated into - I will put it a different way. Parties to a rooming accommodation agreement under the Queensland statute have certain rights by virtue of the Queensland statute. Those rights exist because the statute operates on an anterior rooming accommodation agreement. If there was no rooming accommodation agreement, if the rooming accommodation agreement had been brought to an end, then, subject to any other agreement that might later be made,

there was no longer a rooming accommodation agreement on which the Queensland statute could operate.

PN93

Now, one of the incidents of a rooming accommodation agreement, accepting that there were in fact some, obviously enough, one of the incidents of a rooming accommodation agreement at the time was that, by virtue of a provision of the statute, as it then was, section 366 and 372 - there are copies in the bundle of authorities behind tab 12 - rooming accommodation agreements could be lawfully brought to an end by the giving of notice.

PN94

Subsequently, after the happening of these events, the Queensland statute was amended so as to affect the right of a provider of accommodation to terminate a rooming accommodation agreement by notice, but those amendments were not operative at the time of these events.

PN95

For completeness, we have included, behind tab 11 of our bundle of authorities, a version of the Act that has the currently-applying provisions relating to termination, but the ones that were applying at the time are those behind tab 12.

PN96

JUSTICE HATCHER: So we can reasonably infer from BHP's action that it wished rights that employees may have had under the Residential Tenancies Act not to apply any more?

PN97

MR NEIL: We would put it rather differently. We would say that BHP no longer wished to be a party to such rooming accommodation agreements as then existed and brought them to an end in accordance with their terms.

PN98

JUSTICE HATCHER: Were there any particular rights or obligations under that Act which were causing BHP a practical concern such that it took these steps? That is, I am just - - -

PN99

MR NEIL: The evidence doesn't allow - - -

PN100

JUSTICE HATCHER: It seems to me we don't know what this dispute is really all about. I mean obviously BHP had a problem with something and took a certain step to achieve a legal result, but I'm just trying to understand what is underlying all of this.

PN101

MR NEIL: The answer is that that was not explored in the dispute below. There is some evidence about fears that at least some employees had that the termination of rooming accommodation agreements would permit hot bedding, I think is the expression.

PN102

JUSTICE HATCHER: Or hot bunking, yes.

PN103

MR NEIL: Hot bunking, or whatever it might be, but that never rose any higher than fears. There is no evidence that that has ever actually happened.

PN104

VICE PRESIDENT CATANZARITI: But isn't there, in the actual letter, the point that previously you would have to give notice to go and clean and do maintenance?

PN105

MR NEIL: Yes, there's some - - -

PN106

VICE PRESIDENT CATANZARITI: Once you remove that, then you've got the rosters from the employee and you worked around using their rosters in terms of access, so that is a new and significant change, on one view.

PN107

MR NEIL: On one view. There is certainly evidence of that, but whether that was the purpose, there is no evidence behind it. Whether the purpose of the change was to create that new circumstance, there's no evidence about that one way or the other.

PN108

VICE PRESIDENT CATANZARITI: But the assumption of that clause is, 'If you're not at work, we can have access to the property at any time'?

PN109

MR NEIL: For the purpose of cleaning and so on, yes.

PN110

DEPUTY PRESIDENT ANDERSON: Mr Neil, does it follow that the loss of any entitlements or rights under the Queensland legislation to the relevant employee cohort carried with it a benefit to BHP?

PN111

MR NEIL: Sorry, I misheard the beginning of the question.

PN112

DEPUTY PRESIDENT ANDERSON: Does it follow that the loss of rights or entitlements to the employee cohort as a consequence, that is, rights or entitlements that may have accrued under the state legislation, does it follow from that fact that there was a benefit to BHP as a consequence of the action it took?

PN113

MR NEIL: It does not.

PN114

DEPUTY PRESIDENT ANDERSON: Why not?

PN115

MR NEIL: There is simply nothing that would enable - there is no direct evidence of that and there is nothing that would enable such an inference to be drawn. So that I can be explicit about that, we would accept that that is one of a number of logically-available possibilities, but there is nothing in the evidence that indicates that it's a more likely possibility than anything else.

PN116

DEPUTY PRESIDENT ANDERSON: You see, the difficulty is, from what I have read in the material and correct me if I am wrong, the only reason that BHP has given to employees for making this change is a desire for some standardisation as against certain other practices in other areas of its operations.

PN117

MR NEIL: That's so, but there's no explanation that goes beyond that, yes.

PN118

DEPUTY PRESIDENT ANDERSON: Precisely.

PN119

MR NEIL: Yes.

PN120

DEPUTY PRESIDENT ANDERSON: Precisely. So it leaves me pondering whether or not the standardisation that it seeks gave rise to a more direct benefit or advantage consequent on that decision.

PN121

MR NEIL: One of the difficulties in that is that the only way to arrive at an answer to that question, assuming, with respect, that the question relevantly bears on the answer to the arbitration question, which is another issue, of course, is that a nuanced evaluation is necessary to arrive at the answer to that question. By that, we mean, yes, we accept that rooming accommodations by virtue of - I withdraw that. We accept that the existence of a rooming accommodation agreement within the meaning of the Queensland statute was the trigger for the operation of the statute on that agreement. One of the incidents that the statute provided for, or some of the incidents that the statute provided for, operated to the advantage of residents; others operated to the advantage of the provider of the accommodation. It's a mix.

PN122

One of the statutory incidents of a rooming accommodation at the time was that it could be terminated by the provider of the accommodation lawfully in accordance with the terms of the statute, so that, to the extent there were, at the time, rooming accommodation agreements, they were all rooming accommodation agreements which, by operation of the Queensland statute, could lawfully be brought to an end by BHP by the giving of notice, which is exactly what it did.

PN123

Nothing in the Moranbah Accommodation Agreement cut down - removed or cut down the right that BHP had by virtue of the Queensland statute to terminate those agreements.

PN124

DEPUTY PRESIDENT ANDERSON: You commenced your address this morning by putting to us, as I understood it, that clause 5.2 provides for a benefit to BHP.

PN125

MR NEIL: Yes.

PN126

DEPUTY PRESIDENT ANDERSON: If that proposition is to be accepted, then the question that arises then is are they the only party to either the contract or the statutory provision, however one construes it, that is a beneficiary?

PN127

MR NEIL: Yes, we accept that and we hope we have fronted up to that question. Our proposition is put, as the Full Bench will have seen, that BHP is the sole beneficiary, the exclusive beneficiary, of the first sentence of clause 5.2 of the Moranbah Accommodation Agreement. That proposition holds good, we say, when one looks at the language and context of that sentence. The challenge that is made to that proposition is, 'Don't worry about what the first sentence to clause 5.2 actually says, don't worry about the stipulated purpose of clause 5.2 and the Moranbah Accommodation Agreement in general, the real purpose of clause 5.2 is to give rise to a rooming accommodation agreement under the Queensland statute.'

PN128

Now, we have resisted that. We resisted it below, we have resisted it in writing and we resist it now on the grounds that we have identified, and they all fall under the heading - there is nothing in clause 5.2, there is nothing in the Moranbah Accommodation Agreement that has the consequence that it requires, in compliance with that agreement, that the necessary posterior individual agreements between BHP and particular employees be, in fact, rooming accommodation agreements under the Queensland statute. They could be anything. They could be common law agreements unaffected by the Queensland statute, as indeed they are now.

PN129

DEPUTY PRESIDENT ANDERSON: Thank you.

PN130

MR NEIL: We accept that is an important element of our case.

PN131

Still with the facts, there is in evidence at least one notice to leave under the Queensland statute. That was the notice that was then required to bring a rooming accommodation to an end lawfully under sections 366 and 372 of the Queensland

statute as it then stood. If one could have a look at the statement of Mr Piper behind tab 14, paragraph 163, and then annexure DP3 to Mr Piper's statement - - -

PN132

JUSTICE HATCHER: What page is that?

PN133

MR NEIL: Still behind tab 14 at page 204. It accompanied the document at page 203. One gets that from the document at page 203. That form - I don't know that there was any evidence about this, but one can line it up - the notice to leave is the form that was then authorised under the Queensland statute to bring a rooming accommodation agreement to an end. Indeed, on its face, it's the prescribed form for that purpose.

PN134

On 1 January 2022, the - - -

PN135

JUSTICE HATCHER: Sorry, before you move on, I am just looking at the notice. Notwithstanding what the covering letter says, what is the lawful effect of the reference to vacating a property and using reasonable force to remove someone?

PN136

MR NEIL: It had no effect because that effect is obviously - that's obviously a feature of the prescribed form, but then the right to insist on that requirement was expressly negatived by the accompanying notice under the heading, 'What do I need to do?' Answer, 'There is no requirement for you to vacate your current accommodation.' So the answer is no effect.

PN137

JUSTICE HATCHER: That might be that's until such time as BHP changes its mind. Do you say the notice to leave is negatived by BHP's obligations under the Accommodation Agreement?

PN138

MR NEIL: There was certainly no notice to leave by the prescribed time, by the time stipulated on page 204.

PN139

JUSTICE HATCHER: But is the effect of that notice to leave negatived by BHP's obligations under the Accommodation Agreement?

PN140

MR NEIL: No, it's not, no.

PN141

Those are the background facts, if we may. Could we turn then - - -

PN142

JUSTICE HATCHER: I need to understand this, Mr Neil. If BHP had not purported to terminate the obligation to pay and terminate deductions and had not

issued these notices, employees would have the right to retain their current SPV (indistinct) under the Accommodation Agreement?

PN143

MR NEIL: No, they would have - if these events had not happened, if the notice on page 204 had not been given, then this employee, Mr Piper, who was party to a rooming accommodation agreement, would have continued to be party to a rooming accommodation agreement and he would have had the rights and obligations that the Queensland statute attached to a rooming accommodation agreement made under that statute. So the source of his rights would have been that agreement.

PN144

JUSTICE HATCHER: Yes, but, overlaying that, he also had rights under the Accommodation Agreement itself?

PN145

MR NEIL: Yes, but they were different in character.

PN146

JUSTICE HATCHER: I am just talking about the rights under the Accommodation Agreement. Were those rights under the Accommodation Agreement negatived by the issuing of this notice?

PN147

MR NEIL: No.

PN148

JUSTICE HATCHER: That's 'No'. All right.

PN149

MR NEIL: 'No' is the answer to that question, a firm, emphatic, unqualified 'No'. And why is that so? Because, notwithstanding the giving of the notice on page 204, notwithstanding the termination in accordance with the Queensland statute of the rooming accommodation between Mr Piper and BHP, Mr Piper continued to be an employee, or an eligible employee, within the scope of the Moranbah Accommodation Agreement. In respect of Mr Piper, just as in respect of every other eligible employee, the Moranbah Accommodation Agreement required that BHP offer him, along with other eligible employees, a range of company-subsidised accommodation options, including, in accordance with the provisions of the Moranbah Accommodation Agreement, accommodation in a single person village, and those obligations continued unaffected by the giving of the notice on page 204.

PN150

JUSTICE HATCHER: And that's by virtue of section 29 of the Fair Work Act?

PN151

MR NEIL: In part, yes, but also by virtue of the operation of the Moranbah Accommodation Agreement and its terms and the enterprise agreement.

PN152

If it be convenient now, could we turn to our primary submission on the waiver issue and that is that the Moranbah Accommodation Agreement was, at its making, and continued to be after its incorporation into the enterprise agreement, contractual in character and legal effect. Our submission is that, looking at the Moranbah Accommodation Agreement at the time that it was made, all of the elements of an enforceable contract are satisfied.

PN153

Consideration has been raised against us and Your Honour The President took that issue up with us a little earlier. May we come to it now. In our submission, consideration adequate to support the Moranbah Accommodation Agreement was given by the union parties to that agreement when they agreed conclusively to resolve the matters that are the subject of the Moranbah Accommodation Agreement.

PN154

The evidence is that during the negotiations for the predecessor to the current enterprise agreement, the 2018 agreement - the predecessor agreement was made in 2012 - there was, as a live issue during the bargaining for the 2012 enterprise agreement, dissatisfaction amongst employees and unions about accommodation agreements. Mr Stelmach gives evidence about this behind tab 16 of the appeal book, commencing at page 215, paragraphs 15 and 25.

PN155

When one looks at clauses 7 and 9 of the Moranbah Accommodation Agreement and reads them in light of the recitals, it is our submission that it is clear that the resolution of the bargaining referred to in the recitals, by the making of the Moranbah Accommodation Agreement, was a definitive resolution of bargaining on that topic, a definitive resolution of bargaining on that hitherto source of dissatisfaction, and that is a valuable consideration sufficient to support the agreement.

PN156

JUSTICE HATCHER: But doesn't consideration need to be reflected by some obligation under the contract?

PN157

MR NEIL: The obligation is that the contract definitively bring to an end the issue.

PN158

JUSTICE HATCHER: What operative clause of the agreement constitutes the consideration?

PN159

MR NEIL: We get that by reading clauses 7 and 9 together.

PN160

JUSTICE HATCHER: What part of 7?

