TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CROSS

AG2023/2561

s.217 - Application to vary an agreement to remove an ambiguity or uncertainty

Qube Logistics (Rail) Pty Ltd T/A Qube Logistics
and
Australian Rail, Tram and Bus Industry Union
(AG2023/2561)

Sydney

10.00 AM, WEDNESDAY, 14 FEBRUARY 2024

Continued from 19/12/2023

PN1

THE DEPUTY PRESIDENT: Yes. I note the continued appearances.

PN2

Mr Follett.

PN3

MR FOLLETT: Thank you, Deputy President. Your chambers should have received yesterday, Deputy President, from our side, three documents.

PN4

THE DEPUTY PRESIDENT: Yes.

PN5

MR FOLLETT: One, a road map of propositions and a subsidiary of findings. I will refer to that as a propositions document. There's also an aide-memoire, effectively regarding the credit and the evidence of Mr Pryor, and then there's a separate chronology regarding what we refer to as the key documents, focusing on essentially the period January through June 2014 which the deputy president might recall - although it's been several months now - was the substantive point in time when, on the RTBU's case, there was agreement to pay the award shift and weekend penalties, and on Qube's case, there was an objection of a weekend penalty time which never subsequently resurfaced.

PN6

I will refer to parts of those documents throughout the course of my address. I wasn't intending on reading them to you or taking you through each aspect of them.

PN7

THE DEPUTY PRESIDENT: No, I have read it.

PN8

MR FOLLETT: And certainly, in many respects, what is said there does require some examination of some of the evidence, including particular passages from the transcript.

PN9

Could I just note one matter, for completeness, by way of housekeeping. It seems from one of our notices yesterday and it seems from one of the RTBU's documents they have noticed this issue as well. The Commission received a witness statement of Shayne Johnson which was marked as exhibit A1. That appears at pages 661 and 662 of the court book which is volume 2. Well, my volume is volume 2, and you will see there that it doesn't appear to be complete. There's a third page, which for reasons that escape me, appears at court book 1095. So the document before 1095 concluded at 1094. The next document commences at 1096.

PN10

THE DEPUTY PRESIDENT: Yes.

PN11

MR FOLLETT: That third page is missing in there. Now, in terms of the issues I intend to address today, firstly, and perhaps not surprisingly, I want to say something about the facts because they affect, in several respects, the assessment of ambiguity and uncertainty, and also the question of discretionary variation.

PN12

I will return to this, but the findings, we say, available on the competing case series, are essentially our case or the case. There's no in-between, and importantly, there's no scope on the evidence that you have received to form a view that the parties might have been mistaken as to what each other thought.

PN13

In light of the facts, I then want to say something about the ambiguity/uncertainty gateway and I note, just at this point, that I think everyone accepts that the 2015 and 2019 Agreements can be effectively viewed together in terms of the merit with respect to one or the other; that is, the finding of ambiguity or uncertainty and the discretion varied. No one has suggested there's some differential treatment that might be available with respect to the 2015 and 2019.

PN14

Mr Pryor gave some evidence about that - and I won't take you to it - but it's found at 2530 to 2535, and Mr Coulton gives evidence about the circumstances at paragraphs 84 to 97 of his statement at court book 40 to 42.

PN15

Equally, on the last occasion you might recall both sides of the bar table asked the VP president to essentially determine, on the merits, each application, albeit there is a standing issue with respect to the 2015 Enterprise Agreement. I took you through that at PN25 to 26, and Mr Boncardo at PN996.

PN16

Now, then I want to move to the discretion to vary. Then I want to deal very briefly with the question of standing and the status of that. I want to deal very briefly with retrospectivity and constitutionality, and then I want to deal very briefly with the former awards.

PN17

Now, those three documents that we provided to the Commission we have attempted to be as comprehensive and complete as we can be without asking the deputy president to read everything. Obviously you most probably will, but we have highlighted the aspects that we think are particularly pertinent. There's, obviously, a degree of overlap between those documents, and the document regarding Mr Pryor, we have tried to isolate the key topics or themes without necessarily covering all of the issues.

PN18

We do, of course, rely on the whole of the cross-examination because a very large part of it, in our respectful submission, was evasive, lacking in candour, recent invention, and calculated to mislead. Somewhat rare where these cases come up where there are really only two competing versions of events and the acceptance

of one necessarily connotes the rejection of the other. This is perhaps one of them.

PN19

Just moving now to the facts. It's not irrelevant to note, Deputy President, that we were taken somewhat by surprise, to say the least, when we received the RTBU materials and Mr Pryor's statement. There is no single document that is ever referenced or suggested an agreement in the 25 EA to pay award penalty for loadings. The union has never claimed it over seven years. No employee has ever claimed it over seven years. Qube has never paid it over seven years, and reacted adversely when the Federal Court proceedings were first filed.

PN20

The sworn evidence of Mr Pryor to that time, constituted by what he said to Commissioner Crawford on 31 June, only several months earlier, was that the first time he and the RTBU had identified the potential argument, that is award incorporation leading to alleged underpayment, was in early 2023 when Qube unilaterally sought to remove clause 4.2 in the drafting process; hence, why, for instance, one sees at paragraph 10 of our outline, at court book 13, filed, of course, prior to the RTBU materials:

PN21

> *There is and was no suggestion that the copy precedent award incorporation clause was intended to have any particular effect in the substantive agreement of the parties.*

PN22

To put it another way, no aspect of the substantive agreement between the parties, including any operation of or effect for the award incorporation clause.

PN23

Now, Mr Pryor's account, in that sense, has come out of nowhere. It presents entirely as recent invention, and when it is analysed it defies all logical sense, industrially and commercially.

PN24

As the road map of propositions document shows, that account requires a series of cascading findings that are completely implausible. As the document regarding Mr Pryor's credit shows, it is easily picked apart and shown to be lacking truthfulness, requiring more and more fantastic evidence to try and make the account hang together. It's an account which, we say, no weight can be placed upon, should be rejected entirely, save insofar as it is corroborated by other witness evidence or contemporaneous objective documents.

PN25

There were three Qube witnesses and two RTBU witnesses. The RTBU, in their written submissions, referred to paying particular attention to contemporaneous written documents and, of course, that's a sound observation, but it cuts against the RTBU's case more than ours because, as I have already addressed, there's not a single document anywhere for seven years about this issue, and not one has been produced by the RTBU relevant or referable to that time other than a hard copy

document that is said to have some handwritten notes appended to it which, themselves, don't actually say a great deal. The gravamen of them needs to be interpreted by the author.

PN26

For Qube, we have Mr Coulton, Mr Rich and Mr Johnson. The deputy president will recall that Mr Rich and Mr Johnson were delegates at the time when we were involved in the bargaining for the 2015 Agreement, and for the RTBU we had Mr Pryor and, of course, Mr Matthews. Mr Matthews was not required for cross-examination. Mr Matthews says nothing much of particular relevance, except he gives an unvarnished account, as a legal officer would, that is inconsistent with an important cog of Mr Pryor's account about Mr Pryor's knowledge of whether shift loadings and penalties were being paid.

PN27

We will return to this, but you will see that observation made at point 14(c)(iii) of the propositions document and we say there's no reason why the Commission wouldn't accept Mr Matthew's evidence in that respect.

PN28

Now, we received late last night, at about 6.30 I think it was, some document from the RTBU, some of which deal with, or one of which particularly deals with observations about Mr Rich, Mr Johnson and Mr Coulton. I will intend to make some brief observations now, but it may well be that, at least in some respects, some of that we will have to attend to in reply.

PN29

Looking at Mr Johnson and Mr Rich, their evidence could be described as the cherry on top in some respects in that it accords with what the objective evidence shows; that is, that there's no evidence that any particular person or employee thought or knew of this issue, employee or union official, until at the earliest, late 2022.

PN30

Some of the evidence in this case - and I will repeat this message - but when considering the particular credit and reliability of all of the witnesses, and conflicting findings or inferences that might be capable of being drawn, that always has to be done in the prism of the whole of the evidentiary record, including, most importantly, the inherent probabilities.

PN31

The attacks - if I can call them that - on the credibility of Mr Johnson and Mr Rich are in that category. They need to be assessed against undisputed objective facts; that is, that they were delegates at the time of the bargaining. They were employed as train drivers under the two agreements. During their time as train drivers they rarely worked weekends and early morning shifts and night shifts. They were not paid any penalties or loadings. None of them ever complained about it, and the only rational explanation for why they didn't must be that they didn't think they had any entitlement to them.

PN32

THE DEPUTY PRESIDENT: And you say that overrides the direct evidence they gave, particularly in cross-examination?

PN33

MR FOLLETT: Well, I will come to that, but there's two ways. When I come to it you will see that you need to look at that evidence ably said, and this is Mr Rich. Mr Johnson is not in this territory, and that's a very good example. There may be two ways of reading that evidence. You will have to assess what is more likely having regard to the objective probabilities. Let's take that proposition at its highest. It seems to be put that Mr Rich said:

PN34

Yes, I knew about this. I knew that the award was incorporated and that we were going to get our penalties.

PN35

Let's assume that was true. What possible explanation can there be for him not claiming it, ever raising it with anyone, and coming to this Commission and saying, 'I didn't have any idea about it'? There's zero explanation for that.

PN36

So is that really what happened, and when I come to the evidence you will see that Mr Rich, with all due respect to him, didn't know what day it was. I will take you to the transcript. He had no idea what the word 'incorporation' meant, and there's a final question that wasn't even in cross-examination, it was in re-examination, after basically explaining that he had no idea what 'incorporation' meant and what 'award incorporation' meant. He thought it was a reference to incorporation of the old agreements. Any answer that he gives has to be seen in that context, including he couldn't get the oath right. The deputy president might recall it took him about four goes.

PN37

THE DEPUTY PRESIDENT: I recall what I heard. You say that's material?

PN38

MR FOLLETT: I'm sorry?

PN39

THE DEPUTY PRESIDENT: You say that's material?

