TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT BINET
DEPUTY PRESIDENT GRAYSON

C2023/5577

s.604 - Appeal of decisions

Appeal by Australian Workers' Union, The (002N)
(C2023/5577)

Sydney

10.00 AM, FRIDAY, 17 NOVEMBER 2023

Continued from 16/11/2023

PN658

VICE PRESIDENT ASBURY: All right, submissions. Thank you.

PN659

MR MACKENZIE: May it please your Honours, do you have the outline that was sent through earlier today?

PN660

VICE PRESIDENT ASBURY: Yes, we do, thank you.

PN661

MR MACKENZIE: I would seek only, in light of the outline having been filed, to address you briefly on the matters set out in that. Can I take your Honours first to the issue of extension of time.

PN662

VICE PRESIDENT ASBURY: Yes.

PN663

MR MACKENZIE: The AWU's submission is that there's a good reason for the delay. We say we didn't become aware of the agreement until 28 August. Before then, we didn't know it existed, we didn't know that it was relevant to our members. We only became aware of the circumstances giving rise to the agreement on 8 September and that was only 10 days before the filing of the notice of appeal.

PN664

It is said against my client that the AWU is a sophisticated industrial organisation and the Commission facilitates real time review. I resist that and say that it doesn't matter how experienced our industrial or legal staff are, we couldn't have found out about the circumstances of this agreement until we did.

PN665

VICE PRESIDENT ASBURY: You couldn't know what you didn't know.

PN666

MR MACKENZIE: Precisely. Before the time that we did know about it is the submission.

PN667

Can I take your Honours now to the issue of permission to appeal. The case is that the agreement wasn't genuinely agreed and that a mandatory consideration wasn't taken into account. If we are right about that, the agreement was made without jurisdiction. That goes to the lawfulness of the conditions of an indeterminate number of people and that's at stake in the appeal. As well as that, for the reasons set out in the unchallenged evidence of Mr Cumarella, it goes to the conditions in the offshore industry and it goes to the job security of AWU members. Putting it bluntly, people may have lost well-paying jobs because of the approval of this agreement.

PN668

As well, the case concerns a strategy that we say is at odds with the legislative purpose of collective bargaining. It goes to the integrity of the system, and I say those are public interest matters and the public interest is enlivened and, for that reason, permission to appeal should be granted.

PN669

VICE PRESIDENT ASBURY: I accept, for my part anyway, that from your client's perspective, there is an interest in maintaining a standard of terms and conditions in the offshore industry, but is it contrary to any law or policy that an employer should endeavour to establish terms and conditions of employment which, provided the agreement is genuinely made and they meet the BOOT, is for the least possible amount that it can lawfully pay? Is that really contrary to any legislative provisions?

PN670

MR MACKENZIE: No, I don't say that, Vice President. I say only that the public interest is enlivened because of the possibility of the consequence, that consequence occurring by way of an agreement that was unlawful.

PN671

VICE PRESIDENT ASBURY: I understand.

PN672

MR MACKENZIE: That was made without jurisdiction.

PN673

VICE PRESIDENT ASBURY: Yes.

PN674

MR MACKENZIE: That's as far as the submission goes, Vice President.

PN675

VICE PRESIDENT ASBURY: Yes, I understand.

PN676

MR MACKENZIE: Can I take the Bench now to the first point I make on the genuine agreement point. The AWU's case is that the strategy had, as it were, five limbs: it was a strategy to create a new enterprise agreement; it was to do that to supply labour within the Valmec group of companies; it was to do that with only three employees; it was to do that to avoid bargaining collectively with a larger group of employees, and that, in turn to lower the expense to the Valmec group of companies of the labour employed under that enterprise agreement.

PN677

It is not contested on the first limb. The respondent doesn't contest that it sought to make a new enterprise agreement, and I don't understand it to be seriously contested on the second point, that is, a purpose of the agreement was to supply labour to entities within the Valmec group. I understood Mr McLaughlin's evidence yesterday to be to the effect that he quibbled with perhaps the semantics of that, saying he didn't like the words 'supply labour'. He said he would prefer

'support' other entities in the sense of doing work. That was how I understood his evidence. My submission is that that limb as well is not seriously contested.

PN678

Again, that the group sought to do so on an inexpensive basis I understood not to be contested, and I understand Mr McLaughlin's evidence to be he doesn't contest that the respondent was seeking a low cost enterprise agreement and, indeed, his evidence was, 'I don't say that that's anything unreasonable.' I don't cavil with that, but I understand the effect of that evidence is that the respondent was seeking a low cost enterprise agreement.

PN679

VICE PRESIDENT ASBURY: By insisting that it passed the BOOT - provided it passed the BOOT?

PN680

MR MACKENZIE: Yes, I accept that.

PN681

VICE PRESIDENT ASBURY: I understand, thanks.

PN682

MR MACKENZIE: The next point is that it chose to do so with only three employees. Now, Mr McLaughlin, as I understood his evidence, initially resisted that proposition. I understood, though, that once the documents were shown to him, his evidence changed and he said, 'Those employees were selected to vote on the agreement, just not by me' - and by the documents I showed him, I mean the documents at court book - I don't take your Honours to these at the moment - the documents at 45 to 46 of the court book, 60, 76 to 77 and 106 to 107.

PN683

VICE PRESIDENT ASBURY: Was it also the evidence that they were selected on the basis that they did work that would be within the scope of this agreement, being different work than what - that Valmec had decided to get into this testing, conditioning, condition testing work, and that it looked around its enterprises and found employees that were doing that work?

PN684

MR MACKENZIE: I understood that to be Mr McLaughlin's initial evidence, but my submission is that, having been shown the documents, it changed and he then said, 'We chose these employees because we wanted these employees to be the employees to vote.'

PN685

VICE PRESIDENT ASBURY: I understand your submission. Thank you.

PN686

MR MACKENZIE: The next issue, and this is the core issue, is whether those employees were chosen to avoid collective bargaining. Can I take your Honours to court book pages 115 to 116. This is a document that I say, in a general matter, that is, not in the sense of the reason for this enterprise agreement being made,

shows that Mr Rahman had the intention to avoid collective bargaining. In particular, I draw the Bench's attention to just before the end of the email on page 116:

PN687

> *The question is, if employees did want to start negotiating, how difficult would it be to transfer their employing entity to APTS Pty Ltd and have them covered under our new proposed Industrial Services Agreement, assuming we hire then under Valmec Services Pty Ltd under common law as above?*

PN688

I say that's a contextual matter that goes to the likelihood that this agreement, this different strategy, was also used to avoid collective bargaining.

PN689

VICE PRESIDENT ASBURY: So essentially the strategy is that, 'We've got a Workshop Agreement and we've got an on-site' - for want of a better description - 'agreement and, by transferring employees between the two, they will always be covered by an agreement and they won't have the capacity to engage collectively with us to negotiate about their terms and conditions'?

PN690

MR MACKENZIE: Yes, that's the submission, Vice President.

PN691

VICE PRESIDENT ASBURY: I understand. Thanks.

PN692

MR MACKENZIE: The second point that I make on this issue is that the making of the enterprise agreement only makes sense in the context, as a strategy, to avoid collective bargaining.

PN693

VICE PRESIDENT ASBURY: And that goes to the comment on page 116 of the court book that, 'There's a risk of not having an agreement, which is we'll have to bargain collectively'?

PN694

MR MACKENZIE: That's right, Vice President, and it arises as well from Mr McLaughlin's evidence that there was an element of urgency to the making of the agreement, but also the evidence that he was copied into an email from Mapien, the industrial advisers, saying, 'This agreement can't do anything until February 2022.' So why the urgency? 'Because we need to get the deal done with a few people in order to avoid collective bargaining.'

PN695

VICE PRESIDENT ASBURY: What was the significance of February 2022?

PN696

MR MACKENZIE: That's the nominal expiry date of the Workshop Enterprise Agreement. So, by operation of section 58, these voting employees - - -

PN697

VICE PRESIDENT ASBURY: Because two of them were covered by the Workshop Agreement, one arguably wasn't?

PN698

MR MACKENZIE: That's right. I say - - -

PN699

VICE PRESIDENT ASBURY: Or might have been. I don't know.

PN700

MR MACKENZIE: My submission is that he was covered and the reason being that the Workshop Enterprise Agreement covers employees of APTS except for people at Henderson, who are not relevant.

PN701

VICE PRESIDENT ASBURY: And he moved to Henderson?

PN702

MR MACKENZIE: He moved to Henderson, but it doesn't matter because he's not one of the specified roles at Henderson. I say he's covered because the Workshop Enterprise Agreement applies to all employees in the classifications in the Workshop Enterprise Agreement, except those irrelevant, excluded employees, and the classifications are determined in this way. If you have - it's a points system whereby if you have certain tickets, licences, et cetera, then you get a certain number of points and that determines your classifications, but, even if you have no points, you are in a classification under the Workshop Enterprise Agreement. So I say Mr Woodard must have been covered as well.

PN703

VICE PRESIDENT ASBURY: Regardless, you say the strategy is, 'It evidences that we were selecting these three employees and at least two of them could not have voted on this agreement and have it operate with respect to them until the Workshop Agreement ceased to operate or reached its nominal expiry date because of the provisions of the legislation about an earlier agreement always continues to operate and it can't be over with by a later agreement'?

PN704

MR MACKENZIE: That's the submission.

PN705

VICE PRESIDENT ASBURY: Yes. I understand. Thanks.

PN706

MR MACKENZIE: That's the submission, Vice President.

PN707

VICE PRESIDENT ASBURY: Yes.

PN708

MR MACKENZIE: And I also rely on it because it puts the lie, I say, to Mr McLaughlin's contrary evidence that, 'The reason the agreement was urgent

was because we needed people covered by this enterprise agreement.' That can't have been true and he knew it wasn't true, is my submission.

PN709

I turn now to another point. The point is this, that the allegation is that the strategy was deployed in order to avoid collective bargaining, but there's no one called who can comprehensively respond to that allegation. Mr Rahman wasn't called and Mr McLaughlin's evidence was that he wasn't as involved in the strategy as Mr Rahman and it was possible that there were aspects of the strategy that he didn't know about, including, on my understanding of his evidence, the fact that the agreement was sought to be used as a labour hire agreement - paraphrasing. He didn't know about that. His evidence can't say, 'I know for sure that this wasn't to avoid collective bargaining.' So there's no one who gave evidence who can comprehensively give evidence against that, I say to your Honours.

PN710

I say as well that, to the extent that Mr McLaughlin's evidence would tend to contradict the allegation that the strategy was deployed to avoid collective bargaining, your Honours ought not to accept it. The reason is Mr McLaughlin resisted simple propositions. I put to him that a reason for the enterprise agreement was to supply labour between entities within the corporate group and he resisted that, but he then accepted that it was fine to say it was for employees to provide support in the sense of work. I say that's an evasive answer.

PN711

I also say Mr McLaughlin resisted the proposition that contractual offers were made to Mr Barry and Mr Bellingham, those being the contractual offers that they said ultimately satisfied them of their concerns about the agreement. That can't be maintained, I say, your Honours. They gave evidence themselves that those offers were made.

PN712

Finally, Mr McLaughlin said he had never been a bargaining representative. He was the bargaining representative for this agreement, so that's a reason why his evidence ought not to be accepted on this point.

PN713

The second point I make on genuine agreement is that the voting cohort was a reasonable ground for believing there was no genuine agreement. In the agreement, there are 19 listed typical designations that cover up to 18 award classification across two awards, and this agreement, on the respondent's own evidence, was designed to be rolled out to new work. The cohort, though, is made up of three employees covering two roles and, at most, two classifications.

PN714

It is said against us that the unrepresentative nature of the cohort is legally irrelevant. I think the submission put against us is whether the voting group is capable of giving informed consent and thus genuinely agreeing the agreement is the question. I resist that. I say that's wrong as a matter of law, and it's not just

about how informed the employees are. To make good that proposition, can I take your Honours to paragraph 155 of the One Key decision.

PN715

VICE PRESIDENT ASBURY: Yes.

PN716

MR MACKENZIE: It's at page 311 of the AWU's list of authorities.

PN717

VICE PRESIDENT ASBURY: Sorry, I just have to get that up. If you keep talking - I think I've seen it enough.

PN718

MR MACKENZIE: The passage that I rely on is the last sentence of paragraph 155 and the first two sentences of paragraph 156. They read:

PN719

As Buchanan J observed in John Holland (Besanko and Barker JJ agreeing), in those circumstances the employees will presumably act out of self-interest with the possible result that 'it may not be fair for an enterprise agreement made with three existing employees to cover a wide range of other classifications and jobs in which they may have no conceivable interest'.

PN720

Therein lies the concern. The legislative objective of achieving 'fairness through an emphasis on enterprise-level collective bargaining' could be undermined if the employees who vote on the agreement have no basis for appreciating its nature and terms.

PN721

I say that it's not just about what these employees know, they need to appreciate the terms in a way that's consistent with fairness to a collective bargaining, and if the employees have no stake in the agreement in the sense of being wholly unrepresentative of the cohort of employees who would be covered, I say they don't have that appreciation.

PN722

I add that the submission that these employees had informed consent is also wrong on the facts. Each of Mr Woodard, Barry and Bellingham gave evidence that their witness statements, so far as they go to their employment history, are comprehensive and complete. That evidence, so far as it goes to roles that they had, says that Mr Woodard has been in two positions: he has been a heavy duty mechanic and he's been a condition monitoring technician; Mr Barry has been a technician and he's been a leading hand, and Mr Bellingham doesn't give evidence of holding a position other than PSB technician. I simply say that that's not wide enough to make good the respondent's submission that these employees were sufficiently experienced to give informed consent to this agreement.