PN161

MR NEIL: The whole of. It restricts the capacity to vary the agreement, and a necessary consequence of that, in our submission, is that the agreement can only be varied subject to the mechanisms in the agreement. That makes the agreement a conclusive resolution of that issue, a binding agreement that resolves that source of dissatisfaction and brings bargaining to an end on that issue. So that's our answer to the consideration question, the issue.

PN162

The next point we make in connection with our primary submission is that when any instrument or writing is incorporated into an enterprise agreement by virtue of section 257, it is incorporated with all its legal incidents.

PN163

We have referred in our written submissions, by way of analogy, to *Arrowsmith v Micallef*, which is behind tab 2 of our bundle of authorities. It concerns the incorporation into an order of a court of an anterior written agreement, and the relevant passage is at paragraph 39 and it stands for the proposition that when a written agreement is incorporated by reference to a court order, the agreement falls, after its incorporation, to be construed in the same manner that it had in its original form as an agreement. That's in the opening words of paragraph 39. Our submission is that the same principle applies to incorporation by the operation of section 257.

PN164

JUSTICE HATCHER: So does it follow that every term and incident of the Accommodation Agreement then becomes subject to section 50 of the Fair Work Act?

PN165

MR NEIL: Yes, but the instrument that is incorporated is construed and applied as a contract rather than as - it doesn't alter its character and become statutory in effect.

PN166

JUSTICE HATCHER: Let's just take a step back. Obligations under section 50 under the scheme of the Act can be enforced not just by parties to enterprise agreements but by third party entities - - -

PN167

MR NEIL: Correct.

PN168

JUSTICE HATCHER: - - - such as the Fair Work Ombudsman. That, of itself, gives an entirely different character than a private contract.

PN169

MR NEIL: It provides for a different method of enforcement.

PN170

JUSTICE HATCHER: I am just having trouble how you marry that with the notion that the incorporated terms have somehow got some sort of different character from the terms proper of an enterprise agreement.

PN171

MR NEIL: Not different, relevantly. It is incorporated or imported into the enterprise agreement as a contract and it carries with it all of the incidents of a contract. One of the incidents of a contract is that benefits under that contract are capable of being waived by the party entitled to that benefit. That's an incident of every contract, and our primary submission is that the Moranbah Accommodation Agreement had that incident when it was made as a contract, if we are right about that proposition, and it continued to have that incident once it was incorporated into the enterprise agreement and it did not lose that incident by virtue of that incorporation.

PN172

Another consequence if one looks at enforcement is that specific performance as an equitable remedy is not available in relation to an enterprise agreement. There are statutory mechanisms for a court to make an order requiring a party to comply with an enterprise agreement, but equitable specific performance is not one, but that doctrine does apply to a contract and the Moranbah Accommodation Agreement would not lose that incident by virtue of its incorporation.

PN173

Another way to look at our argument in this regard is through the prism of an authority that we have added to our bundle. We have handed it up separately. A decision of Young J, then the Chief Justice in Equity in the Supreme Court of New South Wales, in *Vella v Permanent Mortgagees*. His Honour was looking at incorporation by reference into a contract, but the same, in our submission, principles apply. The passage we had in mind is in paragraph 296. In our submission, the same analysis would apply to incorporation of a contract into an enterprise agreement by the operation of 257.

PN174

The same exercise would be required. First, what terms have the parties incorporated, what are the terms? Second, what do those terms mean in the context of the contract into which they have been incorporated? Now, in this case, that would direct attention to the enterprise agreement and what the enterprise agreement said about the incorporated instrument. The answer to that in the 2018 enterprise agreement is in clause 34.2(g), particularly subclause (2). That provision is in our bundle of authorities behind tab 10 on page 354. That makes perfectly plain, that's an explicit indication in the enterprise agreement itself of the intention of the parties to that enterprise agreement that once the Moranbah Accommodation Agreement is incorporated into the enterprise agreement, it will retain its character as a contract.

PN175

JUSTICE HATCHER: It seems to me it's possible that the agreement could have a dual status. One, it might, if one accepts your argument, have its own separate existence as a contract with all the usual legal remedies available for enforcement of a contract.

PN176

MR NEIL: Yes.

PN177

JUSTICE HATCHER: But, secondly, the act of incorporating it into the 2018 agreement gave it a separate status as part of a statutory instrument where they are being enforced under the provisions of the Fair Work Act.

PN178

MR NEIL: There are two answers we give to that. One, of course, is our secondary submission, and we will come to that in a moment, if we may, which is that it doesn't matter if it becomes statutory in effect, but the second is to say that one wouldn't reach that point if one gave effect to the provisions of clause 34.2(g), which makes it plain that, whatever it is, it is going to be a contract once it's incorporated, and our submission would necessarily be that that excludes the other possibility that your Honour has mentioned.

PN179

JUSTICE HATCHER: Just to clarify one thing, in relation to section 738 of the Fair Work Act - - -

PN180

MR NEIL: 738? Would your Honour just excuse me for a moment. I will just bring that up. I'm so sorry.

PN181

JUSTICE HATCHER: (c) only permits the Commission to conduct private arbitrations in relation to contracts of employment and other written agreements in respect to confined matters.

PN182

MR NEIL: Yes.

PN183

JUSTICE HATCHER: Of which this wouldn't be one; is that correct?

PN184

MR NEIL: I will just have a look. I'm sorry, your Honour, would your Honour be good enough to repeat that question?

PN185

JUSTICE HATCHER: We are dealing with a decision that was made pursuant to section 739.

PN186

MR NEIL: Yes.

PN187

JUSTICE HATCHER: 738 governs the scope of 739. Section 738 provides different ways in which the division of which 739 falls can apply. Insofar as 738 refers to contracts of employment or other written agreements with a dispute

procedure, it limits the matters which can be dealt with and this wouldn't fall within any of those matters. Is that accepted?

PN188

MR NEIL: No. It would be if the only source of jurisdiction for dealing with this dispute was clause 8 of the Moranbah Accommodation Agreement, but we would not submit that that is the only source of jurisdiction. Incorporation means something. The Moranbah Accommodation Agreement is incorporated into the enterprise agreement. Once it's incorporated into the enterprise agreement, that engages the dispute settling procedure relevantly.

PN189

JUSTICE HATCHER: Yes. The point I am trying to get to is that the matter that was run before the Vice President was run on the basis that we are dealing with a dispute arising under an enterprise agreement.

PN190

MR NEIL: Yes, yes.

PN191

JUSTICE HATCHER: (b) not (c).

PN192

MR NEIL: Yes. We don't deny that proposition.

PN193

JUSTICE HATCHER: Therefore, to the extent that we are dealing with the Moranbah Accommodation Agreement, we are doing so as part of an enterprise agreement, not as an arbitration pursuant to the dispute procedure in a private contract.

PN194

MR NEIL: Correct. Our primary submission doesn't deny the proposition that your Honour has just put to us. We do not deny, indeed we accept, as we must, that the Moranbah Accommodation Agreement has been incorporated into the enterprise agreement. The only question is what character does it have, what incidents does it carry with it once it is incorporated?

PN195

One consequence of incorporation is that it enlarges the subject matter of the enterprise agreement so as to engage the dispute settling procedure in the context of this dispute. We accept that.

PN196

JUSTICE HATCHER: All right. Thank you.

PN197

MR NEIL: One of the incidents of a contract that, on our primary submission, was an incident that was incorporated in the enterprise agreement along with every other aspect of the Moranbah Accommodation Agreement was the doctrine that a party who has the exclusive benefit of a provision of the contract may waive

that benefit, and we have given some references to the relevant authorities in our written submissions. Heron Garage is perhaps one that might stand for all of them.

PN198

We accept, as we did earlier, that the doctrine operates only in relation to a provision which is for the exclusive or sole benefit of the party waiving that benefit. We have to meet that test. We accept that, but we say that that is so in relation to the first sentence of clause 5.2. The first sentence of clause 5.2 is solely and exclusively for our benefit because its only subject matter, its only textual and contextual purpose is to require employees to make a contribution to BHP's cost of providing accommodation under the Moranbah Accommodation Agreement. That's its only purpose.

PN199

It is significant in that regard that the language of the first sentence of clause 5.2 refers to what it calls 'a subsidised rate'. That's a subsidised rate and that language of subsidy, of course, echoes that which appears in the first sentence of the second paragraph in clause 1. The subsidy that BHP is required by the Moranbah Accommodation Agreement to make is to make a payment, to pay for the accommodation over and above anything that the employees contribute. So characterised, the amount of the employees' contribution is necessarily a benefit exclusively to BHP. It defrays the making of that contribution, if paid, defrays some of the cost that BHP is otherwise required to bear in providing the subsidised accommodation. If that is so, then it follows that, contractually, BHP was entitled to waive that benefit, to waive the benefit of receiving a contribution from employees towards the cost of providing accommodation. And that's what it did. It notified employees that they would no longer be charged for their occupation of single purpose village accommodation. Accordingly, it follows, in our submission, that there is no obligation in clause 5.2 of the Moranbah Accommodation Agreement, and not elsewhere in the Moranbah Accommodation Agreement, no obligation on employees to pay and no concomitant obligation on us to make a deduction. To put it another way, there is nothing to deduct.

PN200

Could we then turn to our secondary submission. It is a submission that takes as its starting point the proposition that statutory rights of the kind conferred on us, on BHP, by clause 5.2 of the Moranbah Accommodation Agreement are capable of being waived by BHP.

PN201

We accept, as we have said, we have not dealt with that in writing, but it is made responsively to submissions made against us particularly by the intervenor. The secondary submission is important in the structure of our case because it deals with two circumstances, both of which arise if our primary submission is not accepted.

PN202

It deals with the circumstance where the Moranbah Accommodation Agreement, as Your Honour The President suggested in arguendo, has a dual character, statutory and contractual; it also deals with the circumstance where, contrary to

our primary submission, the Moranbah Accommodation Agreement, upon incorporation, loses its contractual character and assumes an entirely statutory character and legal effect. The secondary submission is an answer to both those circumstances.

PN203

We start with *Sandringham Corporation v Rayment*, which appears behind tab 7 in our bundle of authorities. We might just invite the Full Bench to go to page 527 of the decision. It's page 284 of the bundle of authorities. Against the heading 'Waiver and Estoppel':

PN204

> *It is a well-known principle of law that a man may, by his conduct, waive a provision of an Act of Parliament intended for his benefit.*

PN205

Then the Full Bench will see that cited in support of that statement of principle is *Wilson v McIntosh*. *Wilson v McIntosh* we have included behind tab 9 of our bundle of authorities.

PN206

JUSTICE HATCHER: Sorry, I'm just a bit behind. What was the Sandringham page reference in the bundle?

PN207

MR NEIL: In the bundle, it was page 284 and, in the report, 527. I am reading from a hard copy. I do hope that the electronic copy replicates the same page numbers.

PN208

JUSTICE HATCHER: Yes.

PN209

MR NEIL: It's the first sentence that appears against the heading 'Waiver and Estoppel'. Now there's a qualification to the principle there set out and we will come to that in a moment, if we may, but we wanted to start with the foundational principle. Cited in support of that is *Wilson v McKintosh*, which is behind tab 9 of the bundle. It begins at page 303 of the bundle. The relevant passage is 307 of the bundle, 133 of the report. The question here was whether it was competent for a landowner to waive the lapse of a caveat. One can see that in the first sentence of the first full paragraph of page 133 of the report, 307 of the bundle. Dropping down on that page, about point 7 or 8, the Full Bench will see:

PN210

> *In holding that it was competent for an applicant to waive the lapse, their Lordships did not understand that they are differing from the learned judges in the court below.*

PN211

That was the New South Wales Court of Appeal. There is then a reference to *Phillips v Martin*. *Phillips v Martin* was a judgment of the New South Wales

Court of Appeal. At the foot of this page, the Privy Council quotes from a judgment of Jordan CJ:

PN212

Here there is abundant evidence of waiver and it is quite clear that a man may, by his conduct, waive a provision of an Act of Parliament intended for his benefit.

PN213

Then there's some further discussion at the top of the next page, still quoting with approval from *Phillips v Martin*:

PN214

It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts.

PN215

As I say, there is a qualification to that principle so expressed. The qualification is discussed in, amongst other places, *Commonwealth v Verwayen*, which we have included behind tab 3 of our bundle. We had in mind in particular a passage from the judgment of Mason CJ that is on page 100 of our bundle, 404 of the report, the second full paragraph on that page:

PN216

Putting estoppel to one side for the moment, it is desirable to consider, as Mr Thompson invited, the existence of a doctrine of waiver of the benefit of a statutory right. Undoubtedly some statutory rights are capable of being extinguished by the person for whose benefit they have been conferred.

PN217

Then the Full Bench will see there's a reference to both Sandringham and *Wilson v McIntosh*. But then, just passing over a few lines, this passage:

PN218

More importantly, some rights may be conferred for reasons of public policy so as to preclude contracting out or abandonment by the individual concerned. It is therefore necessary to examine the relevant statutory provision in this case in order to ascertain whether it is susceptible to extinguishment in that way.

PN219

We stop reading there. In that passage is expressed the qualification to the foundational principle.