PN40

MR FOLLETT: To assessing his capacity to recall what occurred and assessing whether or not one answer given in response to one question, you say, well, that's the golden ticket. I think my friend uses the terminology of 'obliterates the case'. Absolutely it's relevant, and I will come to this.

PN41

The essence of the cross-examination and the submissions with respect to both of these gentlemen was twofold, and there's walking both sides of the street involved here. There were two central propositions. One, it was a long time ago and they had limited recall of who said what to whom, in what meetings, what meetings

they attended, what meetings they didn't, and when those meetings were. That's an obvious line of cross-examination, to make that submission, which they do, for Mr Johnson, that his evidence is unreliable. Okay?

PN42

Then the second proposition that they sought to establish with respect to both of them was that they weren't involved in this Part A versus Part B negotiation. Mr Boncardo sought to extract that they were involved in the Part B state-based negotiation only. They weren't involved in what is called the Part A national negotiation, which leads, for example in their document, then to say Mr Johnson's evidence is irrelevant. 'He wasn't involved. It's irrelevant what he thinks.'

PN43

They established the same proposition with Mr Rich, that he had no involvement in the Part A negotiations, but what you see with Mr Rich is they don't say he's unreliable because it was a long time ago, even though you can look at all of the cross-examination that was set up to make that submission, and they don't say his evidence is irrelevant because he wasn't involved in the Part A negotiations. Why do they not say that? Because they think there's an answer there that helps them.

PN44

You might recall - and I will take you to this now - at PN305. This is in re-examination. My learned junior was attempting to ask Mr Rich where his understanding of the effect of the award incorporation clause came from, and there's an objection. The witness said he wasn't privy to discussions in respect to clause 4. The answer was crystal clear and there's nothing that can or should be clarified by way of re-examination.

PN45

That's exactly the same submission they make now about Mr Johnson, but they say for Mr Rich, no, he was obviously a very compelling witness and obliterates the case because there's one answer that they think they like the look of.

PN46

Now, in terms of Mr Rich not being privy to the discussions, you will see that cross-examination at PN249 to 258 and 288 to 291. Mr Rich forgot his hearing aid, you might recall. He said, on repeated occasions, he was a bit slow, and when one comes to assess what he says about the award incorporation, 296 to 297:

PN47

Look at point 4, the relationship to parent award or the NES. Have you actually seen, at any point in time, the text of that clause?---No, I haven't seen nothing.

PN48

Do you know what the text says?---No.

PN49

And then at 321 to 325. At 320:

PN50

Mr Boncardo put to you that you understood the union was not pressing the claim for weekend penalties in Part B because the award was to be incorporated into the agreement and you agreed with that proposition?---Yes.

PN51

What was the source of that understanding?---My understanding of that is that we're getting an EA together to incorporate four things, four EAs together, and that's my thing.

PN52

Mr Rich, when you're referring to incorporation, which instruments are you referring to being incorporated? What is it that's being incorporated as far as you understand?---I don't understand what you're talking about 'being incorporated'.

PN53

Mr Rich, you just gave evidence that you understood?---I understood. Yes.

PN54

That the weekend penalty claim was not being pressed because the award was being incorporated and I asked you what the source of that understanding is and you referred to the incorporation of the agreements?---Yes.

PN55

So I'm asking you, Mr Rich, as far as your understanding is, what it is that's being incorporated here?---I really don't know. I don't know what incorporated is.

PN56

To put any particular weight on an answer later given, or indeed, earlier given in cross-examination, in light of that, in light of all of the issues with Mr Rich's evidence, in light of the fact that the union adopted a diametrically opposed approach to Mr Johnson and Mr Rich when it suits them, balanced against the inherent probabilities of the case, with great respect, it's a little difficult to see how a finding could be made that Mr Rich had any positive belief about any entitlement to award incorporation or penalties or loadings that nothing ever happened about it.

PN57

Now, what is said about Mr Coulton again has to be seen in the context of the case: again, objective probabilities set up Mr Coulton's evidence against Mr Pryor's. Whatever might be said about certain answers Mr Coulton gave at certain times, his credibility, is with respect vastly superior to that of Mr Pryor. Just for the sake of clarity, when I'm referring to objective probabilities of the entire evidence I'm paying particular attention to the proposition document, yes, because as we'll come to you essentially have to make a finding with respect to every single one of those in order for the RTBU's version of the facts to be accepted.

PN58

If the RTBU's version of the facts was not to be accepted then a finding that Mr Rich saw one thing or another would very much be an island and it would have no

significance to the case. Now, even though Mr Coulton is standing behind me, what can we say about his evidence? A lot of this, a lot of the criticisms come from a forensic choice made by my learned friend about how to cross-examine Mr Coulton.

PN59

He conducted the cross-examination in many respects as a form of memory test by asking him a targeted question about a particular document or a particular meeting or a particular point in time without anchoring in any of the material before the Commission what exactly he was being asked about and Mr Coulton, for all his strengths, was prone to shoot from the hip somewhat in response to questions of that type where he would suggest an answer without having the benefit of going back to the surrounding materials and that answer, for instance, might have turned out to be inconsistent with the documents.

PN60

That's not a credit issue. It might be a criticism about the way Mr Coulton gave evidence but it doesn't say anything whatsoever about the honesty of the account Mr Coulton gives. So for example, he mistakenly said – and great emphasis is placed on this – he mistakenly said that he didn't think a version of clause 4.2 that he was taken to in the ether found its way into the enterprise agreement. Now, maybe he didn't think it found its way into the enterprise agreement. To then show the witness a document and say, 'Well, it did', that's not a credit issue. It might be a reliability issue.

PN61

THE DEPUTY PRESIDENT: Reliability doesn't go to credit?

PN62

MR FOLLETT: Reliability is different to credit, very different. Reliability is how much weight can I put on a person's account which is not – I'm not saying they're not telling the truth. I'm just saying that their evidence is unreliable because it doesn't accord, for example, with - - -

PN63

THE DEPUTY PRESIDENT: What's the oath? I don't know if it's oath or affirmation in this particular witness's case but - - -

PN64

MR FOLLETT: That's to tell the truth.

PN65

THE DEPUTY PRESIDENT: Yes.

PN66

MR FOLLETT: Yes. And for him to say, 'I don't think that found its way into the final agreement', what's untrue about that? The fact that it found its way into the agreement doesn't say anything about what – he's answering that question at that point in time. There is a fundamental distinction between reliability and credit. It's one thing to say a witness's evidence is not reliable but they're trying to tell the truth. It happens every day of the week in this place and in every other

place that hears cases. The witness might be trying to tell the truth but their memory failed them or it turned out that what they said was not consistent with documents. You shouldn't put any weight on it.

PN67

It's another thing to say the person is lying. That's credit. Maybe we're just having a semantic debate about different views of the word, 'credit'. The point I'm trying to make is that if he made a mistake but was honestly trying to tell the truth, you don't extrapolate from that the proposition that he was trying not to tell the truth. I think we might come back to Mr Coulton once I've gone through the road map document, Deputy President, because I think the way in which one might view the nature of the answers and the nature of the submissions I've been making will be influenced by looking at that document.

PN68

Now, just bear with me. I'll return to Mr Coulton just a little bit later. Mr Pryor – we say we have two advantages here in assessing the competing versions of the facts. One, Mr Coulton clearly more credible than Mr Pryor and two, importantly – and this affects the assessment of that first proposition – Mr Pryor's account is so fanciful and implausible that one couldn't contemplate accepting it. It's based entirely off two oral meetings: one where Mr Coulton wasn't there and one where Mr Coulton gives a diametrically opposed account of what occurred, which diametrically opposed account is wholly consistent with the surrounding documents. Turning now to the propositions document: this is the unvarnished mountain the RTBU has to climb and almost all of the propositions in this document don't turn on credit. Almost all of them are based on objective contemporaneous logic and circumstances surrounding questions of timing and things of that type. Proposition 1, the starting point: Qube's alleged agreement to pay penalties on top of what was already loaded rates in the context of this particular agreement left it giving some workers a pay rise in excess of 65 per cent.

PN69

Then what you'll see in this document, Deputy President, is a proposition and then the facts that sit behind that proposition establishing it to be true. That proposition, for instance, has got nothing to do with credit or reliability. That's just objective documents. And you can keep coming back to asking yourself this question as part of the mental processing of the evidence: is it possible that Qube did that? Yes, it's possible. Is it likely? Is it more likely than not? Again, you can't assess that in the ether. You've got to look at it in the context of the whole of the evidence. For example – I'll come back to this – the various documentation talking about costs moderation, competitiveness, et cetera, et cetera. That's not the type of language one would be using if you were contemplating handing over 65 per cent pay increases.

PN70

The next logical proposition from proposition one is proposition 13. This is the biggest elephant in the room in this case. Having agreed to pay award penalty and loadings, Qube then immediately failed to pay them throughout the life of the 2015 agreement and then under the 2019 agreement, whilst implementing all other agreed changes in the agreement. The RTBU have never attempted to proffer or

grapple an explanation for or grapple with why Qube had agreed to all of these changes to the enterprise agreement, implement all of them, but just not implement this one. Again, is it theoretically possible that that might occur? Sure, almost anything's possible. Is it likely, really?

PN71

Why would an employer of repute adopt such a course if they really had agreed to take on this liability? To bolster that one then can go to proposition 9, found on page 6. Having agreed to the additional 20 per cent plus pay rise, associated with the addition of award penalties and loadings – when I say additional 20 per cent, that's over and above all the pay rises that had already been offered in the agreement, including bringing all the rates up to South Spur and then adding on the 3 per cent on top or 2 per cent, rather, plus the sign on – Qube never once referred to it in communications with the RTBU when trying to reach a deal with the union over the next two years of bargaining, nor did Qube ever refer to it in its communications with employees over that period, including communications seeking to persuade employees to vote for the agreement on three separate occasions. You have three failed votes where Qube is trying to get the vote up. The RTBU is saying no and Qube doesn't mention as part of the sales process to employees, 'Hey guys and girls, for the first time in your working life at our organisation or its predecessors, we're going to pay you weekend penalties and shift penalties and as you all know that's going to be a massive increase in your take-home pay. It's going to be the biggest benefit out of this enterprise agreement by a country mile and you should vote up the agreement for that reason'.