PN723

VICE PRESIDENT ASBURY: Is it also your argument that, even if they were, two of them were covered by an agreement that had higher rates in it? Do you say the Workshop Agreement provided for higher rates than this agreement?

PN724

MR MACKENZIE: Yes.

PN725

VICE PRESIDENT ASBURY: And were told, 'Don't worry about it', in effect, 'because you're going to keep getting your existing rate'?

PN726

MR MACKENZIE: That's right, Vice President. In fact, I say the representation made to them was worse than that. The representation Mr McLaughlin said was not just, 'Don't worry about these rates, you'll get a different, higher rate', Mr McLaughlin said, 'Yes, a statement to that effect was made, but it wasn't to them only. Going forward, we need to pay market rates to attract people.' I say that's worse because that's not just a statement that, 'Don't worry about these rates, they are not your rates', it's a statement, 'Don't worry about these rates, they're not yours and they're no one else's either.' So that is even less stake in the agreement.

PN727

VICE PRESIDENT ASBURY: Well, that could have meant that, 'The agreement is the baseline that we won't go below, but we'll have to pay the going rate to attract labour', which is arguably going to be more than the agreement.

PN728

MR MACKENZIE: Yes, but, in that circumstance, the representation made was that, 'Don't worry about the agreement, it's no one's minimum rates.' That is even less stake than otherwise and, of course, I rely on the contractual offers made to Mr Barry and Mr Bellingham to say that they had no stake for that reason as well.

PN729

The other point I make on genuine agreement is that the explanation of the terms and their effect didn't satisfy section 180(5), or, alternatively, that the nature and the inadequacy of that explanation was a matter that needed to be considered under section 188(1)(c).

PN730

Can I take your Honours to the One Key decision again at paragraph 142.

PN731

VICE PRESIDENT ASBURY: Yes.

PN732

MR MACKENZIE: It reads:

PN733

Paragraph 188(c)...is intended to pick up anything not caught by paras (a) and (b). Thus, any circumstance which could logically bear on the question of whether the agreement of the relevant employees was genuine would be

relevant. One obvious example is the provision of misleading information or an absence of full disclosure.

PN734

I say there was both, in this case, both misleading information and absence of full disclosure.

PN735

To make good the first of those propositions, can I take your Honours now to paragraph 41 of the One Key decision. At the bottom of that paragraph, it reads:

PN736

With the exception of a statement in the second paragraph, which was at best misleading, the email paraphrased cl 3.2 of the Agreement and merely restated a select few of its other terms.

PN737

It goes on:

PN738

The statement in the second paragraph read:

PN739

'If the vote is successful and the Agreement commences operation, your current terms and conditions of employment will not change, however they will be underpinned by the Agreement.'

PN740

Again I rely on Mr McLaughlin's evidence that, not only was the representation, 'Don't worry about the rates in the agreement, you'll get a different, higher rate and also everyone else will get a different, higher rate', to say that that is the same misleading, but worse, because it applies to more people.

PN741

On the lack of full disclosure point, the parties have both referred to *CFMMEU v Mechanical Maintenance Solutions.* I say the effect of that, at paragraphs 171 to 173 - I don't take the Bench to it - is that an employer need not explain every difference, but it must explain key differences, and the key differences I rely on are, firstly, classifications, and I say, first of all, the classification structures between the existing arrangements for Mr Barry and Mr Bellingham in the Workshop Agreement were very different from the classification structures provided under the Industrial Services Enterprise Agreement.

PN742

As I mentioned before, the points system was in the Workshop Agreement and we have award classifications in the Industrial Services Agreement that rely on competencies rather than training tickets, et cetera. I say they were never compared, and the high point, I say, of the evidence about the explanation of classifications is Mr Woodard saying he remembers some classifications being explained, but Mr Woodard's evidence was also that he doesn't remember the Workshop Agreement being mentioned at all.

PN743

Further, the only evidence that any document or other explanation of classification that was provided was Mr Woodard saying he received some supplementary information by email. Now, if that email exists, it's not before the Commission and I say, as a result, it is not open for the Commission to conclude that it attached, for instance, the awards or an explanation of the classification structure in the awards.

PN744

DEPUTY PRESIDENT GRAYSON: Do you say that would have been caught by the orders of production or not, such an email?

PN745

MR MACKENZIE: Apologies, Deputy President, I think I would have to think about that.

PN746

DEPUTY PRESIDENT GRAYSON: Okay.

PN747

MR MACKENZIE: I can perhaps mention something later - after Mr Pollock.

PN748

DEPUTY PRESIDENT GRAYSON: Very good.

PN749

MR MACKENZIE: So I say the only conclusion open on the evidence was that no comparison was made.

PN750

VICE PRESIDENT ASBURY: And there is authority that the necessary comparison was the Workshop Agreement?

PN751

MR MACKENZIE: Yes, mechanical maintenance, I would say, stands for that proposition.

PN752

VICE PRESIDENT ASBURY: Yes.

PN753

MR MACKENZIE: The second key difference, I say, is the rates. The first point I make about it is that rates apply by classification. If the classifications weren't explained, the rates don't make sense in an adequate way. Putting the point differently, what use is an explanation of rates if you don't know when they apply?

PN754

The second point is perhaps a bit blunter. The difference between the Workshop Agreement and the Industrial Services Agreement was a large drop, on any measure, in the minimum rates. At most, there was some discussion about rates under the Workshop Agreement and under the Industrial Services Enterprise

Agreement. That's from Mr Bellingham's witness statement at paragraph 19, court book 933. The submission is just this: in circumstances of a large drop in minimum wage entitlements, what was required, in no uncertain terms, was to point out the large drop. I say your Honours can't be convinced that happened on the evidence before you.

PN755

The last aspect that I rely on is the meal allowances, and the high point, I think, or I submit on that, is Mr McLaughlin's evidence yesterday that there were discussions about whether those conditions were the same or better, I understand, as between the Workshop Agreement and the Industrial Services Agreement. The submission goes no higher than that's not an adequate comparison.

PN756

I would address the point on the BOOT briefly, your Honours. It's only that we rely on the example that is set out in the opening submissions and repeated in the outline provided today.

PN757

I say in relation to Mr Lord's evidence that it just doesn't grapple with the point made in paragraph 107 of the outline provided today to the same point made in paragraph 47 of our opening submissions at court book 41, which is that, at the test time, the living away from home allowance was necessary to pass the BOOT. It no longer is. Mr Lord's evidence doesn't answer that proposition.

PN758

Further, that problem gets worse for what remains of the life of this agreement. Of course, I have to say that that could have been intuitive by the Deputy President at the test time, and I do say that.

PN759

Unless I can assist the Bench with anything further?

PN760

VICE PRESIDENT ASBURY: You just indicated in respect of - sorry, I've just got a pile of papers here. In relation to the point you make about the nature of the appeal in point 9 of your submission, are we in *House v The King* territory or is it really satisfaction error - are we talking *Buck v Bavone*? I mean, I know there's not much of a distinction, it's a very similar test, but is it *House v The King* or is it *Buck v Bavone?*

PN761

MR MACKENZIE: I say it's *House v The King.*

PN762

PN763

VICE PRESIDENT ASBURY: Okay. Because there's a broader discretion, for example 188(c)?

PN764

MR MACKENZIE: That's right.

PN765

VICE PRESIDENT ASBURY: Okay. I understand. Mr Pollock?

PN766

MR POLLOCK: Thank you, Vice President and members of the Full Bench. Can I start with the notice of appeal, which I think you will find behind tab 2 of the appellant's materials. Court book page 20 is where the appeal grounds are set out.

PN767

VICE PRESIDENT ASBURY: Yes.

PN768

MR POLLOCK: You will see there that two of the - well, in the amended version, five grounds of appeal are framed with reference to Workforce Logistics, and the reasons why it's in the public interest to grant permission is again framed with reference to integrity of bargaining in light of, or in conjunction with, the finding subsequently made by the Full Bench of the Commission in Workforce Logistics. Its position at the outset is another example of that scheme, and two of these grounds, that is grounds 3 and 4, really amount to nothing more than APTS was a related entity of Workforce Logistics and that Mapien was involved and that Mark Hudston was a Mapien employee.

PN769

On that footing, your Honours, the appellant obtained production orders of considerable breadth, touching on internal strategy documents and advice passing between my client and its advisers, and all of that, again, based on what's said to be the public interest considerations and said to be justified by a need to preserve the integrity of enterprise bargaining.

PN770

What is now clear is that this case bears no resemblance to Workforce Logistics. What we are left with is an application to appeal a decision over two years out of time, raising the sorts of stake and explanation grounds with which this Commission has commonly grappled, in loco (indistinct) agreement cases.

PN771

We say nothing in the alleged scheme that my learned friend puts forward in his primary ground necessitates a conclusion that this agreement was not genuinely agreed. There is no appeal ground going to scope. We say, on the documents and on the unchallenged evidence, my client had an intelligible business rationale for making an agreement of the scope that it did.

PN772

Insofar as it is suggested that APTS sought to avoid bargaining with a cohort of hypothetical future employees, well, as I will demonstrate through the authorities that I will take your Honours through, that matter is irrelevant, and again as I will take your Honours through, that contention really runs counter to several authorities of Full Benches of this Commission and of the Federal Court.

PN773

We say the three employees that voted on this agreement were not unrepresentative, as my learned friend would have it, such as to necessitate a conclusion that this agreement was not genuinely agreed and that the Deputy President below could not have been satisfied of that. Those three employees had sufficient experience in the work to be performed under this agreement to provide informed consent, and again I will take you through some authorities that make good that proposition.

PN774

We say also that the three employees had the requisite stake in this agreement. Critically, the fact that they were paid rates of pay that were set at a level of contract, we say two things about that. One, that of itself does not deprive an agreement of the necessary stake in the KCL sense, and I will take you to come authorities that bear out that proposition, but, secondly, that agreement is facilitated under this enterprise agreement. Clause 1.2.4 of this enterprise agreement sets out a mechanism by which the employer and the employees can agree and it sets a floor for a salary rate. This is not a situation of, 'You're paid an over agreement rate, therefore don't worry about it.' This agreement makes provision for it.

PN775

VICE PRESIDENT ASBURY: Well, I don't know that that provision does, Mr Pollock, because all it does is say, 'We can make a salary with you and the salary can be the same as what the rates in the agreement are.' The way I read it, it's hardly a clause that says - it's not even like the Hydrocarbons Award salary clause, which has a requirement that they be - just looking at that clause - just bear with me - - -

PN776

MR POLLOCK: It reads:

PN777

To more efficiently support the performance of certain types of working arrangements, Employees may be offered and may accept salaried terms, in writing. The annual salary will be no less than the applicable amounts set out in Schedule B of this Agreement.

PN778

VICE PRESIDENT ASBURY: Yes, so basically that says 'You can create an annual salary by just working out all the payments you'd get in the schedule and dividing it by 52, which doesn't guarantee they are going to get more than what's in the agreement, it just guarantees that they are going to get the same. That's how I read that clause. It doesn't require any - it's not even like an IFA.

PN779

MR POLLOCK: I'm not sure that's quite right, your Honour.

PN780

VICE PRESIDENT ASBURY: Let's go to the clause.

PN781

MR POLLOCK: If you go to schedule B, B.1 sets out the minimum hourly rates, and in B.3:

PN782

For the purposes of clause 1.2.4, the applicable salary amounts are...

PN783

And then it sets those amounts, which are substantially higher.

PN784

VICE PRESIDENT ASBURY: How do we know that?

PN785

MR POLLOCK: If you look at appeal book page 64, the internal BOOT analysis, Deputy President, again shows those rates are around - well, variously: C14, 93.62 per cent higher than the award; C5, 91.51. They range from the high 70s through to the mid-nineties.

PN786

VICE PRESIDENT ASBURY: Okay. I understand.

PN787

MR POLLOCK: Thank you.

PN788

DEPUTY PRESIDENT GRAYSON: Do the contracts that have been offered to these people only change these provisions in 1.2.4 or are there other differences?

PN789

MR POLLOCK: Over and above what the enterprise agreement provides?

PN790

DEPUTY PRESIDENT GRAYSON: Yes.

PN791

MR POLLOCK: I would need to examine those documents carefully. I suspect the position is it deals with terms over and above.

PN792

DEPUTY PRESIDENT GRAYSON: That's my view as well.

PN793

MR POLLOCK: And I think that's right. Again, the primary submission we make, of course, is that there is nothing of itself improper or counter to the statutory scheme for an employee to be paid a contractual rate higher than what the enterprise agreement sets. That doesn't deprive the agreement of the requisite stake. Again I will address this in further detail as I develop it.

PN794

DEPUTY PRESIDENT GRAYSON: Yes. I'm not even sure that the contracts that people have entered into would be contracts that would comply, that is, this type of a contract that is contemplated by 1.2.4.

PN795

MR POLLOCK: Deputy President, I'm sorry, I may need to develop that and address it in further detail. Simply by way of signposting where we are going, the high point is really this: it would not be a controversial proposition in this Commission. This Commission would be well aware that in industries across the country, enterprise agreements do not necessarily set in stone the rate of pay or the particular conditions that every employee covered by and subject to the application of that instrument will be paid or will be provided the provision of over agreement terms and conditions, whether on rates of pay or allowances or a range of other entitlements, have, since time immemorial been able to be, and have been, provided at a level of contract.

PN796

It would be a strong thing indeed to reach a conclusion that simply by dint of the fact that certain provisions, even rates of pay, were provided at a level of contract, that would deprive the enterprise agreement of stake. I will take you through some authorities that make good that proposition.