PN220

The same concept then is taken up on the next page, page 101 of the bundle, 404 of the report. May we invite attention to the whole of the paragraph that begins with the words, 'On the footing that the right to plead the statute.'

PN221

It follows from that qualification that the doctrine that a party who is entitled to the benefit of a statutory right may waive that benefit does not operate if to do so would be contrary to the terms and purpose of the statute in question. There is no authoritative statement of which we are aware that our researches have turned up that would support a proposition that, in every case and every circumstance, it is impossible for a party to an enterprise agreement to waive a benefit to which that party is entitled under the enterprise agreement.

PN222

JUSTICE HATCHER: So can an employee waive their entitlement to a certain level of wages under an enterprise agreement?

PN223

MR NEIL: The answer is, yes, but not in a way that can be enforced against the employee. Can we come back to that? We are going to address that circumstance, if we may, squarely, but, before we did so, we had wished to remind the Full Bench of an obiter statement by French J, as his Honour then was, as a member of the Federal Court in Metropolitan Health Service Board. We have included that authority, which is unreported, behind tab 6 of our bundle. I'm sorry, I don't have in my copy the relevant page numbers, but French J's judgment is the first which is reported.

PN224

May we first invite the Full Bench's attention to paragraph 17 under the heading 'Estoppel and Waiver in the Enforcement of Industrial Awards'. So paragraph 17 is the starting point; then paragraph 19; then paragraph 20, which is the passage on which the intervenor relies; then, paragraph 21, we would particularly invite your Honours' attention to paragraph 21 up to the reference to Verwayen.

PN225

Then, in paragraph 22, his Honour refers to what his Honour describes as :

PN226

...a well established line of judicial authority in relation to industrial awards inimical to the notion of contracting out and, a fortiori, the invocation of principles of estoppel or waiver in relation to them.

PN227

And makes the point that that line of authority goes right back to the beginnings of industrial law in this country. His Honour starts with a reference to the Victorian Factories and Shops Act of 1915, which identifies:

PN228

The primary object of that Act the benefit of the public in that it was an act not merely for regulating certain trade matters, but, generally speaking, one of social reform, an Act for improving the condition of wage earners and others, not only for their sake but for the public betterment that will ensue from those provisions.

PN229

Then there is a reference to the statute having, as its purpose, to protect employees as a class. Then his Honour goes on to apply that same purpose to the Workplace Relations Act, and we would accept that that is a purpose that flows through into the Fair Work Act.

PN230

Two points we make about this in addition to that point, to this judgment. One, everything that his Honour says is, of course, expressed by his Honour to be consistent with the result in Verwayen and the passage from Mason CJ's judgment of which we reminded the Full Bench a moment ago. Second, everything that French J said on this point was obiter. The plurality dealt with this topic in paragraph 62, leaving it open, leaving the question open - paragraph 62.

PN231

The next point we make in this regard is that all of the authorities in this area, all of the authorities that deal with the qualification to the rule that a party entitled to the benefit of a statutory right may waive that benefit, all of them involve a factual circumstance that is the opposite of that which we have in this case. They all concern whether a party who is obliged to give a benefit by the statute, obliged by the statute to give a benefit, can enforce against the party entitled to that benefit a waiver by the latter party.

PN232

Here we are not concerned with one party seeking to enforce a waiver against the waiving party, only with the question of whether it is lawful for a party entitled to the benefit to voluntarily give it up, or, put another way, whether, if that party voluntarily gives up the benefit, it is, by virtue of doing so, acting in a way which contravenes the statute which confers the benefit.

PN233

The correct position, in our submission, is that the availability of waiver in every circumstance depends on the terms and purpose of the statutory provision in question, assessed in the context of the particular waiver and the way in which that particular waiver arises and falls to be considered.

PN234

In that regard, may we remind the Full Bench of what was said at first instance in *ACE Insurance v Trifunovski* by Perram J. We have included that behind tab 1 of our bundle. We wanted to start, if we may, with paragraph 135, page 40 of the bundle, 570 of the report. His Honour, having referred to the fact that contracting out is not permissible in the case of certain statutes, goes on to say this:

PN235

> *Whether laws concerning estoppel may achieve the very result which the forbidden contract may not has, in the main, turned upon a consideration of the policy at which the legislative prohibition is aimed.*

PN236

His Honour then refers to the advice of the Privy Council in Kok Hoong.

PN237

Going over to paragraph 139, there is a reference to a discussion of the prohibition of contracting out in the Workplace Relations Act:

PN238

The agent submitted that these cases...

PN239

Josephson and Byrne:

PN240

...showed that principles of estoppel and waiver did not apply to such obligations...

PN241

Being obligations under the Workplace Relations Act:

PN242

...but so far as I can see, neither case contains any such statement.

PN243

There is then a reference to the judgment of Moore J in *Jackson v Monadelphous Engineering Associates Pty Ltd*:

PN244

His Honour approached the matter in a way which was consistent with Kok Hoong, that is to say, he sought to discern the purpose of the statutory prohibitions: 'I consider that Division 3 should be approached on the same footing having regard to the stated purpose of it. It is beneficial legislation...and intended to confer rights on employees.' Consequently, so his Honour reasoned, 'it is unlikely an estoppel precluding their enforcement can arise from the conduct of an employee.'

PN245

Perram J then goes on to apply the same reasoning to the Workplace Relations Act in paragraphs 140 all the way through to 146

PN246

JUSTICE HATCHER: Mr Neil, I am just trying to think this through. If, having purportedly waived payment and refusing to make the deductions, BHP, six months down the track, took proceedings against employees for contravening their obligation to pay, then you may well be right that there would be an estoppel defence available.

PN247

MR NEIL: Correct.

PN248

JUSTICE HATCHER: But how would it work if the Fair Work Ombudsman, for whatever reason - they might have suspicion about how this came about - decided to take proceedings against employees for not complying with an obligation under the enterprise agreement?

PN249

MR NEIL: It would still run, in our submission.

PN250

JUSTICE HATCHER: How would it arise?

PN251

MR NEIL: Because - - -

PN252

JUSTICE HATCHER: What has the Fair Work Ombudsman done that would estop them from bringing that proceeding?

PN253

MR NEIL: It wouldn't be the Fair Work - what would be estopped would be the underlying entitlement to receive the benefit, which, by its conduct, BHP have waived.

PN254

JUSTICE HATCHER: It may not be about the payment; it may simply be a proceeding for imposition of a civil penalty for not complying with an obligation of an agreement. How does an estoppel arise in that circumstance?

PN255

MR NEIL: It would arise because, in that circumstance, on the proper understanding of the waiver and the statute, BHP would have effectively waived the right to receive the money in a way that extinguished that entitlement in a legally-effective way, and that would operate against BHP regardless of who brought the suit.

PN256

JUSTICE HATCHER: That's fine for BHP, but how can your conduct affect the rights of the Fair Work Ombudsman under the Act to enforce section 50?

PN257

MR NEIL: Because to enforce an entitlement that existed, we would have extinguished that entitlement by our conduct. There is another - - -

PN258

JUSTICE HATCHER: You said you were going to come back to the question which I raised earlier that, on that logic, employees can waive their entitlement to a certain amount of wages, and it follows from what you have just said that the Fair Work Ombudsman would be estopped.

PN259

MR NEIL: Our answer to that would be - take as an example an enterprise agreement which, like every enterprise agreement, creates by its terms a statutory right for an employee to receive a certain sum of money in return for their work. Now, suppose that the employee chooses not to accept a payment made by the employer under the enterprise agreement. The question - I withdraw that. An employee who did that would not be acting in a way that was unlawful in the

sense that she or he was thereby contravening a provision of the enterprise agreement by their conduct. On the other hand, the conduct of the employee, supposing it gave rise to a waiver, could not be enforced against the employee so as to extinguish the entitlement, so the waiver would be legally ineffective, legally unenforceable.

PN260

JUSTICE HATCHER: Why is that? The employee has waived an entitlement that's solely to their benefit.

PN261

MR NEIL: Because we would accept that - - -

PN262

JUSTICE HATCHER: And they say, 'You are no longer authorised to pay it into my bank account'?

PN263

MR NEIL: We would accept that when one looks at the Fair Work Act as a whole, particularly, for example, sections 43, 44, 50, 55, 56, 61, when you put all of those provisions together, it is apparent that an object or a purpose of the Fair Work Act is to protect the interests of employees as a class by laying down minimum terms and conditions of employment, and that, we accept, is a public purpose.

PN264

JUSTICE HATCHER: But employers have - - -

PN265

MR NEIL: If it's a public purpose, it can't be - - -

PN266

JUSTICE HATCHER: But employers having provisions for their benefit as well, can they waive them? For example, a provision in an award which allows termination without notice for serious misconduct, can that be waived

PN267

MR NEIL: Yes, and it is regularly in practice.

PN268

JUSTICE HATCHER: So how does the scheme distinguish between some categories of entitlement and others?

PN269

MR NEIL: Some are for a public purpose and some are not. There's obviously a public purpose in ensuring that all employees covered by the enterprise agreement have an entitlement and an enforceable entitlement to the minimum rate of pay, and because that purpose is public in character, it is incapable of being effectively waived by the employee. What does that mean? Going back to the language that French J, as his Honour then was, used in the Health Service Board at tab 6, paragraph 20, in the first sentence:

PN270

The inability to contract out of an award by virtue of its statutory operation militates against the proposition that parties may be estopped from enforcing its provisions or may waive its benefits in a way that is legally enforceable.

PN271

We emphasise those last words. An employee simply cannot waive their entitlement to receive the wages stipulated in an enterprise agreement in a way that is legally enforceable against the employee. To put it another way, an employer couldn't raise the employee's waiver as an answer or a defence to a claim to be paid.

PN272

But that's a different question than the question with which we are here concerned. The analogue of the questioning with which we are here concerned is: would an employee who voluntarily chose not to receive a particular payment, for example, would that employee thereby be acting contrary to the enterprise agreement? Would that employee be contravening the enterprise agreement in a way that made the employee's conduct unlawful? That's a different question, and the answer to that question is 'No'.

PN273

JUSTICE HATCHER: The analogy might be that the employee has an obligation to nominate the bank account into which the payment is to be made and they refuse to do so and, in fact, close down the capacity to pay into their account.

PN274

MR NEIL: That would be a different circumstance. That would be choosing to do something in order to defeat an obligation. Factually, that would be different; that wouldn't be a waiver.

PN275

JUSTICE HATCHER: Well, it's the same thing, it's - - -

PN276

MR NEIL: That would be just a failure to cooperate.

PN277

JUSTICE HATCHER: a machinery provision which supports an entitlement to payment, that is, the employer has to pay wages, the employee has to nominate a bank account into which the wages are to be paid and the employee says, 'I don't want to be paid wages so I'm not going to nominate a bank account.'

PN278

MR NEIL: If they don't want to receive the wages and act accordingly, would they be contravening the enterprise agreement? We would say 'No', but at the risk of labouring the point, would the employee be in contravention of the enterprise agreement by not receiving the payment, again we would say 'No'.

PN279

Another example, a way to illustrate what we mean by this, in our submission, is to look at hours of work. Clause 11 of the enterprise agreement, clause 11.1(a), page 327 of the bundle, provides that:

PN280

The ordinary hours of work will be an average of 35 hours per week averaged over a roster cycle.

PN281

The manifest purpose of that provision, construed in the light of the statutory framework that we have identified, is to protect the interest of employees to whom it applies by limiting the number of ordinary hours of work that they can be required to work in return for the wage stipulated by the enterprise agreement. We would accept that it would undermine that purpose and undermine its public character if an employer were able to enforce a waiver against an employee so as to require the employee to work more than the 35 ordinary hours a week. For example, if the employee had said or done something that purported to waive their right to work no more than an average of 35 ordinary hours a week in a roster cycle, that waiver could not be enforced against the employee by the employer.

PN282

On the other hand, if an employer, by its acts or conduct, waived the right, such right as it had by virtue of this provision, to require 35 ordinary hours in return for the stipulated wage, that would not be unlawful. There is no concomitant social interest or public purpose that would prevent an employer from waiving that benefit. In other words, the employer could lawfully say, lawfully in the sense of not contravening the enterprise agreement, could lawfully say, 'I'm going to pay you the same wage, I'm going to pay you the wage stipulated by the enterprise agreement, but I am only going to require you to work an average of 32 ordinary hours a week in any roster cycle.' That would not be unlawful, and that latter circumstance, in our submission, is the analogue of the circumstance posed by the arbitration question.

PN283

DEPUTY PRESIDENT ANDERSON: Mr Neil, isn't that a product of the terms of the instrument itself rather than the contractual right to waive?

PN284

MR NEIL: Yes, and then we look back at the terms of the first sentence of clause 5.2 of the Moranbah Accommodation Agreement and say it's precisely the same character, that that provision, the first sentence in clause 5.2, the construction and application of which is the focus of this dispute, that provision, in terms, textually and also contextually, confers a benefit on us; the benefit is to receive $60 a week.

PN285

DEPUTY PRESIDENT ANDERSON: A sole benefit.