PN72

Crickets. Qube's own costings and modelling assumed that this massive increase in costs didn't exist. You'll see references to that in propositions 9C and 9D and also proposition 2. To further bolster the, 'Why didn't Qube pay, why didn't Qube sell it, why didn't Qube cost it and why did Qube's cost models assume loaded rates only', is proposition 10. Having secured the additional 20 per cent pay increase associated with the incorporation of award penalties and loadings, Qube's biggest concession increasing take home pay for workers, they've put the 2015 agreement ahead of the PN Bulk agreement in terms of take-home pay, the RTBU never bothered to tell employees about it.

PN73

How can the RTBU have never told a soul of this alleged agreement? Not only is there no evidence of them telling a soul, apart from a couple of brief references in answers in cross-examination made up to Mr Pryor saying, 'I told some delegates'. Well, if he had have told delegates do you really think the delegates would have (a) let their own pay not be paid with these loadings for seven years and let all of the employees that the delegates are there to supervise and be responsible for not get paid penalties for seven years – not on your life. But not only is there no evidence of them not telling a soul, there's not a single document anywhere to employees that refers to it.

PN74

The RTBU has got newsflashes for everything. The most trivial of updates in the course of the enterprise bargaining, repeated newsflashes about various

things: 'We've had a meeting, we've exchanged a log of claims, the company's made a wage offer'. All of these things but not one of them refers to securing agreement to what Mr Pryor accepted was the biggest take-home pay increase for all of these employees by a mile, especially when the union had never even asked for it. Relatedly, the PN Bulk agreement was by Mr Pryor to be the benchmark for success and mathematically the Qube deal, if it included the penalties and loadings that the RTBU claims Qube agreed to pay would have exceeded the PN Bulk agreement comfortably because you'll recall that the base rates – sorry, the expressed hourly rates in the Qube agreement are higher than the base rates in the PN Bulk agreement.

PN75

If you add penalties and loadings on top it has to be higher than the PN Bulk agreement and add to that the fact that the PN Bulk agreement's multiplier is not a one for one for all of the penalties. It's a point 9. But if you do the calculation based on the master roster and then you get a point 9 multiple. This was clearly, if it was right, the best rail industry agreement in the country or at the very least, better than the benchmark for success. But the union on three separate occasions told employees not to vote for it because they didn't think the wages were good enough.

PN76

Now, again, is that possible? Is it likely? Is it more probable than not, on the balance of probabilities? Either they are monumentally negligent or they're not telling the truth. Ten F from the propositions document following on from the point about the newsflashes: there was a particular newsflash, less than a month after the 14 March 2014 meeting which was said to be the meeting that Mr Coulton confirmed Mr Owens's alleged earlier agreement to pay these amounts. The particular newsflash was dated 11 April and one of the things it does is provide for a list of agreed clauses. So still fairly early in the bargaining but the union's taking the time in its newsflash to tell employees, 'Here's some of the things the company's already agreed to'.

PN77

Do you think shift penalties and loadings and weekend penalties are in that list? Of course they're not. When Mr Pryor was asked why he couldn't provide an answer. The Commission has the transcript, PN2102, 2100. On the second page it says:

PN78

We can advise the company has agreed in principle to some of your log of claims regarding state-based clause?---Correct, yes.

PN79

You go through some of them and the weekend penalty payments initially are claimed for state-based clause?---Correct.

PN80

Why didn't you tell employees the company had agreed to weekend penalties and shift penalties in that document?---I wouldn't have a clue why I didn't.

PN81

Why did you tell them that for the first time in their working life at Qube or any of those four entities they were going to get separate weekend and shift penalties?---I can't recall. I wouldn't have done it.

PN82

No. Is that really a truthful answer? This claim, it's the biggest of all prizes. Qube never pays it, the RTBU never mentions it. Qube never mentions it and the employees never mention it either. That goes on for seven years. Aligned with the above, Mr Pryor, who said he secured this agreement, took zero steps to see that that windfall gain was actually being passed on to employees. It would have been the first thing on the agenda, post the making of that agreement, was to ensure that everyone was enjoying their massive shift and weekend penalties.

PN83

This is proposition 14. Instead of that, you have Mr Pryor consuming his time with minutes that particular employees spend on particular runs or particular depots and how much money that adds up to for barracks detention, exhibit A8. I don't take you to it. Now, to avoid that somewhat obvious difficulty – why he never did anything about it – Mr Pryor twisted and turned his way around his knowledge of who was working what, when, how often, how long, what he looked at, what he didn't look at, what he thought was happening, what he wasn't sure was happening and ultimately to keep the game alive, he had to fall on his sword – on his account now to you – and admit that he didn't tell Commissioner Crawford the, 'honest truth', under oath, but flat-out lied to Commissioner Crawford. I think it might have been in this room, actually.

PN84

Proposition 15: apparently he said at all times he believed these entitlements were paying and he says he knew since at least October 2022 that Qube were not paying them, which evidence we interpolate is directly inconsistent with Mr Matthews's evidence so he couldn't possibly accept that answer. Yet he said until mid-2023 he wasn't 100 per cent sure there was an issue that needed to be raised with Qube. Well, one would have thought that if there was an agreement to pay and then knowledge came to you that there wasn't payment, that you'd be 100 per cent sure there was an issue. Of course, as we've mentioned, he gave – where the evidence he'd given to Commissioner Crawford, of course at a slightly different point in time when this issue wasn't as important, he said, 'I first became aware of this constructional issue' – i.e. award incorporation, leading to an obligation to pay penalties – 'in early 2023 when Qube sought to take clause 4.2 out'. When I asked him about that, at PN1626, right at the start of day 2, at 1627:

PN85

I suggested to you that your evidence was that you only found out about the construction argument and the incorporation point in February 2023. I think your answer was you found out earlier in 2022?---No, no, it wasn't earlier, it was later 2022.

PN86

I mentioned February '23 and you said earlier than February '23. It was 2022?---Correct.

PN87

Do you an idea what sort of month?---It was late.

PN88

Was that from a discussion with Mr Matthews, was it?---Correct.

PN89

Then there's this explanation he gave that he didn't raise it with Mr Coulton for that six-month period because he didn't want to jeopardise the EA:

PN90

It's your understanding Qube agreed to pay the penalties at the time?---It was my understanding they were getting paid, yes, and they were getting paid, correct.

PN91

So why would raising the issue with Mr Coulton have had any possibility of jeopardising the EA?

PN92

He purports to give an answer at 1635 by reference to other events, of which there is no evidence. And the evidence he gave the day before from there is referred to at 1458, 1457. I asked a question:

PN93

So the union had the view of the construction arguments that it runs in this proceeding for at least a couple of months and your answer is since Qube changed the first day of the draft?---Yes, 4.2.

PN94

Now that's a reference back to February, late February, which led to the good faith bargaining application?---That's correct, yes.

PN95

That you made and I asked you a question – that's made you identify, has it, the argument that you seek to prosecute in the Federal Court?---Correct.

PN96

That evidence, Mr Pryor, is you saying for the first time you were aware that there was any argument that these penalties should be payable was in February 2023 when Qube thought to withdraw clause 4.2, isn't it?---Correct.

PN97

And that wasn't the truth, was it?---No.

PN98

So you lied to Commissioner Crawford?---No.

PN99

It wasn't the honest truth, put it that way?---I knew a couple of months beforehand which has been taken out of context by you.

PN100

I'm not quite sure what I took out of context but anyway:

PN101

So you knew a couple of months beforehand?---Correct.

PN102

And one of those is the truth?---Correct.

PN103

So that's obviously late 2022 or early 2023. And then:

PN104

That means that you can't have known back in 2015 when the enterprise agreement was made. Isn't that right?---Can you say that again?

PN105

You cannot have known that these penalties were payable in 2015 or 2016 when you gave sworn evidence to the Commission that the first time it came to your attention was either late 2022 – i.e. in these proceedings – or early 2023, i.e. in the Crawford proceedings.

PN106

Then he switches:

PN107

When the penalty rates weren't being paid.

PN108

No, that's not what your answer on the question was about. The question was when you first became aware of the argument; that is there was an argument that shift penalties should be paid?---Correct.

PN109

It was late last year. That was the first time you became aware of it?---Correct.

PN110

You can't have become aware of arguments it should have been paid then if you're saying now that you knew all the time that they should have been paid?---That is correct. They should have been paid all the time.

PN111

What is anyone supposed to make of that evidence other than he's clearly lied to someone under oath and in either case, it doesn't matter. Whether he found out in late 2022 or early 2023 about the argument ipso facto means he can't have known back in 2015 that there was some agreement to pay. When he gets cornered he changes it to, 'Oh, no, that's when I found out they weren't being paid', which of course is directly inconsistent with Mr Matthews's evidence and is not true.

PN112

Then he comes up with these explanations. You might recall that, 'People told me in late 2022 that - it was some employees had told me, and I think it was October 2022'. So employees have told him. But he'd earlier purported to say that he got the knowledge of non-payment from Mr Matthews at that time and that of course he came up with this story you might remember that, 'Qube said you're not getting paid them and if you don't like it, there's the door'. Plainly, unlawful behaviour. He gets told about it by an employee who he's an organiser for and does nothing; precisely nothing.

PN113

Really? Of course, none of this is mentioned in his statement: the very definition of recent invention. Propositions 8 and 11 are related. I essentially identify that both sides haggled and negotiated for over two years on items – mostly around cost – which were a complete pittance compared to the penalties issue. Seems distinctly unlikely that you'd agree pay increases of up to 60 per cent or at the very least incorporation of penalties of 25-plus per cent but then spend two years haggling over whether a wage increase should be 2 per cent or 3 per cent, yet that's what you'd have to accept.