PN797

Can I deal first with the key points that my learned friend makes in turn. I will deal with the question of extension of time and permission to appeal at the end because it really is after having developed those grounds that the answer to those questions becomes apparent, and my learned friend Mr Crocker will address the BOOT question.

PN798

Turning first to the scheme point that my learned friend raises in the context of genuine agreement, we make five points.

PN799

The first, as I have indicated, the substance of the argument appears to be really one of scope, that is, that APTS manipulated bargaining in order to avoid bargaining with some broader cohort of employees. We make the primary point that there is no appeal ground that goes to that issue.

PN800

Second, we say the strategy that is alleged presents, on the face of the evidence, an incomplete and, in my submission, a materially inaccurate picture. The contemporaneous materials don't support the view that the strategy was just about making a baseline agreement as an end in itself; rather, those materials reflect Mr McLaughlin's evidence, evidence that he pressed on several occasions orally, that that agreement was a means to secure new work scopes, and we say that that was an intelligible and legitimate business rationale.

PN801

Can I take you to court book page 57. This is the strategy document attached to the emails between Mr McLaughlin and Mr Rahman in April 2021. The background sets the scene:

PN802

In December 2020, an asset services employment strategy was presented to promote discussion about how to employ new skills not covered under existing Valmec Australia, Valmec Services or APTS enterprise agreements.

PN803

It is in that context that the next part of it describes discussions about:

PN804

...a new entity to consider the opportunity to create a competitive agreement that could in turn provide employees to support existing Valmec Group entities.

PN805

And the strategy document then proceeds. So the options that are flagged there, and option 2 in particular - I think the evidence of Mr McLaughlin was that option 2, in substance, was implemented save that it was done under APTS rather than the creation of a new entity. It is framed in that context, that is, a single enterprise agreement to encompass scopes of work and classifications from across these various business units. We see that in the current arrangement, there's setting out what the existing EAs do and what they cover.

PN806

Over the page, on court book page 58, the recommendation - admittedly, it is to proceed with a new legal entity and that wasn't ultimately done - but it is for the purposes of supplying labour to any of Valmec's limited subsidiaries:

PN807

This provides a platform to secure long-term maintenance contracts that are governed by a central enterprise agreement which is market competitive.

PN808

You heard unchallenged evidence from Mr McLaughlin that customers were looking for broader work scopes. You have his evidence in his statement that the group needed to broaden its offering to encompass, amongst other things, condition monitoring work. That's at paragraph 12. You have again his unchallenged evidence that the group had tendered for on-site maintenance work with Origin Energy and with Arrow.

PN809

Of course, the proof of that evidence is in the pudding of the agreement itself. Its scope is different to the 2017 Workshop Agreement. The Workshop Agreement classifications cover only pressure testing inspection and NDT work. It's a different set of classifications. The Industrial Agreement's coverage is based on the Manufacturing and Hydrocarbons Award classifications. Put another way, that Industrial Agreement coverage is more aligned and fit for purpose for the

range of on-site maintenance work for which the group was tendering, rather than a patchwork of other instruments.

PN810

That was Mr McLaughlin's evidence. That aspect of it, that is, the customers were asking for those broader work scopes, and reflected in these contemporaneous documents, that evidence withstands challenge and, on any level, is an intelligible business rationale for making the Industrial EA.

PN811

The third point we make is this: to the extent that APTS' strategy involved making a baseline agreement that had competitive rates, and subject to, as we have seen in the contemporaneous materials, a clear direction that this agreement passed the BOOT and it would be based on the higher rates within the Hydrocarbons Award, but subject to passing the BOOT, yes, of course it's going to make business common sense for the agreement to be as competitive as possible and to give the flexibilities to pay above that.

PN812

You see that come out in the correspondence from Mr Rahman. One, there's no running away from it, but, two, there's no need to run away from it. It's a perfectly reasonable commercial decision to take and, subject to the agreement otherwise satisfying genuine agreement considerations and otherwise passing the BOOT, there is nothing wrong with making an enterprise agreement of that nature per se.

PN813

The thread of my learned friend's submissions and of his cross-examination of Mr McLaughlin seemed to be that it's either one or the other: you're either making a baseline agreement to supply labour to other entities within the group, or you are making an enterprise agreement to go after these new scopes of work. Both of things can be true; both of those things were true.

PN814

You had unchallenged evidence from Mr McLaughlin and in Mr Barry's statement as well that there was a slowdown of work on the East Coast that was impacting APTS. You see that at paragraphs 9 and 10 of Mr McLaughlin's statement. He wasn't cross-examined on it. You see that at paragraph 15 of Mr Barry's statement. He was told that; it was part of the explanation as to why he was going onto that agreement. He wasn't cross-examined on it.

PN815

These employees were told that the purpose of the agreement was around winning new work on these sorts of service and maintenance contracts. You see that at paragraph 9 and paragraph 15 of Mr Barry's statement; you see it at paragraph 13 of Mr Woodard's statement; you see it in the meeting minutes on 14 June, at court book 112; you see it in the meeting minutes on 28 June, at court book 763, discussing the workload moving forward. Again, none of that challenged.

PN816

VICE PRESIDENT ASBURY: But, Mr Pollock, can I just take you back to the point that you made about the company wanting to get into new areas of work.

PN817

MR POLLOCK: Yes.

PN818

VICE PRESIDENT ASBURY: You can correct me if I'm wrong, but the Workshop Agreement, two of the employees who were apparently doing this work, so were therefore selected to be covered by the new agreement, were already covered by the Workshop Agreement.

PN819

MR POLLOCK: That's so, your Honour. The issue is that the Workshop Agreement is of more limited coverage, and you will have heard from Mr McLaughlin's evidence, it was the broader work scopes and, rather than having a patchwork of different cohorts and different enterprise agreements without the ability to have one instrument covering the whole of the work to tender for it and to cover it - - -

PN820

VICE PRESIDENT ASBURY: But is it of narrower coverage because - - -

PN821

MR POLLOCK: In the classification structure, it covers only pressure testing and NDT work.

PN822

VICE PRESIDENT ASBURY: Well, clearly it covers work that two of those employees were doing.

PN823

MR POLLOCK: Yes. I accept that.

PN824

VICE PRESIDENT ASBURY: The classification structure is on page 403 of the court book. What testing were they going to do that wasn't covered by that list of descriptions?

PN825

MR POLLOCK: Well, your Honour, the evidence that you have before you, amongst other, at the very least, you have the evidence about condition monitoring testing as being a part of that; you have Mr McLaughlin talking more generally about future scopes of work. I would need to review the transcript to look at the finer points of that, but, at the very least you had the creation of the condition monitoring department and that being seen as an area of need to broaden out, and that is, of course, why Mr Woodard is brought on board.

PN826

VICE PRESIDENT ASBURY: Well, this agreement, notwithstanding its name, has got allowances for working away from your usual place of work, it's got a

range of things and, arguably, the only issue with it was it wasn't made with respect to the BOOT being considered against the Hydrocarbons Award; it was made considering the Manufacturing Award, as I understand it. When this agreement was made, it didn't - - -

PN827

MR POLLOCK: I think that is right.

PN828

VICE PRESIDENT ASBURY: It didn't refer to the Hydrocarbons Award.

PN829

MR POLLOCK: I think that's right, your Honour, but I think as I've indicated, again, at the very least, you have got evidence that there was another parcel of work, the condition monitoring work, that clients were asking for, which doesn't appear to fall within the scope of the Workshop Agreement by virtue of the classification structure, and you have the evidence of Mr McLaughlin of there being a desire to broaden out what they can offer by way of on-site maintenance and services work.

PN830

VICE PRESIDENT ASBURY: And that was the work Mr Woodard was doing?

PN831

MR POLLOCK: Mr Woodard is a condition monitoring technician, that's right.

PN832

VICE PRESIDENT ASBURY: He made a contract of employment that didn't refer to the Workshop Agreement? So you say Mr Woodard's contract of employment doesn't refer to the Workshop Agreement, it just has a salary in it, so you say the Workshop Agreement didn't cover that work and that was one of the reasons the company wanted to make this new agreement, so it would have an agreement that covered condition monitoring?

PN833

MR POLLOCK: That's right. Well, that's the uncontested evidence, as I understand the question, your Honour.

PN834

These employees were, of course, also told that this was a baseline agreement and that their rates of pay will be higher. We will return to that in the context of the explanation.

PN835

Of course, it wasn't put to any of these employees that they would have voted differently had my friend's five-point scheme been put to them.

PN836

VICE PRESIDENT ASBURY: Well, it was put to them that, 'If your issues weren't addressed, you would have voted differently.'

PN837

MR POLLOCK: That's on the rates question, of course, and I will get to that in a moment, but there is no suggestion that these employees would have voted differently, and it would be a difficult proposition to advance when these employees knew, or were told, that there was a slowdown of work on the East Coast and that this agreement was to cover these new work scopes.

PN838

The fourth point is this, is the evidence doesn't, even taken at its highest on the face of the contemporaneous documents, doesn't support a contention that the cohort was manipulated. Again, no challenge to Mr McLaughlin's evidence that there was a desire to have an agreement with broader coverage than the Workshop Agreement to cover these new work scopes.

PN839

Now that evidence - I understood my learned friend's submission orally to be that Mr McLaughlin's evidence changed. We don't have the benefit of transcript, but Mr McLaughlin, as I recall, did not resile from the proposition that the employees were selected because they fell within the scope of this new agreement, not the other way around. There was no resiling from it; there was no concession on any of that.

PN840

VICE PRESIDENT ASBURY: Am I correct, though, in my understanding that the Workshop Agreement is at page 381 of the court book, the appeal book, howsoever you want to describe it?

PN841

MR POLLOCK: That's correct. That's the 2017 Workshop Agreement, or commencing at 378 is the approval of the decision.

PN842

VICE PRESIDENT ASBURY: Well, that agreement has got an offshore platform allowance, it's got a range of allowances for people working away from their usual workplace. Arguably, it is not confined to a workshop, is it?

PN843

MR POLLOCK: Well, your Honour, that would involve questions of construction around how you reconcile some of those provisions with the classification structure. Ultimately, what my learned friend is driving at, as I understand his case, is that this was a manipulation; this was a deliberate confection. It might be, your Honour, that the proper construction of this agreement dealt with - after argument and arbitration, it might well be that this agreement extends further, but it wasn't put to our, nor would the evidence support the view, that APTS knowingly made the industrial services agreement knowing that this agreement covered all that work, including the condition monitoring work and that this was done for some artifice, in order to avoid voting.

PN844

VICE PRESIDENT ASBURY: Well, why isn't there evidence to indicate that? When Mr Woodard gives evidence about the work he was doing, testing levels and vibration and heating climb assets, typically equipment and plant in the

mining, refinery, oil and energy industries, and then you look at - and it's been a long time since I looked at these kinds of classification and skills descriptions, but I'd be struggling to think, as something that Mr Woodard wouldn't do that's not listed in that ATPS list of skills. The ATPS workshop agreement list of skills.

PN845

MR POLLOCK: The difficulty, your Honour, are the words, in 42.1, 'All employees engaged in pressure testing and NDT work will progress'. That's - - -

PN846

VICE PRESIDENT ASBURY: Yes, but the classification structure doesn't just cover pressure testing and NDT, it covers more than that. So the fact that they progress that way doesn't – the agreement covers all employees for whom there are descriptions of their licences and tickets in the classification structure. It's not only non destructive testing, there's a whole lot of - tank inspection, ultrasonic testing, magnetic particle testing.

PN847

MR POLLOCK: Well, your Honour, there might be argument about those questions, but none of that rises to the level to show that APTS have formed the view and had formed the view that this agreement was unlikely to give coverage to the Industrial Services Agreement that it took to make.

PN848

VICE PRESIDENT ASBURY: Well, that's the argument that's been - that's part of the argument that's being put, as I understand it. You had two employees and, arguably, three, who were covered by this agreement and you selected them and made a different agreement with them that called - that brought in the offshore, the Hydrocarbons Award as well. The only - fundamentally, the difference between this agreement and the agreement that you made is that if anyone went back to look at the agreement that you made, the BOOT would have been conducted against the Hydrocarbons Award, whereas this one wasn't, because it nominated the Manufacturing Award.

PN849

MR POLLOCK: I don't understand it to be in contest that these agreements, that is, the Workshop Agreement and the Industrial Services Agreement, hold different scopes. As I understand the position that my learned friend is putting is that this - that the Industrial Services Agreement was made with three employees, in order to avoid bargaining with a future cohort of employees who were to be coming on board, and he makes the submission at paragraph 7 of his written closing, without evidence among it, that after the agreement was approved the respondent brought online employees occupying classifications and occupations that were not represented in the voting cohort. That's what I understand their case to me. Again, as I'll develop, the authorities put paid to that proposition. One does not bargain with hypothetical future employees.

PN850

VICE PRESIDENT ASBURY: Okay, I understand the submission.

PN851

DEPUTY PRESIDENT GRAYSON: There are other employees that are covered by this agreement, the Workshop Agreement, I think that's in the evidence because there's discussion in emails.

PN852

MR POLLOCK: That's right.

PN853

DEPUTY PRESIDENT GRAYSON: But only three were chosen to bargain with, of those. There's no evidence about why those three were selected, out of the many that were covered.

PN854

MR POLLOCK: Well, there is evidence that - - -

PN855

DEPUTY PRESIDENT GRAYSON: That is, if this agreement has them, and I'm talking about the Workshop Agreement, has the more narrow compass that you say it does, and only applies to more restrictive classifications including some of the ones that you then bargain with it's kind of - we don't have the evidence about why only some of those pressure testers, or whatever work, are chosen to bargain with, do we?

PN856

MR POLLOCK: Well, you have the evidence of - just one moment.