PN286

MR NEIL: The sole benefit.

PN287

DEPUTY PRESIDENT ANDERSON: Your submission entirely hangs on the proposition that clause 5.2 confers a sole benefit on your client.

PN288

MR NEIL: Correct. I hope that we have not shied away from that proposition.

PN289

JUSTICE HATCHER: But if we read the third sentence of the first paragraph as applying to both the first and second sentences, that premise falls away, doesn't it?

PN290

MR NEIL: Yes, but that would not be an available construction, in our submission. We would strongly contend that.

PN291

JUSTICE HATCHER: Why is that? Why is that?

PN292

MR NEIL: The syntax and the sense of this paragraph intractably requires that the subject matter of the second and third sentences be different than the subject matter of the first sentence. 'Compliance' is a word that is used in the second and the third sentence. Its reference in the third sentence is, in our submission, obviously intended to refer back to the use of the same word in the second sentence. It talks about compliance with the rules of the SPV.

PN293

JUSTICE HATCHER: Why would it be logical for the agreement to say if you don't pay the $60.00 you're not going to get the benefit?

PN294

MR NEIL: The benefit in question is the benefit of living in the SPV.

PN295

JUSTICE HATCHER: Yes.

PN296

MR NEIL: And that links – that's the subject of the second sentence, not the first.

PN297

JUSTICE HATCHER: Well, we start off with the premise that these three sentences have for some reason been combined into a single paragraph.

PN298

MR NEIL: Yes.

PN299

JUSTICE HATCHER: That tells us something from the start, doesn't it?

PN300

MR NEIL: Yes. And the joinder we make to that, of course, is that formatting is notoriously an unreliable guide to construction. Text is the reliable guide.

PN301

JUSTICE HATCHER: Well, again, why isn't it logical for the agreement to say you must pay $60.00 for the accommodation and if you don't comply with the requirement to pay $60.00 we give benefit of the accommodation that may be withdrawn.

PN302

MR NEIL: It would be logical to read it in that - - -

PN303

JUSTICE HATCHER: That would be unremarkable, wouldn't it?

PN304

MR NEIL: It would be logical to read it in that way if that's what it said but it doesn't. To reach that conclusion one would have to ignore the syntax and structure of the first, second and third sentences altogether. The subject matter of the third sentence is a failure to comply with the rules of the SPV may result in the withdrawal of the benefit of living in the SPV.

PN305

DEPUTY PRESIDENT ANDERSON: Mr Neil, the text refers to a subsidised rate of $60.00 a week. It doesn't refer to $60.00 a week. It uses the words 'subsidised rate'.

PN306

MR NEIL: Yes.

PN307

DEPUTY PRESIDENT ANDERSON: What do you say to the proposition that the fact that the rate is described as a subsidised rate means that the benefit referred to in the third sentence is benefit associated with the rate as distinct from the living in the accommodation?

PN308

MR NEIL: Again, we would say that that is not the way in which one reads these provisions.

PN309

DEPUTY PRESIDENT ANDERSON: Why not?

PN310

MR NEIL: For the reasons that we've given. It would ignore, be contrary to the structure syntax and manifest purpose of these provisions.

PN311

JUSTICE HATCHER: Is not a subsidised rate a benefit to an employee? Compared to a non-subsidised rate?

PN312

MR NEIL: The third sentence refers to 'this benefit'. That's a singular benefit. The benefit is the benefit – the only benefit that is referred to in that paragraph is the benefit of living in the SPV.

PN313

JUSTICE HATCHER: For which you pay the rate.

PN314

MR NEIL: Well, no. It doesn't say that. It just says you pay a rate. It doesn't link the right to be – there's no explicit link of the right to live in the SPV to the payment of the rate. The only explicit link is the failure to comply and the failure – I don't know that I can add to the point that I am making. The failure to comply in our construction is a failure to comply with the rules of the SPV. And that's all that the third sentence is doing. And putting it bluntly, our submission is one can't squeeze out of that a suggestion that the first sentence of clause 5.2 confers a benefit on employees.

PN315

If it pleases, that's what we wish to say on the two submissions that support our proposition that the benefit conferred by the first sentence of clause 5.2 is one that can be waived by BHP and has, in fact, been done so – and that is so under the primary argument if it is contractual in character under the secondary argument, even if it is statutory in character.

PN316

Can we turn very shortly to the question of permission to appeal? We have pointed to a number of factors in our amended notice of appeal and written submissions that would support permission. The appeal gives rise to questions of general application concerning the interaction of employer subsidised accommodation and the Queensland statute. The appeal is from an incorrect decision and as the correctness standard applies the decision subjects the appellant to an injustice if the appellant is correct. And, third, the decision is attended by sufficient doubt to justify the grant of permission.

PN317

To those contentions we would seek to add the following additional grounds on which permission to appeal could properly be granted in our submission. First, the appeal gives rise to questions of general application as to the legal effect of the incorporation of a written instrument within the meaning of section 257. And, in particular, the principles to be applied in the construction of such a document upon its incorporation.

PN318

Second, the appeal gives rise to questions of general application as to whether and, if so, in what circumstances a party may waive a benefit provided for in or in an enterprise agreement or in a document incorporated in an enterprise agreement.

PN319

The orders that we seek by our appeal is that there be a grant of permission to appeal, the appeal be upheld, the decision of the Vice President be quashed and because the correctness standard applies this Full Bench is authorised to substitute its own determination if it considers that the Vice President wrongly answered the arbitration question. In that event our submission is that the arbitration question ought to be answered – yes.

PN320

There are some interlocutory orders in place so, in effect, a stay. We don't think having a look at them that it is necessary for an order to be made to continue those but lest it be thought to be so we also ask for that pending the decision.

PN321

JUSTICE HATCHER: Right. Thank you.

PN322

MR NEIL: Unless the Full Bench has anything more of us those are the submissions we wish to make by way of supplementing that which we have put in writing.

PN323

JUSTICE HATCHER: We might take a short break and we will resume at 10 past.

SHORT ADJOURNMENT **[11.54 AM]**

RESUMED **[12.11 PM]**

PN324

JUSTICE HATCHER: Mr Walkaden?

PN325

MR NEIL: I wonder if the Full Bench would be good enough to allow me this indulgence? Upon reflection we wish to make one further point about the construction of the third sentence in clause 5.2 at the Moranbah accommodation agreement if we may?

PN326

JUSTICE HATCHER: Yes.

PN327

MR NEIL: That sentence uses the language of a failure to comply. If one looks at the first sentence then it is apparent that it would be impossible for any employee to fail to comply with such obligations as an employee has under that sentence. For so long as an employee is an employee they're entitled to be paid by BHP in accordance, at least, with the enterprise agreement.

PN328

BHP, by the first sentence, has a unilateral right to make a deduction from any amounts paid to the employer, regardless of when they are made. There is nothing for an employee to do with which an employee could fail to comply. That being so the only logical subject matter that the third sentence is the subject of the second sentence, not the first – that's the submission.

PN329

JUSTICE HATCHER: Right. Thank you. Mr Walkaden?

PN330

MR WALKADEN: Thank you, your Honour. Your Honour, I might just start by answering a question that you raised in a question to Mr Neil which was why the change was made. And I think Deputy President Anderson was referring to some of the material that I hope to answer that question which is on appeal book page 101 which is entitled, 'Frequently asked questions'.

PN331

And this, of course, being a document which was attached to the union's F10 and was a document which the evidence will show was issued by BHP on the change that was being communicated to the other employees.

PN332

And the first question is, 'What is changing?' And the answer there makes clear that what is changing is both the termination of the rooming accommodation agreement as well as the deduction. So it's intertwined on this communication piece but it's both the termination of the RAA as well as the deduction. And that's relevant, your Honour, because we then go to why is this change being made which is the fifth question. And of course the only way you can read that question, the reference to change is both the termination of the rooming accommodation agreement, as well as the cessation of the $60.00 per week deduction. And the answer given by BHP is this change or allied BMA with other MIN AUS accommodation arrangements. BMA is the only area in MIN AUS that has RAAs in place – Olympic Dam recently undertook a similar process.

PN333

So I think in answer to your enquiry about why the change is being made that encapsulates in the appellant's own words why the change is being made. And one can infer from the appellant's own words that the change is being driven at the corporate level and on our view divorced from consideration of the local arrangements.

PN334

The local arrangements, of course, being the industrial arrangements in issue in this proceeding being the relevant accommodation agreements, as well as the relevant enterprise agreements. And, on our view, therein lies the problem. It's a decision that's being taken without regard to the relevant industrial instruments that applied to the affected employees.

PN335

JUSTICE HATCHER: So from the union's perspective what practical concerns does this give rise to?

PN336

MR WALKADEN: Well it gives rise to the concerns that are identified in the material that we filed, as well as the intervenor's file. So there's concerns in respect of privacy and the Vice President raised those issues. So it gives rise to concerns that are articulated in the material about employees knowing that when they're at work someone went into their room which whether you live – you know – in whatever arrangement you consider that's obviously an important consideration for a person that a person does not enter the premises or accommodation that you occupy without notice and/or your consents.

PN337

That's one issue. And the materials will identify as a concern what a part of the affected employees about hot bedding which is the point we also made in our outline. That's an issue, as the Commission will well be aware that it does give rise to disputation, particularly in the resource industry, whereby it's very nature work is performed a long way from home and from metropolitan centres.

PN338

So there are those sorts of concerns that are in issue here. But the submission I make is a simple one. We don't need to consider what those issues are, nor do we need to get stuck into consideration of many of the points that Mr Neil has raised in his submission because the task for the Full Bench is a simple one. The task is to consider whether the answer given by the Vice President that a question or the updated question for arbitration was correct or otherwise.

PN339

And I say we don't need to get into many of the arguments that were agitated by Mr Neil because we don't need to concern ourselves with hypothetical propositions. We just need to look at the words in the disputed clause. And, in particular, at the heart of our submission is that this really gets to the essence of our response to the essential thrust of BHP's case is that one doesn't need to consider or where the waiver applies.

PN340

In each and every industrial and employment case one needs to consider whether waiver can apply in this case. And our very simple and short, sharp response is that unilateral waiver or unilateral variation if you want to call it that cannot possibly be applied in this case because it's at odds with the text of the relevant provision. And both the BMA or the BHP Enterprise Agreement, as well as clause seven of the Moranbah Accommodation Arrangement provides a process of variation.

PN341

So how can it be said that unilateral variation would be consistent with the text of those instruments? I am jumping ahead a bit but that's really the essence, your Honour, of our response.

PN342

What we would say is that this appeal is extremely straightforward. And with respect we say that the appellant's case is weak and we make that proposition by reference that to five simple points. One is as is being – as would be apparent to the Full Bench the dispute concerns one sentence in clause 5.2 of the Moranbah Accommodation Agreement – sorry, accommodation agreement which Mr Neil has taken you to and starting on page 85 of the appeal book.

PN343

And when the text at clause 5.2 is read in light of its context and purpose it has a plain meaning. There is no ambiguity. And I will address that in a little bit more detail in a moment.

PN344

Our second simple proposition is that I am going to call it the MAA is not a contract. That's our second proposition. Our third proposition is that BHP or the appellant have not produced any authority for the proposition that the general principle on waiver could be applied in these circumstances. And that's on the appellant's own case. Mr Neil has provided a stack of authorities but on his own admission today has said notwithstanding the efforts of his researchers they haven't been able to find a single authority to support their central proposition.

PN345

And as I said, even more fatal to the appellant's case, is that even if those principles of waiver are applicable we say it's left unexplained how those principles could be applied in these circumstances. Whereas, I said a moment ago, where both the BMA or the BHP Coal Enterprise Agreement – I probably should get the name right – as well as the MAA include an express term as to how the MAA is to be varied. And the simple fact is that process was not followed.

PN346

The fifth simple proposition we advance is that ground 1(c) which didn't get a lot of airplay in Mr Neil's submissions, which goes to the relevance of the Residential Tenancies and Rooming Accommodation Act which I will refer to as the RTRA Act that will actually tell your Honour I am content to rely upon my written outline in that respect.

PN347

Based upon those five simple points we say the net result is clear. We say the decision of the Vice President was direct. We say there was no arguable case of error. We say there's no other basis on which the Full Bench could conceivably grant permission to appeal. Of course we then say permission to appeal should not be granted and/or the appeal should otherwise be dismissed.

PN348

I will turn briefly and address each of the three grounds. ground 1A, ground 1B and ground 1C in due course. I will deal first with ground 1A. I am not going to spend a lot of time with that particular ground.

PN349

Obviously, a couple of key points as would be clear from both the written submissions of the parties and the intervenor, as well as the oral submissions advanced by Mr Neil the MAA is incorporated and has been incorporated into the relevant enterprise agreement. And on our view the effect of that incorporation, under section 257 of the Fair Work Act, is that that becomes a term of the enterprise agreement.

PN350

We don't accept the proposition advanced by Mr Neil that even though the MAA has been incorporated that it retains its contractual nature we say by reference to incorporation it becomes a term of the enterprise agreement.