PN114

Proposition 12 is also important to anyone who understands how unions work and how industrial relations works. There is, in our respectful submission, no way on god's earth that Marc Marotta in Victoria within 12 months would have done a deal with this employer in Victoria that was over 20 per cent worse than the same deal that was reached with New South Wales, as I said, about 12 months earlier. It is simply inconceivable. Mr Pryor accepted that he supported the goal of parity between employees and indeed, the union started off wanting a national agreement to ensure that everyone was being paid the same.

PN115

Yet of course you have the deal in Victoria which has, other than one random classification, identical pay rates to New South Wales except it retained an expressed loaded rates clause instead of going missing. Now, to avoid some of the difficulties with that, Mr Pryor essentially tried to run a Sergeant Schultz argument: 'I know nothing'. So he basically tried to distance himself from the Victorian negotiations. That's what Victoria does? 'Who knows, I wasn't really aware. I don't know what was going on'. You recall the cross-examination. Some of this is in the credit document. He was writing newsflashes about what was happening in Victoria. He did a comparison of the logs of claims. He wrote a newsflash towards the end saying, 'You know, the wages offering in Victoria is X compared to Y'.

PN116

Clearly he was involved and had knowledge of what was going on. He purported to give evidence that he had no idea of whether that agreement was made before or after the 2015 agreement when on any view if Mr Marotta had have done a deal at a particular rate before he'd done a deal in New South Wales, he would have been hitting up Qube in New South Wales for the same outcome. Then of course he had to extend the, 'I know nothing', to Mr Barden. Mr Pryor spent all this time trying to emphasise the distinction between state-based negotiations Part B and

national negotiations Part A. National negotiations include Victoria but then, 'I don't really know anything about what's happening in Victoria'.

PN117

One of the oddities of this case, Deputy President, is that the Victorian agreement looks nothing like the commons conditions document. So it's not really clear where this national common conditions process went. But Mr Barden had his hand and fingers in both pies, clearly, because he was assistant national secretary, I think his title was. He's attending meetings and there was cross-examination. Again it's in the document - I might come back to it later – where he's present when Mr Owens allegedly makes the agreement. He's present when Mr Coulton allegedly makes the agreement. He then participates in the Victorian negotiations and doesn't say anything about it, apparently.

PN118

Mr Pryor's answer is to try to suggest that he wasn't aware of what Mr Barden was doing. That leaves proposition 3 to 7, which are more specific and granular but equally problematic. Proposition 3 – this is the idea that at the very first meeting, which Mr Pryor variously described as a bargaining meeting or a high-level discussion, where the key negotiator from Qube was not there, where presumably the parties might have been discussing some general ground rules about how bargaining might proceed, the most significant item in the entire process was agreed on the spot and there was not a single document exchanged and no one had any idea what the other party wanted. There was nothing, absolutely nothing. Yet Mr Pryor is asking you to believe that despite there, there was some specific discussion about some specific clause and part A and part B and clause 4 and incorporation and we'll pick up the penalties there. No one could have known anything about part A or part B, because they didn't exist. No one could have known anything about clause 4, because it didn't exist. No one could have known anything about any particular claims the union had because they didn't exist, from Qube's perspective.

PN119

In what universe is that really a probable or likely scenario?

PN120

THE DEPUTY PRESIDENT: Where's Mr Owen?

PN121

MR FOLLETT: Where is Mr Owen?

PN122

THE DEPUTY PRESIDENT: Mr Owen was the attendee at the meeting, wasn't he?

PN123

MR FOLLETT: Yes. He's not an employee of Qube.

PN124

THE DEPUTY PRESIDENT: When did he cease being an employee? Was this covered in the evidence?

PN125

MR FOLLETT: It's in the evidence, yes. Mr Coulton gives evidence. He may not say when he left – 31 October 2014. So before the agreement was even finalised. That's paragraph 39 of Mr Coulton's first statement I assume. Yes.

PN126

Proposition 4: After this supposed agreement sight unseen Qube gets an index to Part A, and Mr Coulton, not unreasonably, says, 'Thanks for that. That looks like a reasonable starting point.' He did say incidentally that he wanted to use the POTA document as a base, but he says, 'Obviously I will be wanting to see some specific words for the proposed clauses before I agree to include them in the agreement.'

PN127

Mr Owens, who allegedly didn't have such concerns, didn't have any authority to make any deals in any case, had supposedly agreed to something that he'd never seen, and then days later Mr Coulton saying, 'Of course I'm going to need to see some words.' Again I think we have all been around the mulberry bush in this room a number of times about how industrial negotiations work. It's pretty unlikely people are agreeing to put in substantive claims without seeing some wording. I asked Mr Pryor why Mr Coulton said that and he didn't have any explanation.

PN128

Proposition 5: Although this claim was supposedly agreed, that is a claim for all penalties and loadings, a log of claims is an issue to Qube, and it only contains a claim for weekend penalties; not shift penalties, not the other allowances, knowing of course at this time Mr Pryor knew that Victoria were claiming both types of penalties. So in what universe is someone agreeing an item, but then putting a log of claims in after the item is agreed to say here's a claim I want, and it's not even a claim that was agreed. It's a nonsense.

PN129

Proposition 6: Having agreed to the claim, but then getting a log of claims anyway, Qube responds and they say it's rejected because of loaded rates. All of the documents say that, all of them. So Mr Pryor has come up with some explanation. This is a good example of my learned friend's emphasis on contemporaneous documents versus recollection of witnesses. The documents speak for themselves, yet Mr Pryor has come up with this contorted explanation for how the log of claims managed to proceed the way it did. What's his explanation? 'I don't know why they rejected the claim they'd already agreed to. It must have been a mistake.'

PN130

Proposition 7: In response to making a claim for something that was agreed, and in response to who knows why the company had agreed with it, then rejects it, the union then responds and says, 'We agree to remove it, and the item's closed.' Once again Mr Pryor has to try to explain orally why the documents might look that way. So he comes up with this account, 'When it says agreed to remove I meant remove from Part B and put in Part A.'

PN131

This is an enterprise agreement that is to regulate terms and conditions of employment. And his account is, 'I was just moving it really from one clause to another. So when I move the claim what I really meant was remove it from some unidentified part of the agreement and I will put it in some other unidentified part of the agreement.' You still have to pay it, mind you. 'I'm not removing the claim in that sense. In fact I'm not removing it in any sense, I'm moving it.'

PN132

Why would an employer care whether the clause is in clause 30 or clause 3. He still has to comply with it. It is patently absurd evidence. And as I said at the outset you essentially have to accept, Deputy President, every single one of those propositions for the RTBU's case on agreement to hold. Some is not enough. It needs to be all of them and they all need to be explained away and rationalised on the balance of probabilities.

PN133

Before going beyond the basic implausibility to specific aspects of Mr Pryor's credit it's important to reinforce something I said earlier, that this is really an all or nothing case. There was some suggestion in the RTBU's original outline that there might be a sort of halfway house available of parties thinking the other party was thinking something else. The evidence doesn't leave that open, because Mr Coulton's evidence is it didn't happen, and what happened was 'X', i.e. articulated to the union, and the union's evidence is it didn't happen.

PN134

What happened was why and articulated to the company. And indeed each of them go a little bit further. Mr Coulton says, for example, about the rejection of the weekend penalties claim is because we've got loaded rates and we're not paying penalty on penalty, and Mr Pryor essentially then says 'Okay' and then they remove the clause. That's effectively agreement to loaded rates and no loadings and penalties. And then of course on the other hand Mr Pryor's account is agreement to loaded rates and penalties expressly. So there's no third option.

PN135

For Mr Pryor in his credit it was said at the outset, we say his evidence was wholly unreliable. It was highly self-serving, repeatedly evasive, and always reserved to himself wriggle room in response to questions to enable him a get out (indistinct) later.

PN136

None of the evidence on any crucial points relied on any contemporaneous written documents, save for as I said the written notes, and the explanation he gives to those written notes, as I think we've sought to explain, is entirely fantastical, such notes only authenticated by Mr Pryor.

PN137

I just wanted to pick the eyes out, as it were, Deputy President, some of the aspects of the examples, the aide memoire examples of Mr Pryor's obfuscations and untruths. The first one I have already dealt with. There's all the references there. This is the evidence to Crawford C. I have already taken you to the

reference where he said the first time he found out about the lack of payment was Mr Matthews, but then he also gave inconsistent evidence that it came up from some mystery employees that we'd never heard of before.

PN138

You see PN1318 for example and PN1486 to 7:

PN139

'I went and asked a few individuals around the place at different depots and they confirmed they weren't getting paid it.'

PN140

Now, of course that's not consistent with Mr Matthews' evidence. He gives a timing account of when this conversation with Mr Pryor occurred where Mr Pryor said, 'I don't think they're being paid.' He comes along to this Commission and says:

PN141

'I thought they were being paid all along. Then I found out from some unnamed employees, or I found out from Mr Matthews' - it's not clear which - 'and then I didn't do anything about it for six months.'

PN142

The next item on page 3 essentially deals with that issue as well. I don't repeat any of that, all the references are there. Page 4, whether Mr Pryor did modelling of the pay. You might recall that Mr Pryor in response to some inconvenient questions about how good the deal was, in cross-examination claimed that he'd done some modelling during bargaining, which modelling incidentally he says he assumed people work three Saturdays a month and three Sundays a month. Yet in his statement in the Commission purported to say he didn't really have any idea how much or how regularly employees worked weekends. But he comes up with this modelling, and of course we called for the modelling. Where is it? Plainly you can infer there was no such modelling. It would have been produced. Still not produced.

PN143

There's a lot of references on page 5 about the conflicting statements Mr Pryor made about the extent to which he knew of having weekends and shifts employees were working. Obviously, Deputy President, the relevance of these facts are pretty obvious, both from the perspective of placing a value on what this so-called agreement would be, and also the proposition about whether people would have raised it, and also the proposition about whether the union would have raised it and Mr Pryor would have known.