PN857

VICE PRESIDENT ASBURY: There is evidence that we selected three employees who were doing this work, the new work that we wanted to branch out into.

PN858

MR POLLOCK: Yes.

PN859

VICE PRESIDENT ASBURY: I guess, in fairness to you, Mr Pollock, I don't recall there was cross-examination challenging that on the basis that why did you need this new agreement because you had one.

PN860

MR POLLOCK: Quite right.

PN861

VICE PRESIDENT ASBURY: Yes, I understand that - - -

PN862

MR POLLOCK: Again, that's not the case that's put against us.

PN863

VICE PRESIDENT ASBURY: No, I understand.

PN864

MR POLLOCK: To be clear, the evidence was that we were looking to pick up new work scopes and that this was for in service maintenance and service work, not workshop work. That is, going out to clients, doing work on those contracts, in a broader – needing a broader scope, a broader classifications based on manufacturing and hydrocarbons, in order to cover that work.

PN865

Now, yes, they're existing employees working at workshops doing work that is not going out to the client sites, on that basis, and those employees are carved out from the coverage of the Industrial Services Agreement. You're forging into a new business, or a new project undertaking within this business. Of course we don't say that this was a Greenfields agreement, but it doesn't undermine the genuineness of making that agreement by citing employees who would be transitioning into that business unit and performing that work.

PN866

VICE PRESIDENT ASBURY: Well, I understand your submission and I understand that, really, the case that was put against you may not have been put on this basis. But there is also - I guess, it's also open to say that the APTS Agreement could have covered the work on offshore platforms because it says, 'Work on offshore platforms'. It could have covered - - -

PN867

MR POLLOCK: I'm sorry, the Workshop Agreement?

PN868

VICE PRESIDENT ASBURY: Yes. Because it speaks about those working in those environments. It's got an offshore platform part in it, it's got - and it was coming to its end in February 2021. So, arguably, there scheme could have been to put another agreement in place that carved out a bit of the work that the APTS Agreement could have covered and have a fresh agreement that had a longer life than the APTS one.

PN869

MR POLLOCK: But there's no evidence to - there's no evidence to support the proposition that the existing cohort of employees was going to be flipped onto this new agreement. There's absolutely - the highest that gets, your Honour, is one email that my learned friend took you to that where a response was given from Mapien, floating some of the issues and risks that might arise from that.

PN870

There is not a jot of evidence that any further step was taken. There's no evidence to suggest that any employees, past that date, were transferred. It's nothing more than speculation. Mr McLaughlin wasn't cross-examined on that. No witnesses were cross-examined on that.

PN871

VICE PRESIDENT ASBURY: I understand.

PN872

MR POLLOCK: Now, returning to why we say there was no manipulation here, there's no suggestion, on the evidence, that these three employees weren't actually employed to perform work covered by this agreement. This isn't the kind of workforce logistics scenario that had at least two members of this Full Bench had the pleasure of sitting through, and I need not relay the details of the evidence in that case. But this is not a scenario where those employees sat in a shed somewhere in the Perth suburbs and ended their employment on the day they voted, it's just not that case.

PN873

There is nothing on the evidence to suggest that these employees were selected because they were friendlies or that the scope of the agreement was tailored to match the employees, rather than the reverse scenario, i.e. the employees were selected because of the – in light of the scope of the agreement.

PN874

Now, Mr McLaughlin's evidence, again, consistently, was to the effect that the employees were chosen because they fell within the scope of the agreement. My learned friend invites you to reject Mr McLaughlin's evidence, really on some very minor points. It's suggested that he resisted the characterisation that this agreement would be used to supply labour. As I recall that exchange, even without the benefit of the transcript, but he characterised it as providing support. It's a matter of nomenclature, it's not a suggestion that he resisted the question.

PN875

It was suggested, again in writing and orally, that Mr McLaughlin denied that contractual offers were made to these employees. He didn't. He didn't resist it, his evidence was that he couldn't recall but he believed that they were offered contracts.

PN876

Now, the fact that he can't recall is entirely understandable, given that two years has passed. The question of the impact of two years passing on witness memory I will return to, because this will form a substantial part of what we say about the explanation of terms.

PN877

Lastly, it's said that his initial error, denying that he was a bargaining represented, it's suggested, as I understand it, that that was somehow deliberately false. Now, we were all in the courtroom yesterday. That reflected his confusion about the terminology. He immediately corrected his error when it was identified to him.

PN878

Now, my learned friend relies, in writing, on two other pieces of contemporaneous evidence. These are at paragraphs 35 and 36 and then also at 33, saying that they want to make sure there are no conflicts that could derail a vote or a commission. Then, at 33, relying on an email from Mr Rahman, to Mapien, saying:

PN879

We will need to get our people together to start letting them know about this negotiation, but if that makes things slip a week I'm sure we can live with that.

PN880

It's said that that is suggesting that Mr Rahman wanted a further week to arrange for, 'the right employees to vote'.

PN881

Your Honour, all of that reflects just a desire to make sure that there's sufficient time for this process to be rolled out and then it's compliant with the statutory requirements. There's nothing in that that suggests anything resembling manipulation.

PN882

Now, I said, at the outset, that the fact that - or what's said to be a strategy or a desire to avoid bargaining with hypothetical future employees is irrelevant. We know, and I need not take your Honour's to it, but we know, from the High Court in Aldi, that there is nothing implausible, and we know it from John Holland as well, there's nothing implausible about a group of employees fixing the terms and conditions of employment for a large group, into the future.

PN883

Now, again, where there is no evidence and no case put that this was about avoiding bargaining with current employees, and there's no evidence at all to suggest that a group of employees, upon the making of this agreement and upon the normal expiry of the other instrument, were transferred across in order to achieve the sort of scheme that you were touching on, Vice President. All we're left with is, as my learned friend puts in his written closing at paragraph 42, is that the supposed scheme was to avoid bargaining with future employees. He says this:

PN884

Why the urgency, there's only one explanation, as time wore on APTS had more work to do, that meant it had to bring more employees on.

PN885

It is said that APTS, or Mr Rahman, Mr McLaughlin, Mr Wong knew the more employees they had to bargain with the less likely it was that those employees would agree to lesser rates. So all of this is cast with reference to an allegation that we wanted to avoid bargaining with future employees.

PN886

Now, I said I'd take you to some authorities that set out why that simply doesn't hold. Can I take you, first, to Toll Energy Logistics.

PN887

VICE PRESIDENT ASBURY: Which number in the tab is that?

PN888

MR POLLOCK: It's in the further bundle - - -

PN889

VICE PRESIDENT ASBURY: In the further bundle.

PN890

MR POLLOCK: - - - at tab 4.

PN891

VICE PRESIDENT ASBURY: Just let me get that. Sorry about this. Yes? Sorry, can you just give me a page number?

PN892

MR POLLOCK: In the pdf?

PN893

VICE PRESIDENT ASBURY: Yes.

PN894

MR POLLOCK: It commences at page 103.

PN895

VICE PRESIDENT ASBURY: Thank you.

PN896

MR POLLOCK: Now, broadly speaking, and you'll see the facts, well, setting out from 17 through to 41, but the rubber really hits the road at paragraphs 30 to 41. What this involved was an extant bargain with one corporate group entity unable to reach agreement with the union. Then bargaining, over two days, with seven new employees of a related entity to do the same work. So not entirely on all fours with the facts here, but on any view of the world, sailing far closer to the wind, as it were, and you can well understand why (indistinct) would take an issue with what occurred.

PN897

You'll see the consideration that the Full Bench gives, relevantly progressing at paragraph 59 through to 65:

PN898

> *The complainant, the MUA, is a Toll Group, use Toll Engineering Logistics as the employer rather than Toll Marine Logistics, at a time when Toll Marine Logistics employed a larger number of employees who were potentially within the scope of the Toll Energy Agreement. The MUA submitted there was no bona fide business rationale for the transfer of employment to Toll Engineering Logistics.*

PN899

Now, the Full Bench found its submissions not supported on the evidence. Essentially paragraph 61, there's setting out some of the business rationale for doing what was done. Paragraph 62, Mr Woodward, the relevant witness, accepted that one of the reasons he made the decision to use Toll Energy Logistics as the employing entity was because he didn't think that Toll Marine Logistics would be able to make an agreement.

PN900

Mr Woodward also gave evidence around the same time as the reorganisation and Toll Marine Logistics would, effectively, be (indistinct) as an entity. He did not deny that one of the motivations was that it was more likely that they would be able to make an agreement directly with employees before the Investigator commenced service in Dampier the employees would be employed by Toll Engineering Logistics.

PN901

It was suggested to Mr Woodward that he wanted to exclude the MUA from the negotiations process and he denied that it was his motivation.

PN902

At 65:

PN903

When considering it is arguable that a reason that the decision to use Toll Energy Logistics was made was in order to exclude the MUA from the bargaining process or make it likely that the MUA would be excluded from the process.

PN904

If there was no other legitimate business reason it would be arguable that this was a manipulation of the bargaining process. However, it is not necessary to determine this matter because we found that there were other legitimate business reasons for the Toll Group to decide to use Toll Energy Logistics as the employer of the crew of the new build vessels.

PN905

The reasons advanced by Mr Woodward were not seriously challenged in cross-examination.

PN906

I pause here. Again, returning back to the submissions I made at the outset as to the intelligible business rationale for making this agreement to provide a similar remedy to cover new broader scopes of work, evidence that wasn't seriously challenged.

PN907

Then, at 67:

PN908

It was further submitted that Toll Energy Logistics knew that it would need to employ additional employees to perform the work and those employees were identifiable as the employees employed by Toll Marine Logistics, on the Sandfly and the Firefly.

PN909

There's a further description, at 68, of that extant bargaining the other entity.

PN910

It cannot be denied that the decision to engage only seven employees denied those employees the opportunity to bargain for an agreement which would, if they accepted employment with Toll Energy Logistics, cover the employment.

PN911

Again, not the scenario we're faced with here, but arguably - well, certainly one that would raise eyebrows.

PN912

However, there is no evidence to support a finding that the seven employees employed by Toll Energy Logistics were not employed for bona fide and business reasons.

PN913

Pausing again, no evidence here to suggest that these three employees were not employed for bona fide and business reasons.

PN914

There's a further delving into the evidence, at paragraph 70:

PN915

We're unable to conclude that Toll Energy Logistics, but not employing the second crew at the same time as it employed the first, did anything improper. There is nothing inherently improper with an employer negotiating with a small number of employees, in circumstances where it knows that a larger group of employees will be engaged in the near future.

PN916

In this matter, the contractual requirement to have an agreement in place prior to the commencement of the first swing made the need for such an agreement a priority.

PN917

We accept that the submission that the pool of future employees was identifiable, namely, existing employees of Toll Marine Logistics, employed on the Sandfly and Firefly. However, the real issue is whether the failure of Toll Engineering Logistics to involve the MUA in bargaining, on behalf of its members who were employed on the Sandfly and Firefly and who were going to be offered work on the new build vessels meant that the group of employees was not fairly chosen.

PN918

We are unable to conclude that there is an obligation, in the Fair Work Act, for the employer to bargain with potential employees. The Fair Work Act provides that an agreement is made with employees who are employed at the time the agreement is made and who are covered by the agreement.

PN919

And it goes on.

PN920

Now, can I take you to two further Full Bench decisions which make good this proposition? That proposition, really, cut to its core is this, that the strategy that ATPS applied here, we say, one which, of course, involved the making of what my learned friend described as a baseline agreement, but one which had an intelligible business rationale to cover new scopes of work and with an identifiably different scope to, we say, to the workshop agreement. That sort of strategy is permissible.

PN921

The second case I wanted to take your Honours to is *CEPU v Sustaining Works*, and that's at tab 1 of the further bundle. This is a decision of then Hatcher VP, Gostencnik DP and Roberts C.

PN922

Now, you'll see the relevant facts set out at paragraphs 5 through to 11:

PN923

Relating to the successful in obtaining work across three fuel compression stations and throughout the basin. It needed an enterprise agreement to cover all that work and Sustaining Works commenced negotiations for an agreement for that purpose.

PN924

It then describes the scope and exclusion from that agreement, in paragraphs 6 and 7.

PN925

At 8:

PN926

An application for approval was lodged with the Commission on the same day that the agreement was made. The declaration disclosed that, as of that date, Sustaining Works only employed five people who are covered by the agreement.

PN927

All five of those employees were concreters employed at the Surat Basin in Queensland.

PN928

Just pausing there for a moment, noting there is some echo with the nature of the case that's put against us, in terms of the unrepresented nature of the cohort, but I'll return to that.

PN929

This is paragraph 9:

PN930

There was a meeting between representatives of Leighton and the unions about the agreement on 8 April 2015. One of the representatives explained the reason why the agreement was made in the following terms. The client has

told us we have to reduce our costs by 30 per cent and we decided to reduce labour costs to assist with this. Sustaining Works has been created and has an agreement which reflects how we're going to reduce our costs.

PN931

paragraph 10:

PN932

When the same representative was asked why there was no attempt to try and negotiate an agreement with the unions to achieve what was needed she replied -

PN933

And apologies to the transcript:

PN934

'Because you would have told me to get fucked'.

PN935

At the time of the appeal hearing Sustaining Works only employed two persons who were concreters who were covered by the agreement. They were only expected to be employed for a few further works. These employees' labour was supplied by Sustaining Works for Leightons.

PN936

Now, you'll see the appeal grounds, set out at paragraph 12:

PN937

Selection of the group was unfair because it undermined collective bargaining in a manner that was not compatible with part 4 of the Act.

PN938

Reliance on John Holland.