PN351

Flowing from that we say that relevant provision, clause 5.2, in the MAA must be interpreted accordingly. There's no doubt as to the applicable principles by which

an agreement enterprise hearing is to be interpreted. So I won't repeat or reproduce those.

PN352

The Full Bench has been taken to the clause in dispute which is obviously clause 5.2 of the MAA which is obviously found on appeal book page 90. And the task is a simple one. It's one we have all done countless times, looking at those words, read in context in light of the purpose. Our submission is a simple one. Those words have a plain meaning. We say that the will is mandatory. It required a deduction to be made by the only entity that it's able to make such a deduction, namely the appellant, and that is from the employees post-tax salary.

PN353

So it's a simple one to suggest as the appellant does that the will is permissive and it authorises payment and facilitates deduction. Fundamentally the store – it's the language which is found in clause 5.2.

PN354

The Vice President dealt with this argument at paragraphs 128 to 129 of the decision. We say her reasoning is correct and we adopt her reasoning with respect to the interpretative argument that has been advanced.

PN355

With respect to the discussion that has occurred today in respect of, in particular, the third sentence of clause 5.2. As the Full Bench has identified the third sentence used the word 'benefit'. And there has been discussion today as to how that third sentence should be applied irrespective of whether you accept the submission just advanced by Mr Neil a moment ago that the failure to comply, which is found in the opening words of the third sentence, is a reference only to the requirement in the second sentence that the employees who were living in the SPV will be required to comply with the rules of the SPV doesn't take Mr Neil's argument far at all.

PN356

And that's because the language which is found in the third sentence at clause 5.2 still uses the word 'benefit'. And when one has regard to clause 5.2 with the relevant enterprise agreement what is apparent is that the clause 5.2 is clearly describing that employees derive a benefit from clause 5.2.

PN357

And it's important to understand in that point the interaction between the MAA and the relevant enterprise agreement being the BMA Enterprise Agreement 2018 which is found at tab 10 of Mr Neil's bundle.

PN358

And if the Full Bench was to turn to clause 34 of the enterprise agreement on page 353 of Mr Neil's bundle, you will see that at clause 34.1(a) the enterprise agreement provides the employees may either access accommodation in accordance with clause 34.2 when if you then have regard to clause 34.2 you can see, in effect, clause 34.2 prescribes what is called an accommodation

agreement. Or if you return to clause 34.1(a)(2) the employee may access a commute arrangement in accordance with clause 34.3.

PN359

And if you then turn to clause 34.3 the agreement prescribes the arrangements that are made with respect to commuting employees. The point I would make about clause 34 of the agreement it provides that employees will access accommodation in accordance with either measure, either accommodation arrangement as per clause 34.2 or a commute arrangement as per clause 34.3. But what it doesn't do is prescribe how much an employee will be charged, if at all, if they take up the option of an accommodation arrangement in clause 34.2.

PN360

So it doesn't say, for example, that the accommodation arrangement that the employee may be party to or may be get the benefit of using neutral language envisaged by clause 34.2 will be subsidised. You don't find that language at all in clause 34.2.

PN361

If one just read clause 34 of the agreement and there wasn't such a thing as a Moranbah accommodation arrangement or any of the other local arrangements which are featured at clause 34.2(a)(1) through to (4) it could well be the case that the employee is required to pay market rate for the accommodation that BHP provides. And that's where the interaction between the enterprise agreement and the various accommodation arrangements are critical. And that goes back to the question we're talking about is that does this provide a benefit to employees noting that the final word in the third sentence of clause 34.2 is talking about the withdrawal of a benefit.

PN362

And it may well be the case that the appellant can withdraw that benefit on Mr Neil's argument if there's been contravention with the rules of the SPV. But that doesn't negate the fact that on the plain language of this document it's still describing a benefit to employees. And the benefit is the provision of subsided accommodation. That is the benefit provided by clause 5.2 of the agreement.

PN363

So that really, hopefully, deals with basically the key plaint of Mr Neil's case which is that waiver is permitted. And on his own case it's accepted that waiver can only be permitted if there's exclusive benefit provided to the appellant. Which, as I say, looking at the language found in the document in dispute or in a clause in dispute that that proposition cannot be sustained.

PN364

So that, really, I hope in short term deals with ground 1.(a). I don't have much more to say about that. As I say it's a fairly straightforward clause which, as I say, has a plain meaning and on our argument, at least, there is no need to even consider surrounding circumstances. One just looks at the text, the context and the purpose and we've come to the unremarkable conclusion that the Vice President's answer to the question was correct.

PN365

I will deal next with ground 1.(b) of the appeal and there's a few propositions that Mr Neil has advanced to attend to. The first is and this was in both Mr Neil's written submissions as well as there thoroughly today. It's said that the MAA is a contract. We don't agree with that proposition and we have put that in writing.

PN366

I am content to rely upon what's been put in writing at paragraphs 31, 32, through to 34 and then 36 of our written outline in support of our argument that the MAA is not a contract. One point I want to touch upon is the question of consideration which is an issue that we raised at paragraph 36.

PN367

The President – asked that question of Mr Neil today. What is the consideration that the union parties to the MAA have given? And the answer – I'm paraphrasing was to the effect is that the unions agreed to the terms of the MAA and that amounts to adequate consideration because there has been a binding resolution to the issues that gave rise to the agreement.

PN368

And that's obviously a reference to the fact and the Vice President's decision goes to this that during the negotiations of the 2012 agreement there was concerns and disputation about these sorts of matters.

PN369

So, on Mr Neil's argument, the adequate consideration is that those issues have been put to bed because there's been a binding resolution of those issues. The fundamental problem with that argument is that on the appellant's argument there has been a binding resolution on issues of accommodation but then with the other breath it's suggested that at any point in time BHP or the appellant, I should say, can waive or, on our submission, unilaterally withdraw an arrangement that has been negotiated and agreed and supposedly forms part of the adequate consideration to sustain a fundamental playing field as to what is said to their quantitative employment.

PN370

The proposition, in our view, is at odds. It cannot be said that the dispute has been sorted and has been a binding resolution if, as I say, on the appellant's case there's capacity for BHP to waive, and on our characterisation renege upon a term of the MAA.

PN371

So we maintain our submission put in writing that there is a lack of consideration. But I won't spend too much time on that point, because as I will come to, whether the MAA is a contract, is a term or on the President's suggestion possibly both it doesn't really matter. And I will come to that in due course.

PN372

Dealing with the second proposition that the appellant has advanced that relates to ground 1(1)(b) and this really goes to the heart of their argument. The argument, of course, being one of waiver.

PN373

The appellant has not produced any authority for the proposition that the concept of waiver is applicable in the industrial or employment context. Or put more precisely there has been no authority produced that a term of an enterprise agreement which is what we say the MAA is, which was made as an entity to against the statutory regime of the Fair Work Act can be waived.

PN374

And there's a couple of industrial and employment cases in the bundle which Mr Neil provided and those issues, the first one being tab one, which is the ACE Insurance decision, and the second being tab six, the Metropolitan Health Services Board decision. Both of those cases concerned estoppel. No one's arguing estoppel here.

PN375

Obviously there was consideration of waiver in one of those cases but the question of estoppel does not arise in these circumstances. And the other point I'd make about those two cases, the ACE Insurance as well as the Metropolitan Health Services Board decision is that the factual circumstances in both of those two cases is very different to the present circumstances.

PN376

So, for example, at tab one in the ACE Insurance decision on page three – I'm just using the page numbers in the bottom centre – you'll see the top of that page the fourth line which starts with the word 'Secondly'. The words are, 'Secondly, the applicant argued that the agents were estopped from claiming that they were employees when, for many years, both parties have proceeded upon the understanding that they were independent contractors.'

PN377

And in the Metropolitan Health case at tab six, if we go to paragraph seven of that decision it's a long paragraph so I won't read all the ones I want to take the Bench to but paragraph seven, paragraph eight and paragraph 10, the circumstances in that case or the issue that gave rise to the prosecution by the union in the ANF case were two nurses identified as Elizabeth Ringland and Yolanda Vyner and they're identified at paragraph eight of that decision.

PN378

And you can see from the middle of page 393 of the report, under the word 'date' there's a reference to the second option.

PN379

'The second option form involved a confirmation by the nurse that he or she wished to continue incremental progression to the maximum of the salary range and wished and expressed understanding that he or she would be transferred to a vacancy in one of the fourth areas indicated as being preferred within the metropolitan operations of the dental services.'

PN380

And you will basically see through reading that decision, particularly paragraph eight, the second sentence, 'they' being a reference to Ms Ringland and Ms

Vyner. They accepted the agreement and elected to remain at the Perth Dental Hospital because they understood that amalgamation was to proceed and they did not wish to be transferred to other locations throughout the metropolitan area pursuant to that agreement.

PN381

The point I am making is that both in the Ace case as well as this Metropolitan Health Services case the argument of estoppel and consideration of waiver arose in circumstances where it was said by the employee's relevant conduct that they had consented or agreed to the contracting out of the entitlement.

PN382

That is at the heart of, in particular, the Metropolitan Health Services case where the union has negotiated something with the employer. There has been a – and this is recorded at paragraph seven on report page 392. There's been further discussions between the union and the employer and that all goes to the concern that some of the dental nurses apparently had that on amalgamation of the various employer that they then be required to transfer.

PN383

And, effectively, a deal appears to be done that they wouldn't be transferred of some of these dental nurses and in return those who elected the second option of not to – to accept effectively the deal wouldn't progress up to the – I think it's level 27 pay point. So the circumstances in that case, as well as the Ace case where, as I have said, I've taken you already to page three were quite different. In both of those cases, as I say, the circumstances appear to be that the relevant employees could be said to have consented and/or agreed to the contracting out of entitlement.

PN384

And even in those circumstances, as will be recorded, and as I think Mr Neil has been good enough to say the principle of estoppel or waiver wasn't applied. And, of course, the circumstances there are quite different to the circumstances here where there has been no consent or agreement on the part of the employees to the contracting out of what we say to be an entitlement.

PN385

And just staying with those – staying for a moment – with the Metropolitan Health Services and ANF decision. Mr Neil has taken to the decision of Justice French, in particular, paragraph 20. And then also pointed the Full Bench to paragraph 24 where the argument of estoppel and waiver is rejected in those circumstances. And that is done so after consideration by his Honour of approximately hundred years of industrial jurisprudence on the question.

PN386

And the other judges in that matter the reasoning was unanimous. Justice Lee and Justice Carr they dealt with the argument on its facts, in particular, at paragraph 58 through to 60. And it can be seen that those judges discussed the concept of estoppel to prevent unconscientious departure by one subject matter.

PN387

In the case of the Ace case which is at tab one of Mr Neil's bundle, Justice Perram, at paragraph 145, after also reviewing many of the authorities that the judges in the Metropolitan Health Services case reviewed also found that in the circumstances of that case there could be no resort to waiver nor estoppel.

PN388

So even in, as I say, even in the two employment/industrial cases that are contained in Mr Neil's bundle there is no authority to the proposition that unilateral waiver of an enterprise agreement term is permitted. And as I say, that concession has been made, that – you know – they couldn't turn up any authorities for their proposition. And that really gave it a weakness of the appellant's case.

PN389

Now, as I say, even if it gets to a point where you characterise the incorporation as being enterprise agreement term or a contractual term or both. Once again, it doesn't really matter. So it doesn't matter whether the MAA is a contract and our view is it doesn't matter what characterisation you give the effect of the incorporation because at the essence of the argument is a simple one. And that is when one has regard to the MAA you will find that the parties have turned their minds to how a term of the MAA can be varied.

PN390

And before taking the Bench to those provisions I will return to the enterprise agreement which is found at tab 10 and will return to clause 34. And turn to clause 34.4 which is found on page 355 and at clause 34.4(a) one just needs to read that subclause to acknowledge that the Accommodation Agreement which, of course, the MAA is one such instrument may be replaced or amended from time to time by agreement between the parties in the Accommodation Agreements in accordance with the variation procedure described under the relevant Accommodation Agreement.

PN391

Subclause (c) provides that a variation to the Accommodation Agreement can be sought by either party where supported by appropriate justification. And subclause (e) provides that neither party can unreasonably refuse to participate in discussions where a reasonable justification has been presented.

PN392

We then turn to clause 7 of the MAA which is found on Appeal Book page 93. And clause 7 is in similar terms to the clause 34.4 of the enterprise agreement. The first paragraph provides that this agreement may be amended by agreement between the parties.

PN393

The third paragraph at clause 7 appears to be almost, if identical, clause 34.4(c) of the enterprise agreement. And, likewise, certainly the first sentence of the final paragraph of clause 7 of the MAA is identical, or almost identical to clause 34.4(e) of the enterprise agreement.

PN394

So, as I say, like I said at the outset on our view the answer is a simple one. It is immaterial whether you characterise MAA as a contract. It's immaterial as to whether the legally doubtful contention which, on our view, and as is clear from the review of the authorities undertaken by Justice Perram in the ACE Insurance decision, as well as the judges in the ANF and Perth Hospital decision which is a legally doubtful contention that waiver is applicable in these circumstances – which, on our view, would upend a hundred years of industrial jurisprudence.