PN144

So for example, and there's many examples, you really have to go through it all in order to see, but for example at PN1120:

PN145

'And you had awareness of what the rostering provisions provided?' 'No.' 'Well, how can you say that the agreements provide for

different working conditions, rostering provisions, if you didn't know what the rostering provisions were?' 'Because they were all different.'

PN146

That's not an answer to the question.

PN147

'This is going to take an exceptionally long time. You had an awareness of the rostering provisions of each of those four agreements for four years?' 'Basically.'

PN148

Then of course at 1205 to 1213 you see him accepting that after the agreement was made he sought copies of all of the depot rosters from anyone, wanted to map the workplace.

PN149

'Did you receive those rosters?' 'I probably would have done at the time. Yes.' 'And those rosters would have showed you when the work was being performed? Not every week was the same?'

PN150

Sorry, this is at commencing bargaining, not when the agreement is made. I correct myself. This is at the start of the bargaining.

PN151

'And from those rosters you would have been able to see how many shifts subject to award shift penalties were being worked?' 'Correct.' 'You would have been able to see how many shifts were being worked on the weekend?' 'That's correct.'

PN152

Then you have exhibits A7 and A8, which annex some rosters that he's got. Of course when the questions become a little bit more targeting and pressing on a different issue he gets on to different answers. At 1382:

PN153

'You had knowledge of the rosters and working conditions of your members?' 'No.' 'You didn't have knowledge of the rosters and working conditions of your members?' 'No. And as I said earlier, to this day, some of the Qube depots don't have a master roster.'

PN154

That's not an answer to the question.

PN155

'Is it your evidence to the Commission that you did not have any knowledge or understanding of the rosters that were applicable at the four predecessor entities?' 'Correct.' 'I think the record would show that you've already agreed with me that you did have that knowledge, Mr Pryor. Do you want to reflect upon that answer?' 'No, I didn't. I have told you before. I don't recall what

the rostering provisions were in place for each of those four separate enterprise agreements.'

PN156

So he has knowledge of the rostering arrangements. He says after some reticence, 'Basically, yes.' He then goes and gets rosters from all the depots, and says he would have got them, and then he says, 'I have no idea what the rostering provisions were.' Page 6, whether Mr Pryor told employees about the decision to pay. All the references are there. He accepts that it had a significant impact on take home pay and was the biggest gain for employees in the 2015 agreement.

PN157

At PN1515, 'Did you tell anything, write anything to employees?' That's some earlier questions.

PN158

'I wouldn't have a clue. Did I - I can't recall if I've written about it or not. I probably would have done. Maybe not.' 'Are you seriously saying, Mr Pryor, you now can't remember whether you told any employees that you'd negotiated the inclusion of shift penalties and weekend penalties?' 'I can honestly tell you that the shift penalties was wrapped up very quickly into the enterprise agreement. Negotiations continued for quite some years after that point.'

PN159

MR FOLLETT: Well, that's certainly true.

PN160

'That wasn't my question. My question was are you telling the Commission you can't honestly recall whether you told employees that it had been agreed that the company had agreed to pay shift penalties and weekend penalties?' 'At that stage nothing was settled in here. That clause was still open and wasn't fully agreed until the final document is done.'

PN161

Later I asked him about that by reference to the notation in the log that the weekend penalty claim was closed. I am sure it's in this document somewhere. I said, 'Well, you said earlier that everything's open until you've got your final document?' He said, 'Yes.' I said, 'Well, how do you explain why in the log it's closed?' He was like, 'Well, because from my perspective it was closed.' I said to him, 'It's either open or closed. They're binary propositions.' I will have my junior pull up the reference to that.

PN162

At 2102:

PN163

'Why didn't you tell employees that the company agreed to weekend penalties and shift penalties in that document?'

PN164

This is a document - this is a newsflash where he's agreed in principle. I have already taken you to this. Wouldn't have a clue why. I don't need to repeat that reference. 2129, 2144, I don't need to read any of that. Yes. While we're here, the reference to open I have already given you to was 1517. And then at 2116:

PN165

'You said something to the effect yesterday that the claim was open and not fully agreed until the document was done?'

PN166

This is his explanation why he didn't tell anyone. It was still open. It wasn't agreed. It apparently was.

PN167

'The whole document as a total is not agreed.' 'Why would you say there was an agreement with respect to it though if there hadn't been agreement with respect to it?' 'So there's two parts. Item was agreed, and the second part is where it gets agreed by employees as a vote.' 'But what do you mean the claim is open?' 'Every claim is open until the final document is done and signed off.' 'Presumably you would accept that if nothing is agreed until everything's agreed, that an employer or union could agree to a clause and then disagree to the clause?' 'During bargaining, yes.' 'That's why it's open?' 'Correct. Everything's open.' 'Do you have any explanation for why the weekend penalty claim in this document is described as closed?' 'It was closed because in my opinion it went to clause 4.'

PN168

That is, with respect, a ridiculous answer.

PN169

'You said yesterday it was still open, but in this document it's described as closed?' 'Every clause in that document is open until it's finalised, and in my opinion, clause 4, as a bargaining team, it was closed.' 'That's not dealing with clause 4, that's dealing with weekend and shift - weekend penalties?' 'And that's where it ended up, in clause 4.'

PN170

And of course that's just weekend penalties and not everything else.

PN171

At 2149:

PN172

'Why didn't you tell employees, "I got you a 40 per cent pay increase", or for others, "I got you a 20 per cent pay increase"?' 'I didn't have the figures, didn't work out the figures in the end - - -'

PN173

Although I thought he'd done some modelling.

PN174

- - - 'and also depending on when they worked weekends. I can't predict how much work they're going to work or when they work.'

PN175

At 2160 to 61, this is again a reference to telling employees:

PN176

'Why wouldn't you tell them?' 'I had other things to worry about. That clause was already agreed and I had other things to worry about.' 'You're telling them whether the increase is two per cent or three per cent and whether it's backdated to a particular day, but you don't tell them of the biggest pay increase. Is that your evidence?' 'Yes.'

PN177

The references to the delegates apparently knowing again, and we asked the question:

PN178

'Well, if the delegates knew how do you get a scenario where seven years go by and nothing happened. Not for the delegates or anyone else.'

PN179

PN2323, 2470 and 2521, I don't need to go to them. There's also 2522 and 2528. The next one is risk of the pay for the 2015 agreement might be below the award. This is his make sure above award note that makes no sense at all. They were the highest rates as expressed in an hourly amount, higher than the rates in the PN Bulk Agreement, and if you're putting loadings on top I'm pretty sure there's no risk of it being below the award.

PN180

Where there might be a risk of it being below the award is when you have loaded rates, and you don't have loadings and penalties incorporated, and you have to consider how many weekends they might work, how many shift penalties they might work. On an overall BOOT analysis where does that end up. That's when you might need to make sure it's below the award, not on the counterfactual. That note is in KP13 incidentally and recognised.

PN181

Then at 2314 just briefly, a slightly separate point:

PN182

'Some members were concerned they might be worse off under the new agreement as to their base rate of pay?' 'Yes.' 'I assume you assessed that genuineness of those concerns from discussions with them?' 'Correct.' 'Then you say here, "However, I was confident that the inclusion of the penalty rates would even up the ledger in more cases".'

PN183

I am not quite sure how it could even up the ledger. It would far exceed the ledger in every case.

PN184

'Correct.' 'Did you tell any of the employees not to worry about whether they are going to go backwards because the penalty rates would pick them up?' 'I can't recall at that point in time, no.' 'The fact is you didn't tell anyone about that, did you?' 'Well, I can't recall.'

PN185

I don't need to pause on the PN Bulk Agreement issue. The references are in there. Pay particular attention to PN2181 and 2195. Similarly the paying penalties on penalties. I don't need to pause on that, but pay particular attention to PN2020. The Victorian Agreement, we have already gone through that to some extent. To make good some of the propositions I made earlier about knowledge, or lack thereof, PN1546:

PN186

'Right. What level of involvement did you have in the Victorian negotiations?' 'None.' 'When you say the agreements were split, the agreement was split into National and State based conditions what level of negotiating did you have with the National conditions?' 'Only on Part A.'

PN187

That is the national conditions.

PN188

'So you weren't negotiating partner?' 'I was negotiating. Well, we met with Qube. We were bargaining on Part A and the clauses and what was going to be included in those clauses.' 'Sorry, I'm not understanding your evidence. You either were involved in the negotiation for Part A or you weren't involved in the negotiation?' 'Yes, I was.' 'You were?' 'But I didn't attend every meeting.'

PN189

And then you've got 1575:

PN190

'You understood from the general terms?' 'No, I did not.' 'Do I take it from that answer you didn't know what Qube had put to your Victorian counterpart?' 'Correct. I don't know. All I know is the outcome.' 'Are you sure of that answer, Mr Pryor?' 'I'm pretty sure of that answer.' 'What do you mean by pretty sure? You're either sure of it or you're not?' 'Well, I'm sure of it.'

PN191

Versus 1601 by reference to a newsflash he wrote.

PN192

'Separate Victorian based negotiations have been occurring and it is disappointing that the company has chosen to offer wage increase of .5 per cent above. Now, you agreed with me earlier that you most likely typed this up?' 'Yes.' 'And in order to type up along those lines you would have had to have known what the status of the negotiations in Victoria was?' 'Probably at

that point in time, but I don't sit there and wait for it on a weekly or daily basis.' 'I asked you before, Mr Pryor, whether you had any knowledge at any point in time and you said you did not?' 'I don't recall, no.' 'And now you're saying probably at that point in time I might have?' 'Well, at that point of time I might have got something from the National office or something.'

PN193

With great respect it is all over the place. The top of page 9 - I don't really want to pause on this because it's quite dense. The Commission really does need to read those references, and this goes to an issue with the union's chronology. Our standing position with the chronology is that you should discard it and look at the materials. In fact for example look at ours, because the union's chronology in very large part is built upon Mr Coulton's statement, rather than paying any regard or any substantial regard to the nature of the cross-examination, and there's a whole range of inconsistencies in it, or things that are just plain wrong, as was conceded by Mr Pryor in cross-examination.