PN939

2. In circumstances where the agreement was negotiated with only five concreters, there could not be satisfaction with the selection of the group of employees encompassing a broad range job functions set out in the classification structure is -

PN940

I think there's a typo it reads 'fair' but, in context, it should be 'not fair' or 'unfair'.

PN941

A selection of such a broad group at a time when Sustaining Works only engaged with five concreters meant that the future employees were deprived of the right to collectively bargain.

PN942

VICE PRESIDENT ASBURY: I think 'fair' is right, 'In circumstances where the agreement was negotiated and made with five concreters - - -

PN943

MR POLLOCK: That's right, there could not be satisfaction. Yes, thank you, your Honour.

PN944

Ground 3 deals with the business rationale for the scope. Again, I pause here, some very close alignment to the grounds of appeal that are advanced here.

PN945

You'll see the responses to those grounds of appeal set out at para 16 and 17. And without reading the paragraph line by line, I can indicate that those responses, again, have some pretty close parallels to the arguments that we raised in response here.

PN946

Now, can I take your Honours to paragraph 24. We've acknowledged that in *CFMEU v John Holland* that deliberate manipulation of the agreement made the procedures unfair, might find the conclusion that the group of employees covered by the agreement was not fairly chosen. There is an extract then of that well worn passage from Buchanan J, around the potential for the manipulation of agreement making procedures, given the employer's acting from self-interest.

PN947

At 25:

PN948

> *The union relied on the above passage in support of their third submission that the business rationale for the selection of the group it covered was illegitimate because it was concerned with undercutting market rates for gas project work.*

PN949

Again, the substance of what my learned friend complains about here.

PN950

> *We cannot accept that submission. The evidence before us disclose that Sustaining Works was established for the specific purpose of obtaining small scale supplementary gas supply project work in the Surat Basin. The maintenance costs were not competitive in the market for this work and, accordingly, Sustaining Works needed an enterprise agreement with lower rates than the extant agreement, in order to assist in achieving the necessary reduction in costs. It was also necessary to have an enterprise agreement which covered the whole range of functions required by this work at it was deemed the extant agreement did not have.*

PN951

Now, then 26 and 27, there was no question that the agreement satisfied the better off overall test, for the reasons my learned friend Mr Crocker will identify, that remains the case here.

PN952

The statutory declaration in support of the application for approval show that certain terms and conditions, including wage rates, were markedly more beneficial, in the reference (indistinct) group, being the Hydrocarbons Award.

PN953

Again, I've taken your Honours to the comparison showing that the annual salaries are some 70 to 90 per cent, at a minimum, higher than the relevant award.

PN954

While it is entirely understandable, the union strongly desired, in the interests of the carbon future members, to maintain the standards established by the extant agreement on all future gas project work, we nonetheless consider there was an intelligible and legitimate business rationale for the selection by Sustaining Works, of the employees to be covered by the agreement.

PN955

Further, while Sustaining Works may have had the option to bargain for a Greenfields agreement with the unions, rather than taking the course that it did, it's an apparent assessment that could not achieve the outcome it required in bargaining with the unions provided a legitimate rationale for not exercising that option.

PN956

Put another way and, again, we don't say that's the case here and it's not suggested, it's not put that we were avoiding bargaining with some current cohort of employees, as the case that's put against us, is that we were avoiding bargaining with future hypothetical employees.

PN957

What's said here is that avoiding - 'It's an apparent assessment cold not have achieved the outcome it required in bargaining with the unions provided it with a legitimate rationale for not exercising that option'. That is, it's no bar or its no manipulation to avoid bargaining in that scenario. In any event, as was made clear in *CFMEU v John Holland*, 'The Fair Work Act does not contain any policy preference for Greenfields agreements over other types of agreements', and it goes on.

PN958

There was no evidence, in this case, of deliberate manipulation of the agreement making process. There was no suggestion that the five employees with whom the agreement was made were not bona fide employees of Sustaining Works at the relevant time. No suggestion of that here.

PN959

The (indistinct) agreement was made do not demonstrate any expansion of the Sustaining Works workforce into a wider group which has been deprived of the right to collectively bargain.

PN960

Again, no evidence of that here.

PN961

Sustaining Works actually employed less persons under the agreement at the time of the appeal hearing than at the time the agreement was made.

PN962

Again, it goes on.

PN963

The last case I wanted to take your Honours to, to make this proposition, is MMA Offshore(?). You'll find that behind tab 3 of the (indistinct).

PN964

VICE PRESIDENT ASBURY: The further authorities?

PN965

MR POLLOCK: Yes, thank you, your Honour.

PN966

DEPUTY PRESIDENT GRAYSON: What page is that?

PN967

MR POLLOCK: That commences at page 61.

PN968

Again, a Full Bench comprising of Hatcher VP, Gostencnik DP and Williams C. This case involved three agreements raising similar fairly chosen and genuine agreement issues. Traversing the facts in detail is a difficult endeavour given that they were three discrete agreements, albeit raising some common issues, and they all take considerable time to go through it. I'll try to just deal with it at the highest of levels.

PN969

One sees the relevant factual background really commencing at paragraphs 23 and 24, for the first of these - the first of these decisions, for the MMAOL decision then for the DOF decision, at 31 and following and then for the *Smith v Glenalco*(?) decision, at 42 to 44.

PN970

The substance of the common thread of all of this was what was alleged to be a scheme to - for these various participants to avoid bargaining with the MUA and, instead, seeking to sidestep that to bargaining directly with employees. You'll see the nature of that scheme articulated at paragraph 49 and following.

PN971

The MUA contented in each appeal that each of the three agreements was entered into as part of a scheme amongst a number of employees seen by AMA to achieve an industry standard of employment conditions that were inferior to those agreed in the 2010 industry bargaining award by avoiding having to negotiate with the MUA.

PN972

It is submitted that the genuinely agreed requirement in section 1 86(2)(a) could not have been satisfied in the circumstances because the scheme was extraneous to the employment relationship and had never been disclosed to the employees voting on the agreements, meaning they could not have given informed consent.

PN973

Further, it was submitted that the agreements lacked the necessary authenticity and moral authority because their purpose was related to industry rather than the enterprise bargaining in establishing new industry standards.

PN974

The related fairly chosen contention is set out at paragraph 50, and the grounds are detailed through to paragraph 53.

PN975

The relevant consideration of all of that commences at paragraph 65 and it proceeds this way:

PN976

In considering the common issue raised by grounds 3 and 4 of the MMA notice of appeal, grounds 2 and 3 of DLF and grounds 3 and 4 of (indistinct), it's necessary, at the outset to make three significant observations about the statutory scheme for enterprise bargaining in the Fair Work Act.

PN977

The first is that there is nothing in the approval requirements for enterprise agreements in 186 and 187 of the Fair Work Act, which expressly prohibits the approval of enterprise agreements which have been established within a broader framework of industry bargaining which reflect a standard established in an industry.

PN978

Although the object of part 2(4) (indistinct) a desirability of collective bargaining occurring at the enterprise level, the statutory scheme does not compel that to occur.

PN979

And it goes on, on that point. Relevantly, for our purposes:

PN980

The second observation is that, subject to satisfaction of the BOOT requirement in section 1 is 2(d), or the alternative exceptional circumstances test, in 189. The statutory scheme does not prohibit an employer from bargaining for wages and other conditions of employment which are inferior to those contained in an earlier enterprise agreement and/or those prevailing in an industry as a result of the previous round of industry or pattern bargaining.

PN981

Providing that employees receive the full benefits of the NES and are better off overall, compared to any modern award which covers them, the scheme is not

concerned with the level of remuneration and other benefits which employees receive in any enterprise agreement to be made.

PN982

That's a matter for employees to assess when they vote upon the agreement which the employer requested them do.

PN983

Now, 69 and 70 of DFL, which deals with the scheme in a little further detail:

PN984

Even though it's contention is that the (indistinct) came about as a result of the scheme between employers, (indistinct) to obtain template enterprise agreements in the offshore oil and gas industry, which undercut the industry standard terms and conditions of employment established in the 2010 industry bargaining round and to achieve this result by avoiding bargaining with the MUA.

PN985

Assuming that is the case, we do not consider that that, by itself, is demonstrably of the employees covered by the agreement not having been fairly chosen or not having genuinely agreed to the agreements.

PN986

Simply because a group of employers, led by their employer association, has engaged in a process akin to pattern bargaining in order to improve their commercial position does not mean that any result in enterprise agreements are illegitimate and incapable of approval under the Act. That is no different, in substance, to employees across a range of enterprises in an industry, coordinated by their union, advancing a common claim for the proposed enterprise agreements to increase their wages by a standard amount or to a standard level.

PN987

Even if the relevant employers in the (indistinct) prefer to avoid having to bargain with the MUA, it does not follow that the MUA was illegitimately excluded from the bargaining process for the three agreements.

PN988

Then at paragraph 72:

PN989

We likewise do not consider that without more it could be inferred from the existence of the postulated scheme that the employees were unfairly chosen for the purpose of putting that scheme into effect. The position might be different if it were additional demonstrated that the bargaining and agreement process had been manipulated in sense that there was no legitimate business rationale for the coverage of the relevant agreement and/or that the employees who made the agreement were not engaged in their general work requirements but rather for the artificially short term purpose of negotiating and making an agreement that was disadvantageous to genuine future employees, even though

those contentions (indistinct) were separately considered, but we do not consider that those are matters which can simply be inferred from the existence of the postulated scheme alone.

PN990

Put bluntly, what the Full Bench is contemplating here, as what might - things might be different if this were a Workforce Logistics case. But this isn't that case. And it might be different if there was no legitimate business rationale for the making of that agreement. But my learned friend is stuck with, relevantly, unchallenged evidence on those matters.

PN991

So we say about all of that, your Honours, that the scheme, as it put, does not, even taking my learned friend's case at its highest, on the state of the authorities, does not provide the sort of reasonable ground to believe was not genuinely agreed that would take this case out of the realms of what the Deputy President had, if she had been aware of the fresh evidence, that it would have made that a decision that she could not reasonably have made.

PN992

Can I move on to what's said to be the unrepresentative nature of the cohort? There are really two points here, your Honours. The first is that there is no rule that every classification in an agreement needs an employee within it at the time of the vote, in order for that agreement to have been genuinely agreed. The question is always whether the voting cohort can give informed consent, such that it could be said, and the Commission can be satisfied, that the agreement has been genuinely agreed by the employees employed at the time.

PN993

Now, of course that's always a matter of degree. Cases like KCL and OneKey quite clearly fall over the line but for the rest, as I'll explain, this is neither of those cases. KCL, you'll recall, contained classifications and pay rates for private sector clerical employees, manufacturing employees, production and staff employees in the black coal mining industry and that last category included classifications for surveyors, safety officers, deputies, forepersons, opencut overseers, geologists, chemist, production supervisors and under managers, the whole gamut, and no unifying thread between those various industries, of course. That agreement was voted on by three employees, two of whom were casuals.

PN994

Then in similar vein in OneKey. The company was incorporated in March of 2016 and by the time the agreement was made in August, it had three employees who were hired at different times over the preceding months. The agreement was made with those three employees, two worked in the coal mining industry and one in the construction industry. But for the agreement their employment would have been covered by the Black Coal Award and the Building Construction (General) Award. There was no reason, in that case, to think they had any interest in the effect of the agreement working on employees working outside of their particular industries.

PN995

Of course, the coverage of that agreement, in OneKey, extended to 11 different awards. Construction general, mining, black coal, manufacturing, road transport long distance and the short haul RTD award, hydrocarbons, the Clerks Award, hospitality, oil refining and maritime offshore oil and gas. And, again, three employees, two of whom were casuals.

PN996

Now, my learned friend relies upon there being two awards from which the classifications are derived in this case. Your Honours would be well aware of the alignment between those classifications, being the Manufacturing and Hydrocarbons Awards, and the fact that but for enterprise agreements applying in different worksites and different scenarios, it may well be that each of those awards might cover. There's a reason why those awards have particular interaction provisions.

PN997

The three employees here, we say, render this case full and squarely within the permissible category of cases. These three employees have extensive experience. Barry and Bellingham each hold a Certificate III in mechanical engineering. Between them they hold confined space, working at heights, 4-wheel drive, train operator tickets. Each has performed duties ranging from mechanical fitting to pressure testing of gas pipelines and servicing pressure safety vales.

PN998

Mr Woodard is also experienced. He's a mechanical technician and worked in that role for some 10 years and then moved into condition monitoring and holds certifications in that area.

PN999

This case doesn't involve a wide array of disparate awards and classifications. They all concern the sorts of workplaces where these three employees have experience working in the roles and directly observing them.

PN1000

Now, to that end, can I take your Honours to BGC Contracting, which should be in our initial bundle, behind tab 4. Now, this is the rehearing decision of Gostencnik DP. Binet DP, you sat on it at first instance. I was not involved with it at first instance. I was involved on appeal and on the rehearing. You'll recall our - I'll return to an aspect of that reasoning when we come to the question of stake. But for present purposes, what I wanted to touch upon was the Deputy President's analysis, at paragraph 152.

PN1001

VICE PRESIDENT ASBURY: Sorry, can you just give us the page number in the pdf? I'm sorry.

PN1002

MR POLLOCK: I'm working off a - 133, I'm told.

PN1003

VICE PRESIDENT ASBURY: One-thirty-three, thank you.

PN1004

MR POLLOCK: I'm working off a hardcopy of this version.

PN1005

Now, I'll take you, first, to paragraph 151 and then to 152. The background in all of this, Deputy President, you'll recall that one of your findings, at first instance, was that the employees couldn't have a stake in the agreement because, relevantly, they were paid contractual rates over and above the agreement.

PN1006

The Full Bench allowed the appeal, on the basis of, amongst other reasons, that the employees did have a stake in that context, not withstanding those contractual rates.