PN395

Whether the Bench thinks that this case is the appropriate case to consider that principle which would obviously have consequences for more than this particular dispute we would say this isn't the vehicle. This isn't the case for that sort of principle to be tested. Because, as I say, the answer is a simple one. The parties have turned their minds to how a term of the MAA can be varied and what the parties have plainly agreed to do is that a change to the MAA can only occur by way of agreement. And that should be the answer to, as I say, ground 1(b) advanced by the appellant in this case.

PN396

I don't have much more to say. I am content to rely upon our written submissions with respect to ground 1(c). In very simple terms what we say there is there's no real need and no utility, I should say, for the Full Bench to express advisory opinion about the extent of the Queensland Act in the circumstances of this case.

PN397

That may well be an argument for another place at another time. And just to make that point clear as would be apparent from the material for the authorities filed by the appellant as well as the intervenor there has been some extracts provided of the Act. And they're found at, for example, tab 11 and tab 12 of the appellant's folder. And if I can just ask the Bench to briefly turn to page 414 of the appellant's bundle. You will see there is a definition of 'resident'. 'Resident means a person (a) who is in rental premises, occupies one or more rooms as the person's only or main resident.'

PN398

Now, the Full Bench clearly isn't going to be in a position to entertain an argument as to whether each and every single employee who has the benefit of the MAA is a resident as per that definition – the person, I should say, who's living in the SPV. That is clearly an argument, as I say, for another day in another place.

PN399

There is no utility in the issues that Mr Neil raised with respect to ground 1(c). They are matters that were outside the scope of whether the answer given by the Vice President for the question for arbitration or indeed the slightly amended question that the Bench might be inclined to answer. It just doesn't relate to those matters. That is really an interpretative exercise. We say, a straightforward exercise, done by reference to the words in the clause by reference to its text and purpose.

PN400

And, as I say, there's obviously argument advanced about the applicability of broader principles as to waiver. But I will repeat what I said in my submissions but this just isn't the case to test those matters out in circumstances where the essence of our response is that the parties have turned their minds to the situation and put a full stop upon either party just walking away from the plain meaning of the provision. So, unless, there are any questions those are my submissions.

PN401

JUSTICE HATCHER: Right, thank you. Mr Saunders?

PN402

DEPUTY PRESIDENT ANDERSON: Sorry.

PN403

JUSTICE HATCHER: I'm sorry.

PN404

DEPUTY PRESIDENT ANDERSON: Mr Walkaden, can I just take you back to your textual submission there about the word 'will' where it appears in the first sentence and where it appears twice in the first sentence. And, as I understand the submission, it is that sentence imposes an enforceable obligation on both an employee to make the $60.00 payment and for the employer to deduct it.

PN405

MR WALKADEN: That's correct. Yes.

PN406

DEPUTY PRESIDENT ANDERSON: Now, how does that submission align with the fact that an individual employee is not a party to the MAA?

PN407

MR WALKADEN: Well, I think the way we would see that, Deputy President, is this that the unions and the companies have negotiated the MAA and that MAA has been incorporated into the terms of the enterprise agreement. Incorporated, I think, the evidence shows into the 2012 BMA enterprise agreement.

PN408

Now that would have obviously been through a process of firstly the employer would have been required to explain the terms of the agreement which would encompass not only the terms of the enterprise agreement proper but also would include as we all know terms are incorporated by reference.

PN409

So the obligation on the employer would have been to explain the terms and effect of the agreement, plus documents incorporated by reference, which obviously encompass the MAA. And there's an obligation, as we all know to provide access, and I'm paraphrasing here to that material. So employees are then making a call about whether to support the enterprise agreement and we can infer from the statutory regime, Deputy President, that employees were making that choice to support the agreeing circumstances where it has been explained that a term of that

agreement, a term, a document in which presumably they had access to or given a copy of was, indeed, the MAA.

PN410

DEPUTY PRESIDENT ANDERSON: Yes. An employee may make an agreement, and in fact employees do make agreements.

PN411

MR WALKADEN: Yes.

PN412

DEPUTY PRESIDENT ANDERSON: But it doesn't follow that individual employees are party to the agreement does it?

PN413

MR WALKADEN: Well, that's true. The way the Act obviously works, as we all know, is that the concept of the parties to an enterprise agreement is a relative history. Obviously the way the statutory regime works is that the instrument – the enterprise agreement applies to employees by virtue of its coverage and by virtue of it being an operation. But it's obviously not strictly correct to refer to the concept of parties to an enterprise agreement. That is language which obviously predates the Fair Work Act.

PN414

JUSTICE HATCHER: I thought your submission earlier was the effect of clause 34 of the enterprise agreement was to create an entitlement under that agreement to accommodation, subject to confines with the relevant Accommodation Agreement which you say includes the requirement to pay the $60.00 a week.

PN415

MR WALKADEN: Yes. Yes.

PN416

DEPUTY PRESIDENT ANDERSON: Yes.

PN417

MR WALKADEN: Thank you.

PN418

JUSTICE HATCHER: Right, Mr Saunders?

PN419

MR SAUNDERS: I imagine I'll be half an hour?

PN420

JUSTICE HATCHER: I think we'll just keep going.

PN421

MR SAUNDERS: Certainly. In answer to your question, Deputy President Anderson, it binds or affects the employees in two ways. Firstly, in the manner that his Honour Justice Hatchett has set out via clause 34 of the agreement. The

right to access accommodation is subject to be confined to the terms of the Moranbah Accommodation Agreement.

PN422

And, separately, the Accommodation Agreement itself binds BHP to reasons I will elaborate in the manner in which it offers accommodation to employees and enters into these individual contracts that my friend was describing.

PN423

Your Honour Justice Hatcher had a question about the practical concerns that it describes the dispute was happening. The starting point in the Appeal Book is page 133. The statement of Barry Borrelini at paragraphs 10 to 12. Actual lack of notice as to entry concerns, he's informed by his colleagues that it is in fact happening and rooms are being searched. And then there are concerns about hot bedding and that fundamental loss of amenity it's (indistinct words) the second set, this is at Appeal Book page 163.

PN424

JUSTICE HATCHER: We're just digging a bit deeper. So why would the security personnel be searching through rooms?

PN425

MR SAUNDERS: The camp rules (indistinct) subsequent to this change include a change in the matter of the things that are communicated in the resident's room which is set out in the next evidence reference I am about to take your Honour to at Appeal Book 163.

PN426

JUSTICE HATCHER: So what page is that?

PN427

MR SAUNDERS: 163. This is the statement of Mr Piper. The paragraphs that I point and draw your Honour's attention to are paragraph 50, paragraph 56 and relevant to your Honour Justice Hatcher's last questions 60 to 61. One can infer from that, that that is why rooms were suddenly being searched. Both those witness statements (indistinct) and give some feedback as far as formal evidence is concerned. Of course they might not withstand against some kind of denial from BHP or direct evidence as to why it did this and what it has done since.

PN428

The court says – my friend has made clear, all we have from BHP is silence. So those inferences are available and were available to the Deputy President. It's related to a question that you had earlier, Deputy President Anderson as to whether the change is solely a benefit to employees. Of course it provides a benefit to BHP if we assume that previously the residential tenancies and any accommodation can apply has a benefit of a degree of greater control over this accommodation of what it can do in respect of employees' rooms, it can enter without notice, it can terminate in different ways.

PN429

To put it a different way it is no longer bound by obligations it, at least previously, perceived applied to it as a landlord. Those obligations again it's a matter I'll return to, fundamentally depend on not form, not particular documents being executed but the payment of rent, the payment and collection of rent. Certainly, it is difficult to see the proposition that this is simply a bonus to employees being provided as an expression of generosity as opposed to something directly targeted and the obligations that arise in respect of rooming accommodation as in some evidence today, proposition.

PN430

The starting point of this appeal, I'll return to the three grounds. It does have to be – there needs to be a degree of clarity about how each of the various arrangements or agreements operate, what they are and depending on how you look at it three or four of them. It's important to have some clarity as to how they interact. In particular the approach taken by BHP does involve a degree of that perhaps not as much clarity would be desirable as to what rooming accommodation is, what rooming accommodation agreement actually is and what it requires. Why all this matters.

PN431

The principal document is the BMA Enterprise Agreement 2018. That obviously is a document negotiated between BMA and its employees via the bargaining representatives and like all enterprise agreements it fundamentally positions the manner in which BHP can contract with its employees. So it's wage rates, it's various conditions, it's like all industrial legislation, a fetter on discretion like (indistinct) at the moment, I think section 50 of the Fair Work Act.

PN432

Clause 34 as both Mr Neil and Mr Walkaden have taken your Honours to provides an entitlement to access either accommodation as a concept or (indistinct) arrangements which is what would more conventionally be described as FIFO work. Accommodation has a different concept, it is about permanent residence. As the Vice President's decision sets out there is a long history here and this isn't just about a single person village. The Accommodation Agreement includes people raising their families.

PN433

Clause 34.21 which both my friends took your Honours to deals with the Moranbah Accommodation Agreement. It does two things. It incorporates the Moranbah Accommodation Agreement into the enterprise agreement such that its terms are terms of the agreement, whatever else it may be. It also makes it clear that that agreement is concerned with providing an alternative to FIFO work on permanent residence in a different sense people that will live here. It contemplates alternatives to the single person village and its terms.

PN434

The second matter is the Moranbah Accommodation Agreement itself. Now this is why there is some difficulty in identifying precisely only agreements. There are - unhelpfully they all described as agreements which never assists. It's described and treated as a stand alone document here but – and there's some contention about what it actually is. It's relatively simple, what it is is a matter of practicality

is a document recording a negotiated outcome between BHP and the three trade unions.

PN435

It has, again, as the Vice President summarises it, 154 through to 165 of the decision, a long history as a site deal and (indistinct) well, until today - - -

PN436

JUSTICE HATCHER: Sorry, did you say a site deal? Or a side deal?

PN437

MR SAUNDERS: It could be either, site deal is what I said.

PN438

JUSTICE HATCHER: All right.

PN439

MR SAUNDERS: Until today generally considered to be unenforceable. It's a protocol, rather than entering into an agreement with the individual employee, that's obviously not what it is, it's a protocol that governs how BHP will offer accommodation to those employees that it is otherwise obliged to accommodate.

PN440

It's the parameters within which it may contract with any given individual, binding in that sense. It's not an agreement with any particular individual and the submissions from BHP in respect that it doesn't identify the particular room or the particular start date are obviously correct because that misunderstands the nature of this document. That is something of both ground three but it really is more of distraction.

PN441

The obligations that it imposes now have statutory rules. Even if everything about its construction and its incorporation as a contract, its capacity to survive as an independent contract, even if they're all accepted it doesn't matter. Regardless BHP must not contravene its terms. Contravention looks like contracting inconsistently with an individual.

PN442

It's not a benefit based analysis necessarily when you get to must not contravene the role of the Commission, in an interpretation exercise or a court of competent jurisdiction is to determine what was agreed and then the obligation is simply to do it, rather than whether there is a more beneficial outcome for employers.

PN443

As to whether it's a contract, as I've said it doesn't matter. That said the idea that the consideration is an agreement to resolve an existing dispute is novel. There's nothing in the agreement that prevents the union from reagitating a change, attempting to terminate the agreement, terminating the whole thing.

PN444

It's impossible to identify, knowing the enterprise agreement, impossible to identify anything with this document alone relying on it that it compelled anything, it can compel any of the three unions to do. It might work if it was a deed but it isn't.

PN445

And in respect of your Honour Justice Hatcher's observation as to section 738 as well as not touching on the subject matter it's unlikely that it falls within subsection (c) at all which, on my reading, really contemplates written agreements between an employer and an employee. We see that in reference to a copy of - - -

PN446

JUSTICE HATCHER: Well it talks about contracts of employer or other written agreements though.

PN447

MR SAUNDERS: Yes. And then it carries on to between the employer and the employee - - -

PN448

JUSTICE HATCHER: All right.

PN449

MR SAUNDERS: - - -which does suggest that other written agreements it is meant to be a subset of that employment contract rather than at large. Clause 5.2 I've said essentially what I want to say as to the interpretation arguments in writing. But the main point is the surrounding textual context is critical here.

PN450

This is an agreement that is fundamentally concerned with the provision of accommodation by BHP, residential accommodation as opposed to FIFO camp accommodation. It is very difficult to move away from the presumption, in an accommodation agreement, an agreement for the provision of not just rooming accommodation but houses, that the corresponding obligation to pay money is rent.

PN451

There is no direct challenge to the Vice President's finding below that that's probably what was understood to be. The third subset of agreement here is the agreements that BHP enters into with its individual employees and itself in respect of their particular accommodation. It's not all their employees, it's the ones that opt for this accommodation option.