PN194

So for example there's references to the mystery list of clauses. Mr Pryor sought to say that he had a list of common clauses in the bargaining meeting in January, when the only evidence of that document first coming into being was on 3 February after the event. To explain that difficulty he said he had some other document that wasn't that list, it was some other list, the mystery document. We don't know what it is. We don't know what it says. There was that difficult passage you might recall about him saying in his statement that it was important to him to know where shift penalties would end up in either Part A or Part B at a time when there wasn't a Part A, there wasn't a Part B, there wasn't a log of claims, and there was never a claim for shift penalties.

PN195

I asked some questions about, 'Well, how could it have been important to you when that was the state of the objective evidence?' Then you've got you might recall the incorporation of the award, and incorporation of the award in talking marks in his witness as if it was a quote from his discussion with Mr Barden. Yet at its highest even if there was a list of common clauses in existence at the time which happened to have made its way to that meeting, all that's said was relationship to Parent Award. So where this idea of this is incorporating the award and there's a quote about incorporating the award comes from - sorry, this is the meeting with Mr Owens - where the incorporation comes from with relationship to parent award is not at all clear.

PN196

Then PN1971, 'A conversation you depose to' in paragraph 45 of his statement, which is at court book 688:

PN197

'I advised the bargaining team that one of our logs of claims was about weekend penalties, but this looked like it would be included in the section negotiated by National office. I said it would probably be appropriate to drop the claim from our section on that basis. (Indistinct) should get Qube to commit to a 78 hour duty cycle with (indistinct) in New South Wales

(indistinct).' 'The conversation that you depose to in paragraph 45 you've made that up, haven't you?' 'No, I have not.' 'Because the position at this point in time was that you didn't have a log of claims?' 'Yes, I did.' 'Qube didn't have a log of claims from you?' 'Not for Part B, no.' 'Not for anything. They didn't have any draft clauses for Part A, and despite that there's this little specific arrangement just for shift and weekend penalties through incorporation of the award before the negotiations start. That is your evidence?' 'If that's my evidence, yes.'

PN198

And of course at that point in time there were no logs of claim, there were no documents. There was nothing. Financial impact - I don't really want to pause on that greatly. At 2205, this is a point I referred to earlier. The company is writing letters saying:

PN199

'The company is negotiating the current agreement with the new proposed conditions and wages is already agreeing with terms that will equate to $500,000 per annum. This letter's written well after Qube has agreed to pay the weekend and shift penalties on his case?' 'Correct.'

PN200

Then we go through some mathematics over the page as to what the rough estimated cost of that claim would be, 2.5 million. Yet the company's writing a letter saying, 'The cost up to us is $500,000.' Now, in what world is a company writing the cost up for them based on their modelling as 500,000, when on any view it's more like 3 million per annum.

PN201

At 2302 there's another email about proposed increase from the company. It was the top end of what was sustainable.

PN202

'The company categorically rejects a claim of 5 per cent.' 'Negotiating is about creating parody between our employees who are currently on various agreements. The company's proposed increase already adds an initial $1 million to our wage bill. The 5 per cent you seek would make us an ex El Zorro.' 'Do you know what the reference to El Zorro is?' 'El Zorro went bust.' 'Again, on the rough maths I took you through earlier, that an increase of this kind is roughly $2.5 million, he couldn't be talking about the shift penalties, could he?' 'I don't know what calculations he used.'

PN203

That might be true, but it doesn't really answer the conundrum. The other two points I've already covered. Whether Qube agreed to pay the relevant penalties, I don't need to pause on any of that. I note - this is the email after the Owens agreement. This is PN1960:

PN204

'So he knew at this point in time when he's sending you an email on your account that it had already been agreed, and yet he's saying to you, "I haven't

seen the clauses. I can't agree to them going in the agreement"?' 'Well, that's his version, yes.' 'Why would he be saying that he wanted to use the POTA version as the base document if on your account he already knows that you're going down a Part A, Part B process and that you'd agreed that a claim that hadn't even been made at that point would move from Part B to Part A. Do you have an explanation for that?' 'No, I do not.'

PN205

All of that evidence needs to be seen in light of all of the propositions. All of Mr Coulton's evidence needs to be seen in light of all of the propositions, and Mr Pryor's evidence. All of Mr Rich and Mr Johnson's evidence needs to be seen in the context of the propositions of Mr Coulton's evidence and Mr Pryor's evidence.

PN206

We say on the balance of probabilities clearly the position was there was no agreement whatsoever to pay shift penalties and loadings, and it was specifically agreed, just like it has been for years prior, that the employees would be paid loaded rates for any hours of the week, any days of the week, any units of the day up to 1976 hours annually, and then would be paid a 1.6 all purpose multiplier on top of that for overtime in excess of that, and everyone knew that's what the position was.

PN207

What we said in our written submissions before receiving Mr Pryor's statement was correct, that no one was suggesting that that award incorporation clause had any significance, other than being the archetypal example, which I will return to, and what we said in our submissions Gray J said in the Woolworths case about pulling bits and pieces of documents from different parts and putting them all together and no one paying any attention to what that all means.

PN208

Now, ambiguity, uncertainty - if it be accepted, which it ought, that that reflects the intention of the parties, then it fairly easily follows, in our submission, that there is ambiguity and uncertainty in both of the 2019 and 2015 EAs, simply because on its face clause 4 appears to say something different. The ambiguity or uncertainty has to be assessed in the whole of the context, not just looking at one clause, and asserting that it is clear. We make that observation in paragraph 33 of our submissions.

PN209

I don't read, but we note the excerpt from Woolworths which is in paragraph 9 of our submissions, court book 13. I have already referred you to it. But that's this case in a nutshell. Now, how one reads the wages and hours clauses in the agreement with clause 4 is uncertain, and gives rise to uncertainty.

PN210

We identify how that is so in paragraph 33 of our written submissions, court book 20, about the whole of the context and looking at all of the clauses as a whole, and we make the same observation in paragraph 5 of our reply, court book 1097, that there are other clauses that influence the question. And even on the RTBU's own case there's an incongruency between ordinary hours being worked whenever, and

penalties. It's not an answer to say, well the two can work together, you just pay the loadings on top.

PN211

The whole point of the wages and hours provisions in the agreement, objectively construed, having regard to the known context, which I have just spent the time going through, is that they were intended to incorporate loadings and penalties, not provide for a loading on a loading or a penalty on a penalty.

PN212

The RTBU asserts clause 4 is clear by taking an overly narrow approach to the assessment. They don't look at what the other clauses mean, they just say, 'Read clause 4. It's clear.'

PN213

We have made the observation that I've already taken you to that one needs to look a little bit further when assessing contextual or textual ambiguity, and either we are right in our construction or, at the very least, there is uncertainty or ambiguity, by actually going through and taking a bit of a more considered analysis of the 2015 Agreement. Does the Commission have the 2015 Agreement handy? It's PM2 commencing at page 965. That may be the easiest place to find it.

PN214

THE DEPUTY PRESIDENT: Yes.

PN215

MR FOLLETT: When one conducts a more considered analysis, you will see that the actual document itself gives rise to ambiguity or uncertainty because other provisions in it don't work with loadings and penalties incorporated and, from this, one can assist in divining what the parties' intentions were and what was really being agreed.

PN216

There are a range of clauses in the document which are premised on loaded rates. Just start with ordinary hours, page 975. You've got hourly rate, being the hourly rate applicable to the ordinary hours component of the remuneration, including leave loading. One wonders why 'including leave loading' is referred to in the hourly rate when, on the union's case, it's incorporated through clause 4.

PN217

Ordinary hours means the number of ordinary hours worked over a roster cycle necessary to average 76 ordinary hours per fortnight over the roster cycle. Then at clause 30 on page 1013, the ordinary hours of work for a full-time employee is 1976 hours per annum. Then there's working on a public holiday and working overtime. So the hourly rate for an ordinary hour of work is 1976, you get overtime after that, and there's nothing else.

PN218

The table in clause 29 lists separately overtime and casual rates, one might assume because there are specific clauses in the agreement doing the same thing. So you

have the overtime clause at clause 30.3 and you have the casual clause at clause 7.5(a):

PN219

...ordinary time shall be paid an hourly rate for the work performed in this agreement plus a casual loading of 25 per cent.

PN220

There's no corresponding rate for shifts or weekend work. As I said, clause 30 is agnostic as to time of day or day of the week, save for a public holiday - clause 30.2 - and that clause notes that the public holiday hours are part of the 1976 and, 30.3, anything over 1976. 75(a) and (d), casuals, they get paid 125 per cent for all ordinary hours and 160 per cent of the all purpose rate - it's not defined, but it can be assumed to mean the 125 per cent - for overtime.

PN221

But the EA is silent on what a casual gets paid for any of the shifts with penalties, or a Saturday, or a Sunday. Do they get a penalty on a penalty? Is one set off against the other? At the very least, that creates ambiguity. We say it points to the parties' understanding that it's 1976 for a flat hourly rate and that's it. You have a similar issue with part time, clause 7.4(iv).

PN222

I should note on this penalty on a penalty, clause 4.2 doesn't do it. That's referring to a different subject matter. 7.4(iv):

PN223

Actual hours worked will be paid each fortnight and any

PN224

hours worked past 76 hours in a duty cycle will occur

PN225

standalone overtime of 1.6 the employee's normal rate.

PN226

So on the RTBU's account, that's a 10 per cent penalty on a Saturday and they get paid less for working overtime on a Sunday.