PN1007

From the rehearing there was an argument about whether or not the Full Bench's conclusions on that issue were determinative or still in the ring. Ultimately where Gostencnik DP landed was, 'Look, it's in the ring', but he finds what the Full Bench found.

PN1008

But you'll see, paragraph 151, there's the Full Bench's analysis:

PN1009

Issues sought to be agitated before me was dealt with by the Full Bench as follows: The respondent contended, as was found in KCL, employees of the appellant did not have a state in the proposed agreement.

PN1010

We don't disagree with the proposition elicited in KCL, however, with a view that KCL was distinguishable.

PN1011

In particular, KCL was concerned with only two employees and the Full Bench held that lack of authenticity of the agreement meant that these employees has no stake in the agreement.

PN1012

There's an extract of KCL.

PN1013

Moreover, there was no evidence in KCL to suggest the employer was facing challenges in the market due to an industry downturn, as the case in the matter before us.

PN1014

I'll just pause here for a moment, that - we have unchallenged evidence that there was a downturn on the east coast which was, in part, the reason or securing these new work scopes here.

PN1015

The (indistinct) factor between these two matters is there is no lack of authenticity in the case before us.

PN1016

Then Gostencnik DP finds this:

PN1017

I agree, in essence with the observations of the Full Bench. Although it is readily apparent that the employees who voted for the agreement did not have a stake in the agreement, in the sense that their terms and conditions of employment would be preserved in common law contracts of employment. It does not follow that the employees did not, more generally, have a stake in the agreement or in voting to approve it. (Indistinct) continued employment of employees in the enterprise to which the agreement relates is contingent upon BGC conducting a successful viable and profitable enterprise.

PN1018

It is apparent from the material that BGC explained to relevant employees that this strategic business case to make the agreement. It included the need for it to position itself for continuing mining operations and contracts in an environment where there was an industry downturn.

PN1019

It seems to me that the employees can be taken to have understood the consequence of no change on the viability of the ongoing employment in the enterprise.

PN1020

The relevant employees had a stake in the agreement in the manner I have just explained, notwithstanding the determinative conditions of employment will be preserved.

PN1021

In these circumstances I am not persuaded, despite the matters, to which the unions point, that there are reasonable grounds for believing that the agreement was not genuinely agreed to by the relevant employees.

PN1022

And here's the rub for present purposes:

PN1023

Although the relevant employees have no apparent experience in black coal mining, there being no evidence of it, they were mining employees nonetheless. This is therefore not a case where, with appropriate explanation, a point to which I will return to shortly, the employees could not properly have given informed consent in respect of, for example, classifications applicable to the black coal mining employees. It is also to be borne in mind that those classifications and other terms that are contained in the Coal Award have been determined by the Commission, with input for industry, including unions, that appropriate minimum safety conditions applicable to coal mining employees.

PN1024

Now, what we say there is - what's exercising the Deputy President's mind is that these employees, they're not giving consent to terms that sit wholly outside their field of expertise, their industry of expertise. They have, through the work that they do and the work that they observe, the ability to provide full consent to terms that relate, in a practical sense, to the work that they do. And that is the same here.

PN1025

It's also to be borne in mind, your Honours, that this agreement doesn't - it's not as if it sets out detailed prescriptive terms that apply only to particular classifications, such that one would require detailed knowledge of exactly how that role is to be performed in order to provide informed consent to it. In the main, these terms and conditions go to broad concepts. Hours of work and allowances and leave and the like. It's not apparent how these experienced employees, who have performed a range of functions and have a range of expertise and qualifications, couldn't give informed consent to those terms.

PN1026

Now, the upshot of my learned friend's submission and, as I understand it, the way he puts it in writing is, 'Well, these employees aren't trades assistants, how can they know that the rate of pay that's set for a trade assistant is right or appropriate?'. Well, the necessary conclusion that flows from that argument is the negative of the proposition I put at the outset. That would require that in every case you have to have an employee sitting in every classification and that can't be right.

PN1027

The other point, of course, is that it wasn't put to any of these employees that they lacked the requisite experience to consider the agreement.

PN1028

Can I just briefly draw your attention to two further cases in our additional bundle. The first is a first instance decision of (indistinct), in Fabcast Pty Ltd. I need not take you through it, but that was a case where we had a small number of trainees who voted on a broad range of classifications and the case put against it is that they couldn't have the - didn't have the relevant experience to provide informed consent.

PN1029

I'll just give you the relevant reference. Bear with me just one moment, your Honours. Paragraph 27 of that is the paragraph to which I refer. Your Honours, or Vice President, in particular, I raise one further, with some trepidation, given the declarant in that case being Mr Hudston, but a decision that you recently sat on, in OGS. You might recall, in that case, there was a smaller cohort of employees with substantial construction industry experience and your Honours conclusions, in that case, and I'm paraphrasing here. Of course, Vice President, you'd be well aware of what you found, but the broader experience that those employees held was sufficient for them to be able to consent to an agreement with coverage that extended beyond simply construction in general and beyond simply the roles that these particular employees performed.

PN1030

Turning next to the stake question. Again, this really boils down to two points. First is this, it doesn't follow that simply because these employees are paid high contractual rates that they can have a stake in the agreement. There is no basis to conclude that the questioned stake is confined to rates of pay.

PN1031

I've taken you to both of the passages in BGC Contracting. In that case the Full Bench and Gostencnik DP, on rehearing, found that the mere fact of the agreement providing a basis to secure further work and, it follows, improving job security was enough, notwithstanding that the employees were preserved on contractual - high contractual rates of pay.

PN1032

Here in this case, you have evidence that the employees were interested in other terms of the agreement and they negotiated changes to those terms.

PN1033

Now, can I take you, first, to the statement of Mr Woodard? This is at court book 1029. Paragraph 17, which appears on 1031. It says:

PN1034

After the first meeting I received a copy of the ABTS Industrial EA by email, from Mr McLaughlin and Mr Wong. I printed a copy and we went through the document, highlighting terms where I thought there were issues. The version initially sent to me did not have a standby clause. This was important to me and I considered that standby hours should be paid. I also remember having concerns about the training clause where training or induction is being performed outside of work hours then the training or induction should be paid for. There were also some parts of the Industrial EA which in considered to be grey areas, where the wording was ambiguous. I had concerns about how some of the allowances were express to apply and the circumstances in which they would be received. I had a follow up meeting which was attended by all the employees. Mr McLaughlin, Mr Wong and others I cannot recall. I raised the comments I refer to but at the meeting the Industrial EA was shared on the screen and notes were typed in the document when I and other employees made comments and gave feedback. APTS took on board all the comments that were made and after the meeting sent me a further version.

PN1035

And it goes on.

PN1036

The meeting minutes of 28 June, and that's found at court book page 764, make plain, that's really the - you see some of the issues that Mr Woodard recalled as playing out in those meeting minutes. There's discussion of these claims and they're marked as to be negotiated.

PN1037

So the notion that the only way that an employee can have a stake in an agreement is if their rates of pay are fixed by that agreement as a paid rates instrument. It's just simply not right.

PN1038

It also ignores, of course, and I think this was a point that, Vice President, you were touching upon in an exchange between my learned friend and yourself earlier today, that approach ignores the interest that employees have in minimum rates of an enforceable safety net.

PN1039

My learned friend, and I apologise if I mischaracterise what he said, I understood him to say, at least on one occasion, that Mr McLaughlin's evidence was that he said words to the effect, 'Don't worry, these will be no one's minimum rates'. That is not as I recall the evidence. We'll have the benefit of the transcript, of course, in time. As I understood his evidence it was to the effect that, 'Don't worry, these won't be the rates that you'll be paid', and my learned friend's position is it was also said that, 'These won't be the rates that anyone else will be paid'. But that doesn't cavil with the proposition that these rates are an enforceable minimum safety net and employees have a stake in that.

PN1040

That proposition also finds voice, I should say, your Honours, in *Theiss v CFMMEU*, which is behind tab 16 of our initial bundle of authorities. This is a decision of Gostencnik and Clancy DPs and Lim C. I won't take you through all the background facts, I can just take you to the relevant passage, which is at paragraph 74. This is cavilling with the primary Commissioner's conclusion that the agreement was not genuinely agreed.

PN1041

The Commissioner concluded that there was no evidence that the employees gained any benefit from voting for the agreement. This conclusion was arranged for three reasons. First, the very existence of an agreement which was, in turn, (indistinct) placed Theiss in a strong position to obtain preferred contractor status for work at the Mt Pleasant Mine. Employees plainly had an interest in the success of the employer's business. This is a benefit flowing to employees who voted for the agreement, although not immediately. Quantifiable -

PN1042

Paragraph 77:

PN1043

Further, it's plain, as the Commissioner observed, that subject to winning the contract when three employees commenced work on site the arrangement for working hours and the roster available at the site might result in some benefit to the three employees.

PN1044

And at 80:

PN1045

Given the above, the Commission's conclusion that three maintenance employees had no stake or direct interest in the terms and conditions of the majority of potential employees who would be covered by the agreement, should Theiss get the contract, respectfully cannot be sustained in the material before him to the extent that under this head the Commissioner noted that if it were necessary to determine the matter I would find the selection of three employees who participated in the ballot for the agreement was a manipulation of the Act and would not be in agreement.

PN1046

We observe that we've already dealt with the manipulation point earlier, but if there are other bases on which such a finding might have been made, there is no indication to (indistinct) the decision as to those bases. The conclusion cannot be maintained.

PN1047

Again, to that point, I return to the evidence that I took you to earlier, that was unchallenged, that there was a slowdown of work on the east coast. The purpose of the agreement was to target new work scopes for the broader services and maintenance contracts. The coverage of this agreement is coherent with that purpose.

PN1048

That is, the mere fact of an agreement puts an employer in a better position to win work and that proposition should be uncontroversial. That brings with it job security and other benefits.

PN1049

Now, lastly, on genuine agreement, I turn to the explanation of terms and effect. Can I make this general observation at the outset, on the state of the evidence? I don't think anyone who read the written statements and who heard the oral evidence yesterday would reach any other conclusion than the recollections of those involved have faded over the two years since all of these events occurred. That is entirely understandable.

PN1050

Can I briefly take your Honours, just on this point, to a judgment of Jackman J, in *Kane's Hire Pty Ltd v Anderson Aviation*, which is behind tab 2 of the additional bundle? I draw your particular attention to paragraphs 123 through to 128.

PN1051

Now, this arises in the context of Jackman J, in perhaps typical style, teeing off on the form of evidence being put by affidavit as to whether it needs to be put in direct speech or otherwise. But the observations around the reliability of our recollection over time are apposite here.

PN1052

This is at the bottom of paragraph 123:

PN1053

Even as long ago as 1984, the Full Court said in - - -

PN1054

VICE PRESIDENT ASBURY: Excuse me, what page?

PN1055

MR POLLOCK: I'm sorry, your Honour. Fifty-six of the pdf. I should be clear, your Honour, is your Honour's version of the pdf tabbed, or - - -

PN1056

VICE PRESIDENT ASBURY: No, I've just got it on my computer.

PN1057

MR POLLOCK: I'm sorry, I've been labouring under the misapprehension that it's tabbed. I can see some tabs down my - - -

PN1058

VICE PRESIDENT ASBURY: I didn't print them all out, I've just got them - - -

PN1059

MR POLLOCK: Even in the electronic version there are bookmarks for each of the tabs.

PN1060

VICE PRESIDENT ASBURY: Sorry. I haven't even got that open.

PN1061

MR POLLOCK: Your Honour, I'm obviously happy to give you the page number, it's just if that assists.

PN1062

DEPUTY PRESIDENT GRAYSON: It will assist me.

PN1063

MR POLLOCK: Yes. So Kane's Hire is behind tab 2 of the additional - - -

PN1064

DEPUTY PRESIDENT GRAYSON: Sorry, the page number?

PN1065

MR POLLOCK: Page number? Fifty-six.

PN1066

DEPUTY PRESIDENT GRAYSON: Thanks.

PN1067

MR POLLOCK: So the bottom of paragraph 123 his Honour observes this:

PN1068

Even as long ago as 1984, the Full Court said in Commonwealth v Riley at 34 that the practice of adducing evidence of conversations in direct speech was probably disregarded as often as it was followed. Evidence should

be given in direct speech only if the witness can remember the actual words used.

PN1069

The following passage from the judgment of McLelland CJ in equity in Watson v Foxman, a case dealing with alleged misleading conduct arising from oral statements pursuant to the former section 52 has often been cited with approval.

PN1070

Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases, but not all, the question whether the spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another.

PN1071

Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

PN1072

His Honour goes on:

PN1073

The passage is characteristically pithy and insightful. I would respectfully add the following observations relevant to the present issue.

PN1074

Those initial observations aren't really relevant here, save for the observation that his Honour makes at the end of the paragraph:

PN1075

The statement towards the end of the quoted passage, as to what is actually remembered being little more than an impression from which plausible details are then constructed, is particularly pertinent to the present issue, although many would find his Honour's reference to that often occurring 'subconsciously' to be overly charitable.

PN1076

And 126, this is relevant here:

PN1077

The primary duty of a witness is one of honesty. The oath or affirmation binds the witness to tell the truth, the whole truth and nothing but the truth. Witnesses should not be compelled or encouraged into uttering untruths on oath by giving a form of words in direct speech with which they are not happy and which they cannot actually recollect in preference to their own words in indirect speech.

PN1078

What your Honours heard yesterday, orally, and what your Honours can see in writing, in the witness statements, was honest evidence of those employees and was honest evidence of Mr McLaughlin and those who were involved over two years ago. It's not artificially reconstructed memories at an unrealistic, wholly unrealistic level of precision.