PN452

The (indistinct) individual posterior agreement it's perhaps a little grand but it's what we're talking about here. BHP makes an offer and the employees accept. Where the submissions – that is not a difficulty, that's a function having engaging employees with an overarching statutory document, of course corresponding contract arise. Where the submissions depart from the scheme as it actually works, is the idea that these contracts, the individual posterior agreements are unlawed in any way from the terms of the Moranbah Accommodation

Agreement. Their terms are prescribed by that agreement and necessarily shaped by it. It is about statutory obligation to offer accommodation in a particular way to not contravene that agreement as a term of the EA.

PN453

The idea in the written submissions and it's paragraph 21(d) that there's an infinite flexibility in this respect misunderstands how the protocol at the Moranbah Accommodation Agreement actually works and actually binds BHP, they are inextricably linked. That's the critical point before I get to the world of the Residential Tenancies Act.

PN454

The Moranbah Accommodation Agreements and clause 34 of the enterprise agreement have their own interaction. They must – these individual agreements must be entered into once the employee exercises that right of election. It's not abstract, it will be done. It governs the nature of the accommodation that will be provided, by which I mean units, houses, single person village, depending on the person's marital status and the number of children. And it governs what will be charged for that accommodation, what the employee will pay necessarily in exchange. The obligation to hand over money can't be detached from the central purpose of the exchange which is to accommodate, and it's $60.00 a week.

PN455

BHP, as well as the ability to collect that, it has a corresponding obligation to collect it via the agreed mechanism of deduction but it's not simply an obligation to pay, it's concurrent. They're mandatory conditions subject to an individual employee's ability to reach a different arrangement with BHP, as clause 1 of the Moranbah Accommodation Agreement makes a claim. BHP can't put someone in a van, it can't charge $100.00 a week without their agreement. Simultaneously, it can't cease to – it can't vary the agreed arrangement in any substantial way.

PN456

This, perhaps regrettably, brings me to the Residential Tenancies and Rooming Accommodation Act and what rooming accommodation agreements are under it, and this is where we say the BHP analysis goes wrong.

PN457

The submissions - and you see that most clearly at paragraph, again 21(d) of the written submissions where it's advanced that the parties could enter into a common law contract to provide rooming accommodation that isn't a rooming accommodation agreement. It seems to be based on the proposition that the particular form that your Honours have seen in the Appeal Book is what's needed to make something; rooming accommodation and the rooming accommodation. It's simply not how this legislation works.

PN458

It's not concerned at all with the form of the agreement. There are, contrary to the submission that was made, no prescribed forms under this Act. There are certain requirements to put things in writing and certain things must be put in writing but the authority doesn't have the function that you might expect of doing in a

particular way that a lease needs to be entered into if it's structured differently. It's not locked in legislation. How it works - - -

PN459

JUSTICE HATCHER: So just to be clear. So you need a written agreement to attract the operation of - - -

PN460

MR SAUNDERS: No, quite the opposite.

PN461

JUSTICE HATCHER: You don't.

PN462

MR SAUNDERS: You don't.

PN463

JUSTICE HATCHER: So the mere operation of the accommodation agreement say for Moranbah where the subsidised accommodation is provided and the $60.00 is paid is sufficient to attract the operation of the Act.

PN464

MR SAUNDERS: Correct. There's a separate obligation under the Act. So section 16(2) of the Act provides that a rooming accommodation agreement which is as you'd expect an agreement to provide rooming accommodation can be written, oral or entirely implied. The fundamental question as to how that would happen is a little unclear but nevertheless that's what it says. The fundamental question is it accommodation as described in section 15 with reference to the definition of resident in section 14. The linchpin - I have to leave the detail aside, the linchpin of that is that it's provided in exchange for rent.

PN465

VICE PRESIDENT CATANZARITI: So the zero rent would not work?

PN466

MR SAUNDERS: Zero rent would not work.

PN467

JUSTICE HATCHER: If the whole arrangement exists pursuant to BHP's statutory obligations under section 50 of the Act how can you necessarily employ any agreement, that is, BHP is not doing it because it agreed with any individual employee. It's doing it because it's obliged to by the enterprise agreement.

PN468

MR SAUNDERS: Two reasons. That concurrent obligation to actually put it in writing, which is at section (indistinct). I'll start the submission again. I apologise for the interruption. Really, BHP is doing two things, it is compelled by force of section 50 to enter into these agreements with individual employees. Those agreements - - -

PN469

JUSTICE HATCHER: So why is it compelled to enter into individual agreements?

PN470

MR SAUNDERS: Because of the right provided by section 34. The employee has an entitlement to accommodation, that's its starting point. The employee opts to exercise the right under 34(2)(1) to access accommodation rather than a commute arrangement. That devolves into - it has to be in the terms prescribed here by the Moranbah Accommodation Agreement and that sets out the particular way that it will be provided. But there's no option for BHP to say, 'No, we're not going to provide you accommodation.' So when I say 'compelled' it's compelled in that sense.

PN471

JUSTICE HATCHER: Yes. I understand that point but it's compelled to do it by the agreement and the Act. But while - - -

PN472

MR SAUNDERS: The Fair Work Act.

PN473

JUSTICE HATCHER: Yes. The Fair Work Act. But how does that give rise to an agreement of an individual employee for the purposes of the Residential Tenancies - - -

PN474

MR SAUNDERS: It's the other way round. It creates an agreement with the individual employee necessarily. BHP offers them accommodation and they receive it. That is, we say, it meets – if it is in exchange for rent meets the criterion described separately. So just – it's a separate statutory obligation. That's why it doesn't matter that this document doesn't refer to this legislation at all in that regard (indistinct) again, a distraction. It meets the criteria of being rooming accommodation. The obligations of the Act are imposed regardless of whether a particular form was entered into.

PN475

Just separately, landlords have to – there's an obligation to put things in writing which is enforceable but that's not the genesis of the obligation, the creation was a defined term in the Act and Accommodation Agreement or that the concurrent obligations and the consequent obligations I should say. I hope that assists your Honour's question.

PN476

I should possibly explain how rooming accommodation is defined. Without taking your Honours to the section, they are in the authorities, it's at section 15. The key feature is rent. There are various criteria which as the written submissions set out say, are satisfied that if there's no rent there's no rooming accommodation, there's no rooming accommodation arranged.

PN477

This informs the past practice of BHP, what it means and why it happened. It explains why documents of a particular kind were entered into with residents, the proposed documents that we have seen in various places in the Appeal Book, aren't the source of the entitlements. What's happened is that we – what BHP has consistently with the enterprise agreement, consistently with the Moranbah Accommodation Agreement provided those residents with the right to occupy a room in the single person village, charged them $60.00 a week as rent, the submissions set this out, 141 to 142, which they were understood by both parties as being in the purview of the Residential Tenancies and Rooming Accommodation Act not physical particulars of the document but physical features of the accommodation.

PN478

BHP, accordingly, as a responsible landlord used the particular form that the Residential Tenancy Authority issues. It's not required by the Act but it's out there and which is why the notice to leave sits so oddly with what actually happened. It is odd to give some of the forms saying well (indistinct words) if you're not out of here in a month (we don't mean it).

PN479

Why that matters is because of the reliance by BHP on the Residential Tenancies and Rooming Accommodation not being discussed. The context that existed at the time the 2018 agreement was negotiated, as the Vice President found, was that there was a uniform practice at the time of the negotiation. That is at paragraphs 167 and 168. It's inferential reasoning, it's a factual finding of the (indistinct) standard would necessarily apply.

PN480

The challenge of it wasn't actually featured in the grounds of appeal. It was open to her Honour particularly with BHP not saying anything, an available inference when the forms are there, people are saying it, there's no reason that BHP would enter into this agreement with one person and not another in identical circumstances and the silence.

PN481

It's not, in that sense, post-contractual conduct. It's critical conduct to the – critical context for the interpretation of the agreement is made. There is then subsequently post-contractual conduct in that the practice continued thereafter.

PN482

I don't need your Honour to go to it but it's at Appeal Book 143 to 144. That is Mr Piper's signed form which he entered into in 2020. It continues until early 2022. That post-contractual conduct is – confirms the practice and confirms objectively the existence of, as the Vice President found, a common understanding as to what these arrangements were and what that $60 was.

PN483

2022 the changes proposed. Rent is no longer – they waive the obligation to pay rent. The corresponding refuse to accept it and the effect is that BHP considers that the accommodation and treats the accommodation as no longer caught by the Act. The particular protections no longer apply because the conduct changes. Of

course the inference is that was the purposes available but there's very little else that can be sensibly said about it.

PN484

There's no evidence is the submission but only in the sense that BHP declined to explain or provide an alternative in the face of the blindingly obvious. The crux of the dispute is about that decision to stop accepting rent from the employees. The agreed question in that sense as reformulated today poses two issues which are ground one and two of the appeal.

PN485

The first is that was clause 5.2 that the Moranbah Accommodation Agreement means that individual accommodation agreements that are subsequently entered into have to include that obligation to pay rent. If it does can BHP waive that obligation? And ground one to accept it.

PN486

What doesn't arise is whether any particular individual arrangement is a residential rooming accommodation arrangement. There's a contention advanced that it might not be someone's main residence. And if it's going to be engaged in that's an individual residential question necessarily and it's outside the scope of what your Honour was being asked to determine.

PN487

Dealing briefly with the actual grounds of appeal. Ground one the interpretation of 5.2 is simple enough. It's the employee will pay and BHP will deduct. That 'will deduct' should be in the context of rent in the broad context of the agreement be read not just as a machinery provision but is imposing an obligation to accept. And that is is it the particular function that rent has? It's more than – just rather sits fundamentally – it goes fundamentally to the nature and core of the relationship itself.

PN488

It's difficult to read differently and, as I have said, it set out the – and I adopt what Mr Walkaden said as I have set out any offer of accommodation that individual deal with employees has to conform to this unless there is mutual agreement.

PN489

Ground two, the question of waiver. It's a notoriously slippery concept to the inner width and, indeed, in my friend's exploration of the authorities one sees that an up motion between it and estoppel and to a degree variation of contract. And the question is what's being waived here is it something – a term of the Moranbah Accommodation Agreement or is it terms of these individual contracts that necessarily exists with the employees.

PN490

It's not clear what's happened here. It seems that it's varying and possibly entering or purporting to entering a contract with employees that have contained either obligation. The obligation to pay or the obligation to collect. What that is, in truth, is well contracting in a way – dealing with the employees in a way that is inconsistent with the terms of the Moranbah Accommodation Agreement and thus

precluded it cannot be done. It is – contracting out as an enterprise agreement the entitlement. It could not be done even if wholly beneficial to BHP, which is not for reasons I will return to.

PN491

In respect of Metropolitan Health Services Board my friend is right in a sense that it's obiter but passages at 17 to 25 are a useful and comprehensive summary. As I understand the uncontroversial principle regularly adopted by subsequent Full Courts. Most recently in *WorkPac v Rossato* [2020] 278 FCR 179. My friend will correct me if I am wrong but not an aspect of the case turned on and not something affected by the subsequent High Court decision. The point is it's a comprehensive statement of when one can contract out and even agree not to accept the benefit. And I don't actually understand the submissions (indistinct)but anything that Justice French says in that passage is controversial.

PN492

It's not though a situation that is, in fact, precisely analogous to an employee refusing to accept wages. The reality is both is that two things have happened here. BHP is relieving employees of the obligation to pay but is correspondingly refusing to accept it prior we will not deduct. That's the mechanism that is agreed under the enterprise agreement.

PN493

That has an effect on the employee. It changes the nature of the relationship between them in a way that we say is detrimental in the sense that it's no longer a landlord and tenant relationship with the – obligations. It's just something else.

PN494

BHP will be sensibly unable to rely on waiver in the estoppel concepts to resist an order requiring it to comply in proceedings to start collecting the rent. That's the point here and it is as your Honour Justice Hatchett observed, why the reference to the lawful is a bit of a red herring, it's more in the, are you allowed to do sense, and here they're not. In any event even if we approach this as a purely contractual question we assume that these site deals are – it's exciting news for many of my clients – these site deals are enforceable.

PN495

The reality is the payment of rent is, as I have said, integral to the relationship. It is something that fundamentally creates a particular relationship, a tenant and landlord that's not a particularly novel statutory concept. It's not something that requires deep understanding of the Residential Tenancies and Rooming Accommodation Act.

PN496

It's fundamental but that Act is in play and protections that arise from it (indistinct) it's a pure benefit to BHP doesn't work in that sense. It's something that's in a relational contract, not as easily available anyway, but here it's just inextricably mixed up with the rest of the transaction. And so, as BHP accepts in its submission, terms of that kind (indistinct) can't be severed (indistinct) even if this was a contract from statutory instrument wouldn't be available.

PN497

The third ground is are these rooming accommodation agreements. If the Bench is minded to deal with that we say it's outside the question of rent. They're not rooming accommodation agreements. It is outside the scope of the dispute below. I have dealt with that in my written submissions and I don't intend to expand on it, except to correct an error, at paragraph 56 refer to section 16. It should be section 15. Other than that those are the submissions.

PN498

JUSTICE HATCHER: Mr Saunders, or anyone can answer this, in relation to clause 5.2 of the second sentence.

PN499

MR SAUNDERS: Yes.