PN227

What then happens, Deputy President, is there's a range of penalties in this instrument which are all set up at the overtime penalty rate, and if the RTBU is correct, employees go backwards for these penalties on a Sunday and they get 10 per cent on a Saturday. For example, starting with 31.7(e), work on a TBA shift, which is an available shift - changed the terminology in 2019 to available - to be available, you get normal time, so that has to be just the hourly rate in the agreement. Now what's the position if that TBA shift is worked on a morning or afternoon or night or on a Saturday or Sunday? The agreement says you get your normal rate, not you get your normal rate plus something on top. Can't work.

PN228

32.4(b), something about penalties for an RDO, signing on during the dimensions of an RDO, and it gives an example that:

PN229

If an employee on an RDO (which expires at 6 am) is requested to sign on before 6 am and agrees, for example 4 am, there will be 2 hours paid at the overtime rate and the remainder of the planned shift will be paid at normal.

PN230

In that example, that whole shift is an early morning shift. Why would you be paying normal time for an early morning shift, and how does that clause interact with clause 4?

PN231

30.3 - that's the standalone overtime clause. Again, if the overtime's on a Saturday, is it really suggested you get 10 per cent, and if the overtime's on a Sunday, you actually take a haircut? You work ordinary hours of 200 per cent on a Sunday and then, as soon as you clock over to overtime, you go down to 160 per cent?

PN232

The same again with 31.1(i), shift outside the master roster, you get the standalone overtime rate. Same issue. 3.25, hours on an RDO, same issue. 34.2(a), sign on outside lift up or layback, and 39.4 looks pretty similar. Same issue. 35.3, working past a rostered shift, standalone OT, same issue.

PN233

All of these clauses are purporting to identify or compensate employees for some specific dislocation over and above ordinary hours, attracting penalties to compensate for that dislocation, yet, on the face of the document, they're going backwards if the RTBU are correct. It does two things: it proves that, as a matter of construction, we're right, and, second, and in any case at the very least, it gives rise to ambiguity or uncertainty.

PN234

The final is clause 42.1, payment of wages. There's a guarantee - you've got to pay wages fortnightly: one, a guarantee of 76 hours; two, excess hours, so overtime; three, any RDO worked and, four, any allowances that are applicable. That's consistent with how Qube's payslips are presented - DC36 pages 1289 and 1294. You don't need to go to them. There's no mention in there of paying shift or weekend penalties.

PN235

The other part we wanted to highlight regarding, (a), construction and, (b), at the very least ambiguity and uncertainty, is the operation and effect of clause 4.3, which is the inconsistency provision. The RTBU, in its submissions, calls it a 'conventional inconsistency clause', but their submissions on it really miss the point. If it is accepted that the clause 29 rates were intended to be loaded rates inclusive of penalties, there is inconsistency of the relevant kind. There is a direct collision between the award clause, the award incorporation clause - sorry, not the award incorporation clause - the award clause as incorporated, which purports to

deal with the same subject matter as the enterprise agreement, that is, 'What do you get paid for this hour of work?' Incorrectly, it is not an answer to say, 'Well, you can simultaneously comply with both by paying the higher amount.' That is the archetypal example of inconsistency.

PN236

I want to hand up three cases that I intend to take the Commission to very briefly. I will hand them to your associate. They are all High Court cases and I want to commence with *Telstra v Worthing* and I want to take the Commission to paragraph 27. This is a 109 inconsistency case:

PN237

> *The applicable principles are well settled. Cases still arise where one law requires what the other forbids.*

PN238

That's not this case, and it's obvious direct collision. None of this is put - I withdraw that:

PN239

> *However, it is clearly established that there may be inconsistency within the meaning of s 109 although it is possible to obey both the Commonwealth law and the State law.*

PN240

There's a suggestion in Glen Cameron, the Full Bench, that provided it's possible to comply with both, there can't be inconsistency. If that's what it actually says, it's plainly wrong.

PN241

> *Further, there will be what Barwick CJ identified as 'direct collision' where the State law, if allowed to operate...*

PN242

the subordinate instrument here, state law:

PN243

> *...would impose an obligation greater than that for which the federal law has provided.*

PN244

To adopt that language here, the award term, once incorporated, if allowed to operate, would impose an obligation greater than that for which the enterprise agreement has provided. That is direct collision. The enterprise agreement says, 'For this hour at this time, you get paid the hourly rate in the table' and the incorporated clause wants to come along and say, 'No, you get paid more.' Direct inconsistency.

PN245

Paragraph 32:

PN246

It would be no answer that the subject-matters of the two laws are not co-incident. Rather, the State law, by granting certain rights, would deny or vary a right, power or privilege conferred by the federal law.

PN247

That is, rather, the award clause, by granting certain rights, i.e. more payments, would deny or vary a right, power or privilege by the EA. That's the right, power or privilege of the employer to comply with its minimum obligations by paying what the agreement provides for. The imposition of greater obligations creates direct inconsistency.

PN248

In support of that, I want to take you very quickly to *Dickson v The Queen*, the unanimous High Court decision from 2010, and the paragraph is at paragraph 22, where the state law rendered criminal conduct not caught by the federal Criminal Code:

PN249

The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria...no room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in Devondale Cream...

PN250

which is what *Telstra v Worthing* referred to:

PN251

...the case is one of 'direct collision' because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law.

PN252

So then let's go *Blackley v Devondale Cream*, and it's far closer to home, Deputy President, because it was a case involving a federal award and a State Wages Board determination requiring certain employees in certain cases to be paid more than the federal award. So that's this case. The incorporated award term, say for a weekend penalty, requires you to pay more than the agreement provides. That's the prevailing federal instrument.

PN253

258, about point 5, about halfway down that paragraph, about seven lines:

PN254

Properly understood, the Act and the award, in placing that obligation upon the employer, enacts, in my opinion, that the sum so to be paid is the only sum which by law the employer is obliged to pay.

PN255

Now that's 100 per cent consistent with the way the industrial relations system works in this country still:

PN256

The description 'minimum wage' must not, in my opinion, be allowed to obscure the fact that in truth the prescribed wage is the largest wage which the employer is required by the Act and the award to pay. It is also of course the least he can lawfully pay. But no room is left, in my opinion, for a statute of the State to require the payment of a larger sum by way of wages than the amount prescribed by the award. To give the employee a right to be paid the larger wage is, in my opinion, to come into direct collision with the provisions of the award

PN257

Then the next paragraph is a paragraph that's been referred to in those earlier two judgments.

PN258

259 point 1:

PN259

Of course both may be obeyed by the employer by abandoning the protection of the Act and award and paying the larger sum. But, in my respectful opinion, that they may both be obeyed in that sense indicates their inconsistency.

PN260

Finally, at 272, about line 8:

PN261

It was pressed upon us that the respondent here in paying the minimum rate of wages determined by the State determination would also be fulfilling his obligation under federal...This of course is true enough but to my mind it is not decisive. The problem here arises in different circumstances, namely, where the payment of wages at a particular rate would meet the employer's obligations under federal law but would not meet its obligations under State law, if applicable.

PN262

And Menzies J goes on to explain why that is direct collision.

PN263

The incorporation of these penalties and loadings is either wholly inoperable or, at the very least, it creates ambiguity and uncertainty that ought be resolved.

PN264

I move now to discretion to vary. If, as we say we have comfortably established on the facts, that the common understanding and intention of Qube and the RTBU was to preserve the existing operation of the loaded rates without separate penalties, that is substantive agreement ambiguously reduced to writing, to use the turn of phrase from Specialist People, and there is no good reason not to seek to vary the agreement to reflect that. It is the archetypal example of a case where a

variation is appropriate, just as it would occur in a rectification case involving a contract.

PN265

Whatever may be the position regarding employees and this idea that, well, as a matter of statutory structure, the employees make the agreement doesn't obscure the fact that in many cases, including this one, including Specialist People, there is also a substantive agreement made at an earlier point in time between the bargaining representatives that is then put out to employees to vote.

PN266

Whatever may be the position with respect to that - there's some emphasis placed on it by our learned friends - it doesn't arise in this case because no other reasonable finding is available other than that employees, when voting, thought that they were getting loaded rates. They are pre-existing loaded rates for all of them. The broad structure of the wages and hours and overtime clause in this agreement are the same as the predecessor agreements: the 1976, the ordinary hours, the overtime penalty. The other clauses in the enterprise agreement I've already taken you to are reflective of loaded rates.

PN267

No one from Qube told anyone of any proposed change regarding penalties and loadings; no one from the RTBU ever told anyone of any proposed change; no document said that, whether distributed to employees or otherwise, and no one complained subsequently when they didn't get award penalties and loadings.

PN268

Plainly, insofar as one needs to consider what any employees thought, they were voting on the status quo because no one suggested anything different, other than the pay rise.

PN269

Standing. 2015, our position remains as it is in our submissions, that is, we contend we have standing, but we appreciate standing in the way of that is a Full Bench decision and, as I noted on the previous occasion, that judicial hearing is listed for 1 March.

PN270

Retrospectivity and constitutionality, we don't repeat or rehearse anything we said previously about this issue, both in writing and orally, at the summary dismissal case. For the reasons we have rehearsed there, the constitutional issue, insofar as it's said to arise, simply ought not be decided. It's not the Commission's role to do so, and, in any case, it's wrong, for the reasons we identified previously, and I don't wish to rehearse them.

PN271

Retrospectivity continues to be pressed, that is, there is no capacity or power in the Commission to order retrospective variation of an enterprise agreement.

PN272

At PN20 to 23, there was an exchange between you and I, Deputy President, about the context of retrospectivity in the Full Court, and I attempted to explain as best as I could the way retrospectivity came up was knocking out a central component of our argument as to why 'covered' extends to covered at the relevant time of the dispute or when the document was in operation, and part of that involved a submission that, well, if a union or employee can prosecute you for something that occurred three years ago, why ought the employer not be able to apply to vary in the Commission because it can extend to retrospective variation to neutralise, as it were, the case.

PN273

I can tell you that the union in the Qube Ports Full Court continues to press that issue, so in their written submissions, they are taking on retrospectivity. Again, whether and to what extent the Full Court needs to decide it, who knows? One might assume they might say something about it. Maybe they don't. If they dismiss our argument, much like the Full Bench did, then, strictly, they would not need to deal with the issue.