PN1079

What is put against us, your Honour is, in essence, a bootstraps case. My learned friend relies on faded recollections of specific details. It relies on what he says are three key points in the explanation and relies on the fact that the witnesses don't have anything more than a general gist, recollection of what occurred. That is said to justify or provide the basis for an arguable appeal ground to justify the granting of the two year extension, when the faded recollections are, themselves, symptomatic of that two year delay.

PN1080

Now, that puts us, of course, in a position of material prejudice, trying to deal with that case now. We could well have been in a position to address some of those matters, had the appeal been brought within time. Now, again, my learned friend provides the reason as to why his client was not aware of the decision until the time that it was.

PN1081

Now, be that as it may, it doesn't change the fact that we are in a position where the evidence that we can martial to deal with the specific recollection of (indistinct) explanation he's necessarily prejudiced. And if that provides, if that lack of clear and cogent recollection of precisely what was explained, what terms were discussed, in my submission, that provides a powerful reason why, at the very least with respect to the explanation of terms ground, why everyone would either not extend time or, alternatively, not grant permission to appeal on that ground.

PN1082

That's not cavilling with what my learned friend says that his client didn't know about it until two years later, but you need to balance that issue with the prejudice we face in trying to meet that case here.

PN1083

Of course, if time is to be extended, and permission is to be granted on that ground, in our submission one needs to approach the assessment cognisant of those issues: the fallibility of memory, and the strength of gist memory, if I can put it in those terms.

PN1084

His Honour Jackman J deals with that at paragraph 127, in Kane's Hire, that's on page 57. Sorry, through to paragraph 128, it's on page 58:

PN1085

The form in which evidence of conversations is given should reflect the difference between verbatim memory and gist memory. While in general terms gist memory tends to be more stable and durable over time than verbatim memory, possibly because it has engaged with higher reasoning processes which interpret and give meaning to what has been heard superficially, it will often be the case that certain words or phrases can actually be remembered verbatim. It would appear that verbatim memory and gist memory of conversations are not merely different in degree, but are also different in kind.

PN1086

His Honour's observations about gist memory being more stable and durable over time really is consistent with the nature of the evidence that your Honours have heard.

PN1087

Your Honours will also need to take into account the principles that we set out at paragraph 28 of our outline of submissions. I don't need to take you through all those authorities. Mechanical Maintenance Services, in the Full Court provides a pretty good distillation and the most recent distillation of what the test is. I think, in the written outline, I also set out several of the leading Full Bench authorities on the question. But, really, it boils down to this is not the attainment of counselling perfection. Mistakes can be made. It is always easy to say that more could have been done. It is, essentially, a practical requirement.

PN1088

Now, the gist accounts that you heard from those witnesses, coupled with the meeting minutes and, of course, the meeting minutes plainly aren't verbatim. They describe, variously, meetings that proceed for an hour, two hours, and they're meeting notes that (indistinct). But, in my submission, I'm cognisant of the difficulties that we face with the nature of that evidence that your Honours could be satisfied that that evidence would have allowed the Deputy President, had she have had that evidence in front of her, to reach a state of satisfaction on section 180(5) that was not out of the bounds of reasonableness.

PN1089

What does that evidence look like? You have Mr Bellingham deposing that at the first meeting they went through the agreement on screen and discussed a comparison against the awards. You have that at paragraph 15 of his witness statement. You have him deposing that employees raised concerns about training clauses and classifications, at paragraph 16.

PN1090

The second meeting, he asked questions about the differences between rates of pay, training and allowances under the Workshop EA and this agreement, so a comparison as against the Workshop EA, that's paragraph 19.

PN1091

At the third meeting, going through the agreement on screen and describing the changes, paragraph 20.

PN1092

Mr Barry gave evidence that they went through the Industrial Agreement on screen in the first meeting, this is at paragraph 12. Had a week to review it. Raised questions about coverage, paragraphs 13 and 15, or 13 through to 15. The voting cohort raised concerns that the agreement didn't include all of the entitlements in the Workshop EA and that those concerns were discussed. So, in a practical sense, a comparison as against the Workshop EA because the employees are raising issues about it, paragraph 16. And also a discussion concerning a comparison between the agreement and the awards, at paragraph 16.

PN1093

Mr Woodard deposes that there were discussions at one of the three bargaining meetings about how the agreement terms compared with the two awards. He raised issues about standby and training clauses, and ambiguous working, I took your Honours to those paragraphs earlier. Employees had an opportunity to discuss concerns amongst themselves, paragraphs 23 through to 25. And a further opportunity, in the third meeting, to ask questions, at paragraph 28.

PN1094

I would also draw your Honours attention to the meeting minutes of 14 June, court book page 760, a one hour meeting where the purpose of the agreement is explained. Now, exactly what was said is not set out in that meeting minute. But at the very least, is evidence for your Honours that that issue was canvassed.

PN1095

There is then a clause by clause distillation of, or evidence that the parties went through, clause by clause, of the agreement. You'll see that at court book 761. Not just a one line reference to the fact of going through those clauses but actually listing the clauses by number.

PN1096

The 28 June meeting, court book 763 to 765, there's discussion of scope, meal allowances, training, wage increases, standby times, travel, overtime pay and salary. You recall that meal allowances was one of the matters upon which my learned friend relies. You'll recall also classifications is another matter upon which my learned friend relies, and you'll recall, a moment ago, I drew your attention to Mr Bellings' evidence that employees raised concerns about, amongst other things, classifications, in the first meeting.

PN1097

Now, true it is, the state of the evidence, over two years later, does not give us the kind of clarity to identify precisely what was said. The position might well be different if this were a contested first instance matter and these events occurred only a short period or weeks or a month or so prior.

PN1098

That may not be - you might accept my learned friend's explanation that they only learned of this agreement and they acted promptly. All of that can be true, but it doesn't change the fact that the state of the evidence is what it is because of that two year delay.

PN1099

Whether your Honours approach that at a level of that that provides a discretionary reason as to why you would not extend time or grant permission to appeal on that ground, or whether your Honours would approach the analysis of the fresh evidence in light of and cognisant of that delay in giving due allowance to it. On either view, one reaches a landing that the Deputy President conclusion should stand.

PN1100

Can I just make some comparative observations as against Mechanical Maintenance Services, in the Full Court? Your Honours will find that at tab 7 of the first bundle of authorities. It commences of page 212 of the pdf of that document.

PN1101

Can I start at paragraph 138, which my learned co-counsel tells me is at page 256 of the pdf. This is in the joint judgment of O'Callahan and Wheelahan JJ who formed the majority in that case.

PN1102

Now, your Honour's will see, about half way down the paragraph, that the nature of the CFMMEU's argument is they point to the declaration of Mr Timothy Brown, and the case is that there was no evidence that these matters were explained, that is, that there were less beneficial terms, compared to the two awards. The Commission submitted:

PN1103

There was no evidence that the differences between the proposed agreement and existing industrial instruments were explained to the employees and there were some key differences between the proposed agreement and the Greenfields Maintenance Agreement.

PN1104

They provided an non exhaustive list. Then you see the majority's distillation of Mr Brown's evidence, in paragraphs 139 and 140. The summary of the cross-examination is a little more instructive, at paragraph 142.

PN1105

Mr Murphy was cross-examined at the hearing. In cross-examination he confirmed that other than the documents referred to in his third statement, he did not provide a copy of any other documents to the employees. Otherwise, the tenor of the cross-examination by the representative of the CFMMEU was to seek to exhaust Mr Murphy's memory as to what was discussed with the employees. Mr Murphy clarified that he'd attended three meetings with the employees, although not all voting employees had been present. At the first meeting he asked a number of questions. Mr Murphy reiterated, in answer to

other questions in cross-examination, that he took the employees through a clause by clause analysis of the proposed agreement, explaining its terms and their effect and he did so sequentially. He also explained the inter-relationship with some clauses with others.

PN1106

Down the bottom of paragraph 143:

PN1107

The nature of Mr Murphy's oral evidence was largely descriptive of topics that he covered and his evidence did not amount to a verbatim account of the discussions that he held with the employees.

PN1108

At 157, on page 265 of the pdf, the CFMMEU suggests or submitted that:

PN1109

The employer did not provide anything in writing to the employees setting out the differences between the enterprise agreement and the Greenfields Agreement.

PN1110

Being the extant agreements. And that:

PN1111

The result the only evidence of any explanation that could be relied upon by the employer was in relation to the discussions which occurred. It was submitted that Mr Murphy gave evidence by way of bald general statement or conclusion that he explained to the voting employees about how the agreement differed in any material or significant way to a number of different industrial instruments including, relevantly, the Greenfields Maintenance Agreement.

PN1112

Counsel submitted that the state of the evidence was such that there was no detail of anything about numerous conditions contained in the Greenfields Agreements that were not included in the enterprise agreement.

PN1113

Then there's a list of what was relied upon. Pausing there for a moment, of course that rather resembles the way in which my learned friend has approached the case, on 180(5), that he's identifying, picking out particular clauses and attacking the cogency of the evidence, with reference to the poor recollection of witnesses, given the passage of time.

PN1114

One-sixty-three and 164 is where their Honours set out the relevant principles. That is:

PN1115

The Commissioner's satisfaction must be formed in good faith but capable of being formed by a reasonable decision maker and be formed in accordance with the correct understanding of the law.

PN1116

The only relevant material before the Commission had been the statutory declaration filed on behalf of the employer -

PN1117

This is over on 164, paragraph 164:

PN1118

which is silent as to the contents of the explanation, indeed the substance of the explanation.

PN1119

I'm sorry, I withdraw that, this is contrasting the analysis in OneKey. Their Honours are observing that:

PN1120

In that case the only relevant material before the Commission has been that statutory declaration filed on behalf of the employer, which was silent as to the content of the explanation and the substance. It was common ground that the Commission was never told what was said to the relevant employees.

PN1121

Then an extract from OneKey.

PN1122

At 169 their Honours really get to the heart of it here:

PN1123

For the purposes of 180(5) the Commission must be satisfied that all reasonable steps were taken to ensure that the terms of the agreement and their effect were explained to the relevant employees. We don't consider that this requirement necessarily involves the identification of the universe of reasonable steps and requires the Commission be satisfied that every one of those steps was taken. Often a requirement to take all reasonable steps to achieve a particular outcome may be made in different ways. The fact that one reasonable path is chosen (indistinct) need not result in the conclusion that all reasonable steps were not taken.

PN1124

They give some examples:

PN1125

The legislation contemplates that there be flexibility. That flexibility arises particular from 180(5)(b) which requires that the employer take all reasonable steps to ensure the explanation is provided in an appropriate manner, taking into account the particular circumstances and needs of the employees.

PN1126

If an employer, in a particular case, pursues a path of explanation and mode of communication that is reasonable, the standard of reasonableness may not require that the employer pursue all parallel means of the explanation in communication which share the same end.

PN1127

Further, any explanation the terms of the agreement and their effect will often be open to challenge on the ground that the explanation could have been made with a greater level of precision or particularity. It is in the nature of most explanations that they could be given in greater detail, or alternatively at a higher level of generality.

PN1128

171:

PN1129

The central premise of the applicants' case before this court in relation to the Explanation Issues was to identify a series of claimed differences between the Greenfields Agreements and the enterprise agreement, not all of which were the subject of submissions to the Commission, and to contend that the Commission was required to consider the explanations, if any, given to the employees in relation to all those claimed differences. In our view, that was not the Commission's function. The Commission's function was to form an evaluative judgment about issues that were at a higher level of abstraction, directed to the statutory question whether the employer took all reasonable steps to ensure that the terms of the proposed agreement and their effect were explained to the employees in an appropriate manner.

PN1130

And there's a contrast to the situation in OneKey, where there was no evidence at all of what the explanations were, just a bear assertion of compliance.

PN1131

Now, I took your Honours through the state of the evidence, such as it is, through those various meetings and the recollections, as best these people could recall, over two years ago, of what was explained. What you get from that there was an explanation and a comparison as against the two awards. There was an explanation and a comparison against the Workshop Agreement. These employees did have opportunity to - took up opportunities to discuss, amongst themselves and to raise their concerns and issues with terms of the agreement. That was discussed in meetings, changes were made to the agreement and not in the space of, say, two days, as was the case in the Toll case that we looked at earlier, but over a period of several weeks. The employers reached a position where they are comfortable to vote up the agreement.

PN1132

Now, the way in which it's put against us really, your Honours is very much akin to the approach that the Full Court, or the majority of the Full Court, in this case, criticises. That is to take potshots at particular terms and attack the cogency of the evidence on those terms.

PN1133

There might be greater merit in the approach that my learned friend takes, again if we were some weeks or a month or so away past the point of which all this occurred. But we have to look at this with a realistic lens. And if your Honours were presented with evidence from those employees, at a greater level of crystallisation and detail, your Honours would be very slow to accept it. Your Honours would be very slow to accept that people would, sensibly, recall those fine details after that passage of time. What your Honours got was honest evidence.

PN1134

Now, my learned friend says that the employees were misled because they were told that they'd be getting a higher rate than that which was in the agreement. My learned friend took you to paragraph 41 of OneKey, where a statement of that nature was described as, at best, misleading, by the Full Court. But of course there was no articulation by my learned friend as to the context, the relevant context in OneKey that made that statement, at best, misleading.

PN1135

It may well have been, at best, misleading in the context of the facts of that case. But here, paying higher rates that the - certainly than the hourly rates, and then also, at clause 1.2, for setting salary rates or setting a floor for salary rates, is, as I've drawn your Honours attention to, a function of the agreement.

PN1136

Now, employees spent time on the rates in these clauses in the first session, as the meeting minutes show. There are further questions about these things in the second session. So, in those circumstances, what is it about this case that renders a statement to that effect misleading? The employees won't be paid a higher rate of pay; what is misleading about that?