PN500

JUSTICE HATCHER: Are the rules of the SPV in evidence somewhere?

PN501

MR SAUNDERS: No. No they're not.

PN502

JUSTICE HATCHER: Are they reduced to documents before me?

PN503

MR SAUNDERS: Yes, they are.

PN504

JUSTICE HATCHER: Thank you. In reply?

PN505

MR NEIL: Just very shortly. There is – we say with respect an incoherence at the heart of the case made by the respondent and the intervenor. They each refer to clause 5.2 of the Moranbah Accommodation Agreement as conferring a benefit or an entitlement on employees. But they are unable to identify with precision what that benefit or entitlement is. Is it the benefit of living in the SPV? Is it the benefit of living in the SPV, being accommodated in the SPV pursuant to a rooming accommodation agreement under the Queensland Statute.

PN506

Both the respondent and the intervenor are unable to say with precision. But the best that it gets is the submission that if the $60.00 to which the first sentence of paragraph 5.2 of the Moranbah Accommodation Agreement is probably characterised as rent. Then it necessarily follows that it is rent within the meaning and for the purposes of the Queensland Statute, and the payment of that rent is all that is required to give rise to a rooming accommodation agreement under the statute.

PN507

Neither of those two propositions follows. First, we do take issue with the notion that the rate that is referred to in the first sentence at clause 5.2 is properly

characterised as rent at all. And, certainly, with the proposition that it is rent for the purposes within the meaning and for the purposes of the Queensland statute.

PN508

The Moranbah Accommodation Agreement refers in terms to both to rent and a rate that the language is used of rent, for example, is used in clause 2.2 – the second paragraph – in ways that indicate plainly that rent and rate are for the purposes of the agreement two distinct concepts. And it is the latter rate, not rent, that is used in clause 5.2.

PN509

JUSTICE HATCHER: Well, if you go to the second paragraph 2.2 there's a reference to their current rent/rate being less than any rent/rate prescribed in the agreement. I must admit I read that as many of their interchangeable expressions. But you're saying they're separate. Is there somewhere in the agreement where rent is described as rate?

PN510

MR NEIL: For example, in that paragraph itself. Third party rental properties.

PN511

JUSTICE HATCHER: But are you referring – I'm just talking about the specific reference to rent/rate described in this agreement.

PN512

MR NEIL: Yes.

PN513

JUSTICE HATCHER: Is there a rent that is not a rate described in the agreement in it?

PN514

MR NEIL: Yes. In that – those words – which I'm reading from that paragraph – third party rental properties. That's a reference to rent, as opposed to a rate. The second paragraph in clause 2.2 is intended to refer, not just to accommodation in the SPV but all sorts of properties. Again, clause 5.4 uses the language of 'rent' as opposed to 'rate'. 5.5 uses the language of 'rent' as opposed to 'rate'.

PN515

JUSTICE HATCHER: Well if you go to 5.5 what do you say about the very last sentence?

PN516

MR NEIL: An indication that the subsidy that applies to employees occupying something in the CPP.

PN517

JUSTICE HATCHER: Well, the point is though - - -

PN518

MR NEIL: Is rent rather than a rate.

PN519

JUSTICE HATCHER: The point is the last sentence refers to it not being required to pay these rental subsidy at clause 5.3.

PN520

MR NEIL: Correct.

PN521

JUSTICE HATCHER: But 5.3 then refers to a rate.

PN522

MR NEIL: Yes. I see that point.

PN523

JUSTICE HATCHER: Isn't that indicating they're treated as interchangeable expressions?

PN524

MR NEIL: That may be an indication but it doesn't overcome, we would say, the fact that the agreement uses the two expressions.

PN525

JUSTICE HATCHER: I just want to ask you another question about that same sentence. The last sentence in 5.5. Might that be taken as indication that where the agreement intends that the rate or the rent or whatever is not required to be paid it says so.

PN526

MR NEIL: I hadn't - - -

PN527

JUSTICE HATCHER: That is it describes the circumstances.

PN528

MR NEIL: Can I go backwards? This may not answer your question but if I haven't I will come to it. If you look at the structure of 5.3 and the last sentence in 5.5 it makes good the analysis that for which we contended in our submissions in chief. That the primary obligation created by the Moranbah Accommodation Agreement is for BHP to provide subsidised accommodation to certain employees of certain kinds.

PN529

The rent that the last sentence at paragraph 5.5 refers to is what we're obliged to pay. It's the subsidised rent. The subsidy comes from – it is our subsidy, not the employee's subsidy. The rate that is referred to in 5.3 is what the employees pay.

PN530

JUSTICE HATCHER: Yes.

PN531

MR NEIL: But by way of a contribution to our obligation.

PN532

JUSTICE HATCHER: Yes. But it's that same amount which the last sentence at 5.5 says they're not required to pay.

PN533

MR NEIL: Yes.

PN534

JUSTICE HATCHER: In certain circumstances.

PN535

MR NEIL: Yes. The subsidy in the last sentence at 5.5 – I'm not sure if I am repeating myself – but the subsidy in the last sentence at 5.5 is the $60.00 that's referred to in 5.3.

PN536

JUSTICE HATCHER: Yes.

PN537

MR NEIL: It's a subsidy paid towards the rent. It's the rent is paid by us.

PN538

JUSTICE HATCHER: I see. So the rate is a contribution to rent paid by BHP

PN539

MR NEIL: Correct. Correct, that's the way we put it. And we then take up the proposition - - -

PN540

JUSTICE HATCHER: So who owns the accommodation?

PN541

MR NEIL: I don't know if there's any evidence about who owns it but we certainly provide it. In terms of ownership I don't know that – I can't recall there being any evidence about that question.

PN542

JUSTICE HATCHER: So BHP does not own it.

PN543

MR NEIL: I don't know the answer.

PN544

JUSTICE HATCHER: Sorry, I thought you just said that the rates prescribed by 5.2 and three were contributions to rent paid by BHP.

PN545

MR NEIL: Yes.

PN546

JUSTICE HATCHER: That assumes that BHP doesn't own it. It's paying rent to some third party. Is that the case or not?

PN547

MR NEIL: I didn't mean it in that sense. What I meant was the rent is the reference to what we pay to provide the accommodation. It costs us money to do that.

PN548

JUSTICE HATCHER: Only in the notional sense.

PN549

MR NEIL: Well, I don't know with respect that we would accept that proposition. Would your Honour excuse me for just one moment?

PN550

MR SAUNDERS: While my friend is – can I just draw your Honour's attention to – at clause 3 of the agreement the definition of company controlled property, owned or directly (indistinct).

PN551

JUSTICE HATCHER: All right. Well, that doesn't clarify much does it?

PN552

MR NEIL: I don't know that I can take that any further.

PN553

JUSTICE HATCHER: No.

PN554

MR NEIL: Except to draw attention to the fact that the agreement itself refers to – I withdraw that submission. That doesn't take the matter any further.

PN555

The next point we make about this rent – about the rent issue is that rent – that even if it were, even if the amount referred to in the first sentence at 5.2 were rent that is not conclusive of the creation of a rooming accommodation agreement. A rooming accommodation agreement is defined in subsection (1) of section 16 of the Queensland Statutes. That's at page 415 of the bundle behind tab 11.

PN556

There must be rental premises. There must be rooming accommodation and the rooming accommodation must be provided to a resident. Rooming accommodation is defined in subsection (1) of section 15 of the Queensland Statutes. That's at page 414 and 415. Paragraph (a) of that definition refers to a right of – effectively, we would submit – a right of exclusive occupation. That right – such a right is not to be found in any provision of the Moranbah Accommodation Agreement. Even if rent is paid.

PN557

The definition of a resident is the subject of section 14 of the Queensland Statute. There is an important qualification in subsection (a).

PN558

JUSTICE HATCHER: I am lost. What section are we talking about now?

PN559

MR NEIL: Fourteen. So 16(1) defines a rooming accommodation agreement. We accept it needn't be in writing. That's subsection (2) but subsection (1) is mandatory. Two definitions are important. One is rooming accommodation. The other is resident. Rooming accommodation is the subject of section 15. That requires by paragraph (a) of subsection (1) a right of exclusive occupation of at least one room, which is not conferred by the Moranbah Accommodation Agreement. It's perfectly silent about that.

PN560

JUSTICE HATCHER: Where does exclusive occupation come in?

PN561

MR NEIL: Paragraph (a) in subsection (1) – occupy one or more rooms.

PN562

JUSTICE HATCHER: A right to occupy.

PN563

MR NEIL: A right to occupy. That's the language of exclusive occupation. Not the language of accommodation. Someone can be accommodated in something which is the language of the enterprise agreement. Someone can be accommodated in a room or rooms but they don't have a right to occupy. Two different things.

PN564

JUSTICE HATCHER: So the accommodation rights in the Moranbah Accommodation Agreement are not exclusive rights. Is that - - -

PN565

MR NEIL: According to the terms of that agreement, no. Now employees may have a right to occupy a room but that is a consequence not of the Moranbah Accommodation Agreement but of the individual posterior agreements that are then made.

PN566

But we're concerned not with the construction – this dispute is concerned not with the construction and application of the individual posterior agreements but with the construction and application of the Moranbah Accommodation Agreement.

PN567

The other definition that's important is section 14. Definition of a resident. And particularly important there is subsection (a) and whether any of the employees who are within the scope of the Moranbah Accommodation Agreement fall within that paragraph is a matter not resolved on the evidence. There's evidence about two employees and neither one of them meet that test.

PN568

JUSTICE HATCHER: You mean the only or main residents test?

PN569

MR NEIL: Yes. We next turn to a related submission made in the submissions on behalf of the intervenor. The submission was that the terms of the individual posterior agreements are shaped by the Moranbah Accommodation Agreement presumably having regard to what were described as the surrounding textual circumstances.

PN570

There is no provision of the Moranbah Accommodation Agreement was identified, that in terms gave rise to or required the creation of a rooming accommodation agreement under the Queensland Statute. The words of clause 5.2 mean just what they say and nothing else. That's what the High Court said in Personnel Contracting. We made some submissions about this that are below that are recorded in paragraph 115 of the primary judgment and we repeat them here.

PN571

If one can't read into the intractable language of clause 5.2 some obligation – enforceable obligation to give employees the benefit of a rooming accommodation agreement, if you by having regard to surrounding textual circumstances that have their source seemingly, if anywhere, in the expectations created by what was said or done before the contract was made.

PN572

The last point we wanted to – I'm sorry next we wish to say something in answer to your Honour, Deputy President Anderson's question about the significance of the factor that the Moranbah Accommodation Agreement, or the parties to the Moranbah Accommodation Agreement do not include individual employees.

PN573

Our answer to that is that consistent with the authorities which we reminded the Full Bench earlier, when the Moranbah Accommodation Agreement is incorporated in the enterprise agreement it doesn't give rise to any obligations, other than those to which it refer. The only obligations to which it refers are necessarily obligations as between the parties to that agreement, not including employees. It followed when the Moranbah Accommodation Agreement is incorporated into the enterprise agreement it doesn't give rise to create a wholly new legal obligation or entitlement as between BHP and individual employees. That's the answer we give to that question.

PN574

The last point we wanted to deal with is this question of consideration. Could we give a reference to - - -

PN575

JUSTICE HATCHER: The second or third edition?

PN576

MR NEIL: The third edition. Hot off the press. In a most engaging blue and orange. *Ryan v Textile Clothing and Footwear Union* which is really the similar authority about the contractual significance of collective agreements of course. Volume 130 of the Federal Law Reports, page 313. The passages we had in mind were at pages 328, 349 and 350. They stand for the following

proposition. A promise by a union that it will not make any new demands or future claims on the same subject matter of the dispute that is resolved by collective bargaining may constitute good consideration as a result of the agreement. One of the conditions that such a promissory consideration must fulfil are that it be sufficiently certain that it be able to be enforced.

PN577

So that's the test that we would have to meet. Now what we have said about that is when one looks at clauses seven and nine in particular of the Moranbah Accommodation Agreement and notes that the agreement is not said to be subject to a term. It doesn't include any provision for its termination. And strictly limits the circumstances in which it can be varied.

PN578

Our submission is that the Moranbah Accommodation Agreement is and is to be taken to be a conclusive and definitive resolution of the claims being made in the course of bargaining on the subject of accommodation. That's the way we put it. There's a difference, of course, between variation and waiver, they're two different concepts.

PN579

Unless the Full Bench has anything more for us that's what we'd wish to say by way of reply.

PN580

JUSTICE HATCHER: Mr Neil, can you just finally clarify one matter for me? In 5.1 of the Moranbah Accommodation Agreement the table refers to SPV and then various types of units or house.

PN581

MR NEIL: Yes.

PN582

JUSTICE HATCHER: Are all the units and houses referred to do they all fall within the definition of company controlled property?

PN583

MR NEIL: Yes. As I understand that.

PN584

JUSTICE HATCHER: Yes. All right. Right, if there's nothing further we thank the parties for their submissions. We'll reserve our decision and we'll now adjourn.

ADJOURNED INDEFINITELY **[1.45 PM]**