PN1137

VICE PRESIDENT ASBURY: A higher rate of pay than what though? What is the statement really saying? The employees making the agreement would be paid a higher rate of pay, but future employees may not.

PN1138

MR POLLOCK: Well, your Honours, that statement insofar as it can be - and again these employees weren't cross-examined on all that, but as far as one can glean from the meeting minutes, 'You will be paid a higher rate of pay.' That's not misleading. If the evidence was that the statement was, 'You will be paid a higher rate of pay and all future employees will be paid a higher rate of pay', and there was also evidence that the employer intended not to do that, well, that might well be misleading. There is no evidence to suggest that. In fact the evidence from Mr McLaughlin was, 'Well, we have to pay market.'

PN1139

Unless there are any questions, that's all I wanted to say on the genuine agreement grounds. My learned friend Mr Croker is going to address you briefly on the BOOT. I think rather than me getting up on my feet again and tying all that together, I can simply make these observations. I've addressed your Honours on

the real difficulty particularly with respect to the explanation grounds in trying to run this kind of case over two years after the fact and, in my submission, the appropriate way to deal with that is either to not extend time with respect to that ground or perhaps more properly if your Honours are minded to extend time on the appeal proper, to not grant permission to appeal on that ground.

PN1140

Whatever one might say about it, of course we say that that ground lacks merit in any event, but even if that proposition were arguable it's arguable only because of the delay or at the very least your Honours couldn't be satisfied that that wasn't in play and that would give you a powerful reason why not to. I've set out in writing the reasons why we say permission to appeal on the extension of time ought not be granted. Really it comes down to this is over two years in the past.

PN1141

This case doesn't raise particularly novel issues. It raises the sorts of fairly chosen, genuine agreement issues, stake and so forth. I've traversed several authorities today that grapple with just these such issues. For the reasons I've explained, those authorities support the view that there was no basis upon which the Deputy President's evaluative judgment is carried even had these things been known.

PN1142

In those circumstances, particularly given two years after the fact a conclusion that the approval of the decision is quashed, of course that leads to a range of potential consequences relevantly for my client who until this point has been applying an enterprise agreement that it understood to be lawful and approved by this Commission. Having a lag of some two years raises, you know, material consequences from a compliance standpoint in the event that it's found never to have been validly made.

PN1143

That's all I wish to say about those issues. My learned friend Mr Croker will address the BOOT and subject to any further questions that your Honours might have, those will be the submissions of the respondent.

PN1144

DEPUTY PRESIDENT GRAYSON: Mr Pollock, just before you sit down I thought I had - obviously I think AG13 evidences that (Indistinct) applied to transfer - made an application for orders in relation to a transfer of business for the workforce logistics agreement people.

PN1145

MR POLLOCK: Yes.

PN1146

DEPUTY PRESIDENT GRAYSON: I had a recollection that that had been - I had seen that that been withdrawn and I couldn't find that in the document, so I wasn't sure - so were those orders made?

PN1147

MR POLLOCK: As I recall - and I'll just get some instructions from my instructors - the basis for that fell away so the approval decision was quashed.

PN1148

DEPUTY PRESIDENT GRAYSON: Yes.

PN1149

MR POLLOCK: There's nothing for which that application could attach and so - - -

PN1150

DEPUTY PRESIDENT GRAYSON: That's make sense.

PN1151

MR POLLOCK: - - - unless I'm told otherwise, I would assume that application was simply discontinued consequent upon the Full Bench's decision and orders.

PN1152

DEPUTY PRESIDENT GRAYSON: Yes, that's what I recall and I couldn't find it. All right. Thank you.

PN1153

MR POLLOCK: Thank you.

PN1154

MR CROKER: Thank you, your Honours. Just briefly on the better off overall test, what is put against us by my learned friend is that the Deputy President misconceived or did not perform the statutory task below in that the Deputy President could not be property satisfied that the BOOT had been passed. That is an argument that is advanced by way of one example that rose not higher than the level of submission.

PN1155

Before turning to that example, I just want to briefly turn to the task that was before the Deputy President at the time. It's uncontroversial that the task in applying the BOOT requires the Commission to identify terms which are more beneficial for an employee, terms which are less beneficial and then conduct an overall assessment as to whether or not employees to be covered by the agreement are better off overall. It's a global test and it's one that performed at an impressionistic level. It doesn't require a line by line assessment. Here there is evidence before the Full Bench that that task was attended to by the Deputy President.

PN1156

If we turn to page 49 of the appeal book there is an email from Dean DP's chambers to Mr Cooper of Mapien. It sets out over six different categories concerns that the Deputy President had with whether or not the BOOT had been met in relation to this agreement. The Deputy President considers matters including the casual minimum engagement, the penalties that apply by reason of public holidays and weekends, and overtime, and raises concerns directly with APTS that these matters have not been appropriately addressed in the then

proposed agreement. In response to those concerns, ultimately undertakings were given by APTS which addressed the concerns and the agreement was made.

PN1157

As part of that the Deputy President also had consideration not only of the particular terms but, for example, that in an industry like this in relation to the public holiday penalties it may be unlikely that casual employees would work on a public holiday in isolation. We say that this evidence is a detailed consideration of whether or not the terms under the agreement have been satisfied.

PN1158

The example that is advanced by my learned friend involves a Monday to Friday employee working for a fortnight away from home and working eight hours each day for one of the - each of the weekends during that period. Under the example that is provided in the first set of written submissions it's said that an employee working in that way is $280.44 worse off as at the test time, being when the application was made on 25 June 2001. My learned friend says that that's a problem that compounds, it becomes worse over time because the salary that is provided for under the agreement doesn't increase as do the hourly rates.

PN1159

In reaching a state of satisfaction as to whether or not the better off overall test is passed, the Commission is not required to take into account fanciful or improbable working arrangements which of course can be put to one side in conducting the analysis required in performing the better off overall test. That comes from the *CFMMEU v Specialist People* at paragraph 36 which is in the respondent's authorities at page 182, tab 5.

PN1160

I only want to take your Honours to one case in relation to the example that is proffered, which is the *SDA v Prouds Jewellers*, which also appears in the respondent's authorities at page 439, tab 15. Now, in that case the Full Bench considers seven grounds of appeal which essentially boiled down to a contention that Young DP had erred in concluding that the relevant enterprise agreement passed the BOOT.

PN1161

One of the issues that was raised by the SDA was that under the applicable award - being the General Retail Industry Award 2010 - a particular clause provided that where a retail establishment employs 15 or more employees per week, unless there was a specific contrary agreement, an employee will not be required to work ordinary hours on more than 19 days in each week cycle. On the SDA's interpretation - I can see, Vice President, that you're nodding having sat on the Bench, yes.

PN1162

VICE PRESIDENT ASBURY: Yes, I remember this case. It was about hypothetical scenarios and how you don't need to - - -

PN1163

MR CROKER: Yes, Vice President.

PN1164

VICE PRESIDENT ASBURY: - - - apply the BOOT to those sorts of scenarios.

PN1165

MR CROKER: Yes.

PN1166

VICE PRESIDENT ASBURY: Yes.

PN1167

MR CROKER: And where that takes us we say in the current case, your Honours, is that we've got - sorry, just to return to the Prouds case for a second, that provision was only going to 15 employees who were to be employed at a particular retail store.

PN1168

VICE PRESIDENT ASBURY: In the store, yes.

PN1169

MR CROKER: And the SDA were saying, 'It's possible that there will be 15 employees engaged at one of these Prouds stores across the several thousand employees and several hundred stores we had, and then they being materially disadvantaged to employees where that occurred in that they might not be able to access relevantly overtime.'

PN1170

Ultimately Young DP at first instance rejected the contention and part of the reason for that rejection was that there was uncontested evidence put by Prouds that it had no store that had 15 employees and it had no intention of employing more than 15 employees at a particular store. So the basis upon which Young DP rejected the SDA's ground of appeal - or one of the bases - was that the Commission is not required to take into consideration purely hypothetical, fanciful or implausible scenarios, nor every contingency relying on paragraph 36 of Specialist People to which I referred previously. Young DP's position in relation to that matter was not disturbed on appeal and permission to appeal was ultimately refused.

PN1171

In this case we say that there are analogous circumstances in that the respondent's HR/IR manager Jon Lord has given evidence regarding one example; the one example that's set out in the appellant's submissions. Mr Lord's evidence is that in the hydrocarbons industry employees typically - that is about 70 to 80 per cent of those employees - work on a FIFO basis. He gives evidence that that is because these plants and facilities are typically in remote locations and the balance of employees - the other 20 to 30 per cent - are local employees who work close enough to the plant or facility that they're able to commute to and from each day.

PN1172

VICE PRESIDENT ASBURY: Which is why they can work Monday and Friday, not - - -

PN1173

MR CROKER: Indeed, yes.

PN1174

VICE PRESIDENT ASBURY: Yes.

PN1175

MR CROKER: So he further give evidence to the effect that in his 10 years of work in human resources in the hydrocarbon sector, he's unaware of any employee working a Monday to Friday arrangement where they are then seconded away or work for extended periods of time in other locations.

PN1176

So what we are driving at, your Honours, is that there is uncontested evidence from Mr Lord to the effect that a Monday to Friday employee working for an extended period of time away from home is simply a scenario that doesn't occur within this industry and that's not a position that has been challenged by contrary evidence being called, nor was Mr Lord's evidence challenged under cross-examination.

PN1177

So again it's not put at the level that it's impossible, just as it wouldn't have been impossible for Prouds to regularly employ more than 15 employees at one of its stores, but the evidence of Mr Lord we say puts it in the same category as that decision, being one that's fanciful and being one that did not need to be considered at the time of the BOOT.

PN1178

At paragraph 18 of Mr Lord's statement, which is at case book 817, it's made clear that once the living away from home allowance is deducted the particular employee in the appellant's example is better off as at the test time. Now, what has been put in the written submissions filed by my learned friend this morning is that that fails to grapple with the issue I adverted to earlier, being that overtime - the detriment to the employees is compounded by reason of rates in the award going up and living away from home allowances increased over time. My learned friend says that that's something that is not grappled with in the respondent's submissions.

PN1179

I think the answer to that is that the assessment is to be made at the test time pursuant to section 193(1) and section 193(6) and section 185 together make clear that the time at which the assessment is to be conducted is at the time the application is made to approve the agreement; here, relevantly, 21 June 2021; so the Deputy President would not have known and could not have regard to increases in the award that occurred some two years later.

PN1180

This is not something that happened shortly after the agreement was made. It was, you know, some full two years later. It's not something to which the Deputy President was required to have regard and we say that it doesn't reveal any contravention of the legislation. There is no modelling or other examples relied

on by the appellant. It's one example only and for the reasons set out in Mr Lord's statement it's simply not plausible. The Deputy President's assessment of the BOOT in this matter we say doesn't reveal any error.

PN1181

VICE PRESIDENT ASBURY: I understand. Anything in reply?

PN1182

MR MACKENZIE: I have no matters in reply. There is a matter that the parties want to raise jointly with the Full Bench.

PN1183

VICE PRESIDENT ASBURY: Yes, sure.

PN1184

MR POLLOCK: Thank you, your Honour. It's really just out of an abundance of caution.

PN1185

VICE PRESIDENT ASBURY: Yes.

PN1186

MR POLLOCK: Your Honours will recall in the (Indistinct) judgment in the High Court the majority judgment that their Honours make this observation:

PN1187

On any view of what a rehearing entails once the Full Bench admitted the new evidence which challenged the satisfaction of the BOOT and was incumbent on it to decide the appeal upon the facts and in accordance with the law as it exists at the time of the hearing of the appeal.

PN1188

Now, my learned friend helpfully has given you the relevant references in the footnotes to his opening submissions, notwithstanding that both the approach to BOOT has changed since this agreement was approved and also to the Commission's assessment of explanation in genuine agreement. There are effectively grandfathering provisions that apply, the pre-existing law, given the notification time of this particular agreement. It was just out of an abundance of caution to draw your attention to those footnotes which you'll find I think at footnote 19 of my learned friend's opening outline.

PN1189

VICE PRESIDENT ASBURY: Thank you.

PN1190

DEPUTY PRESIDENT GRAYSON: Mr Mackenzie, there was a question I asked you about whether you thought that something would be caught by notices for production that you were going to get instructions on and come back to us on. Have you done that?

PN1191

MR MACKENZIE: Yes, Deputy President. I do say that if an email exists it would have been caught by the first paragraph of the order to produced issued to APTS Pty Ltd.

PN1192

MR POLLOCK: Your Honours, I obviously haven't had any opportunity to take any instructions on any of that. I suppose I can make the observation that of course all of that came on at pretty short notice and the obligation is to conduct a reasonable search. Simply because an email of that nature wasn't turned up in that search does not of itself carry with it any suggestion that the email was located and was withheld. That's as far as I can put it without any further instructions.

PN1193

VICE PRESIDENT ASBURY: Well, it arose because one of the witnesses said he received an email.

PN1194

MR POLLOCK: That's so, your Honour.

PN1195

VICE PRESIDENT ASBURY: So it could have been called for at the time if there was an issue taken with it.

PN1196

MR POLLOCK: Well, indeed.

PN1197

VICE PRESIDENT ASBURY: I'm assuming - are we making any issue about this or - - -

PN1198

MR MACKENZIE: No, Vice President.

PN1199

VICE PRESIDENT ASBURY: All right. Thank you, parties, for your comprehensive submissions. We will indicate that we will reserve our decision and issue it in due course. On that basis, we'll adjourn.

ADJOURNED INDEFINITELY [12.55 PM]