PN274

Everything we want to say about retrospectivity was said in writing, including there were some additional arguments not put previously in the union's submissions, and we have replied to them in our reply document. I simply note that retrospective variation of instruments made under the Commonwealth industrial legislation has been a feature of the system for over a hundred years, all in the context of no provision specifically empowering retrospectivity, and there the Full Bench, on point - there's three Full Benches, sorry, one more on point than others - accepts the capacity to vary retrospectively.

PN275

Otherwise, we rely on our written submissions and simply note that if the point of it is to implement the substantive agreement reached by the parties, but then ambiguously or uncertainly recorded in writing, just like a rectification of a contract, that is, the parties intended to make a particular agreement, but then when they wrote down, they maybe didn't, why wouldn't it be retrospective, because they always meant it?

PN276

Form of orders, just very briefly - we've already addressed this in our reply at paragraph 17 - there seemed to be some suggestion in the union's submissions that you can't make the change beyond several words, or a short amount of words, because that might effect a substantive change. That's just wrong, for the reasons we've articulated. The power is to remove ambiguity. Whether, in order to achieve the purpose of the power requires you to remove one word, insert one word, or one paragraph, or one page, all you are doing is removing the ambiguity, and we think the form of orders proposed in our application at pages 8 and 9 of the court book achieve that purpose.

PN277

That, I think, covers everything we intended to say. I might say something about Mr Coulton in reply, depending on what exactly is said about his evidence by my learned friend, and they are our submissions.

PN278

THE DEPUTY PRESIDENT: Thank you. Mr Boncardo.

PN279

MR BONCARDO: Thank you, Deputy President. Deputy President, I note the time. I'm in your hands as to whether we sit on until 1 or whether we have, perhaps, an abridged lunch break now and I can come back and commence.

PN280

THE DEPUTY PRESIDENT: I think that might be more convenient.

PN281

MR BONCARDO: Yes.

PN282

THE DEPUTY PRESIDENT: We will return at 1.30.

LUNCHEON ADJOURNMENT [12.32 PM]

RESUMED [1.34 PM]

PN283

THE DEPUTY PRESIDENT: Mr Boncardo.

PN284

MR BONCARDO: If the Commission pleases. Deputy President, my learned friend has placed much emphasis on the need to have regard to the objective record, and it's useful, before I give you a roadmap of where I want to take my oral submissions today, to just remind the Commission of a number of events that are of, we say, importance in emphasising that Mr Pryor's account of the course of bargaining and, in particular, what occurred at the 22 January meeting with Mr Owens, and thereafter at meetings attended by Mr Owens and Mr Coulton, is an account which the Commission ought accept.

PN285

The Commission knows that my client initially sought a national enterprise agreement. Now Mr Coulton rejected that, and the Commission will find his correspondence of 16 September 2023 at pages 704 and 705 of the court book. I don't need to go to it now, but it pays attention being provided to it for a couple of reasons.

PN286

Firstly, in that correspondence, Mr Coulton rejects the proposition of a national agreement and he says:

PN287

> *We operate separate business units, they are organisationally and operationally distinct, and we want to consolidate our four current enterprise agreements into state-based agreements.*

PN288

He makes a number of points, including that the cost of living in different states varies, and he talks about wage outcomes and other terms and conditions of employment being likely to differ. Now that's exactly what happened, we say, in respect to New South Wales and Victoria, and I will come back to that in due course.

PN289

My client, through Mr Barden, via email - and the email is located at page 708 of the court book - seeks clarification from Mr Coulton, including what he means by there may be different wages and different wage outcomes. Mr Coulton responds - court book 710 - in an email on 29 October where he says, amongst other things, the body of the agreements should include standardised terms, for instance, in respect to things such as hours, penalty rates and superannuation.

PN290

There is then some difficulty and delay between that email and the parties ultimately meeting. In the intervening period, my client finalises a log of claims for New South Wales.

PN291

A matter which Qube overlooks in its submissions is, as Mr Pryor explains at paragraph 18 of his statement, my client had a log of claims back in August 2013. It's annexed to Mr Pryor's statement. At paragraph 26, Mr Pryor makes clear that that log of claims was finalised by December 2013. That's at court book 684. He then goes on to explain, in his statement from paragraph 27 to 28, that the national office undertook preparatory work prior to the first bargaining meeting occurring and produced a numbered list of clauses that would form Part A in outline - in outline only.

PN292

He doesn't have a copy of that document, but what he does have is a draft that he was sent via email on 3 February 2014. When I say he doesn't have a copy, he doesn't retain a copy now, but he certainly, on his evidence, had a copy that he says he took to the 22 January meeting.

PN293

That 22 January meeting is significant, as the Commission no doubt appreciates. We note, in that regard, Mr Coulton, and I don't think Qube, assert that a meeting didn't occur that day. It appears uncontroversial that there was a meeting. The question as to what was discussed and what was determined at that meeting is a live one and, contrary to my learned friend, the only contemporaneous note of any of these meetings that occurred over a decade ago is the note Mr Pryor made of that meeting.

PN294

My learned friend made some allusion to the fact that it requires opinion and interpretation. We say it is as plain as day that it makes clear that the issue of award incorporation was determined, and it was determined for the purposes of dealing with the payment of shift penalties and weekend penalties, amongst other things.

PN295

Now, Mr Coulton receives an index on 7 February. My learned friend referred to his email in response. I'm sorry, Mr Coulton replies to an index which has been sent to him subsequent to that meeting and says, amongst other things, in his email on 7 February, that he wants to see the content of the clause that's proposed. Fair enough.

PN296

Then there's a meeting on 14 March. Now what was said at that meeting is in dispute. Mr Pryor's evidence was that, at that meeting, he provided a hard copy of the draft Part A to Mr Coulton and Mr Owens.

PN297

What is not in dispute is that, on 24 March, Mr Coulton and Mr Owens were emailed a soft copy of a draft Part A of the enterprise agreement. That draft Part A included clauses 4.1, 4.2, 4.3 and 4.4. Mr Coulton's evidence, which I will take you to in due course and which we have referred to in our outline of closing argument, is that he read that draft agreement. Now, one would expect nothing less from a person in his position with his responsibilities, and his evidence was also that he considered each and every clause. Again, one would expect nothing less from someone with Mr Coulton's experience and the role he said he had in respect to bargaining.

PN298

Clauses 4.1, 4.2, 4.3 and 4.4 remain exactly the same from, we say, the time they were first provided to Qube on 14 March, but, at the latest, uncontroversially, on 24 March, until the employees voted for the agreement.

PN299

The agreement itself, which Mr Coulton and Mr Owens had, didn't remain the same. It was analysed, it was amended, it was commented upon by Mr Owens, and amendments included an amendment to ordinary hours to make clear that the ordinary hourly rate included annual leave loading, not shift penalties, not penalty rates for weekend work, not any other amounts, just annual leave loading. That's an incontrovertible fact.

PN300

There is then, after some further bargaining for a number of months, a vote on the agreement in circumstances where the voting group are covered by enterprise agreements that do not incorporate the award and that have provisions - and we have summarised these in our outline of closing argument at paragraph 3(c) onwards - that make expressly clear that the hourly rate in those agreements encompass and include shift penalties, weekend penalties, allowances, et cetera.

PN301

So that's the objective framework in which employees are voting on an agreement. They are covered by enterprise agreements that don't incorporate the award and that make it clear that the rates are loaded rates. That's what they understand, that's what they know from the documents that regulate their employment, being the four antecedent agreements, and they have been provided with a new agreement which materially differs from those documents.

PN302

Then we have what I might describe as the cherry on top, the Victorian agreement, which was tendered at the heel of the hunt through cross-examination of Mr Pryor. Mr Coulton appears to have been intimately involved in negotiations for the Victorian agreement. He sent the emails about it that my learned friend tendered, which are exhibits A11 and A12, he signed the agreement on behalf of Qube, he signed the undertaking which accompanied the agreement on behalf of Qube, and, as he perhaps presciently predicted back in October 2013, that agreement contained different terms and conditions.

PN303

It didn't incorporate the award, and it had a provision that made clear that the hourly rate did not include - I'm sorry, I withdraw that - the hourly rate expressly incorporated shift penalties, weekend penalties, et cetera.

PN304

In terms of the submissions today, like my learned friend, I want to say something, firstly, about the facts and, in that context, deal with Mr Coulton's evidence and Mr Pryor's evidence. My ultimate submission is that Mr Coulton was an entirely unsatisfactory witness. He was evasive, he was argumentative, and a number of aspects of his evidence were just inherently implausible and unbelievable.

PN305

Mr Pryor, as the Commission knows, was subject to a sustained attack by my learned friend in cross-examination. We say, to the extent that my learned friend landed some blows on Mr Pryor, those blows were landed in the context of Mr Pryor being subjected to a memory test about things that he did, or must have done, over a decade ago, and a nit-pickity analysis of answers that he's given in evidence at one point and at another and answers that he gave, relevantly, in respect to a question my learned friend asked him, which was, in our respectful submission, ambiguous, before Crawford C.

PN306

I also want to say something about Mr Rich, whose evidence puts this case to bed so far as we are concerned.

PN307

I will then move on, briefly, to say something about ambiguity and uncertainty, then the exercise of discretion.

PN308

I want to say something about the form of the order that is sought if we are unsuccessful, and I want to draw out in particular a distinction between the incorporation of shift penalties and weekend penalties and the incorporation of allowances.

PN309

The Commission has heard a lot about shift penalties and weekend penalties, even today from my learned friend when he was describing what was actually agreed. It is, we say - and this is obviously our alternate case - clear that it was

intended objectively that the award be incorporated. If there was an agreement, on our learned friend's case, of the kind that Mr Coulton contends for, it was that there was a loaded hourly rating in respect to shift penalties and weekend penalties, allowances do not fit into that equation, and any order - and we say you shouldn't make an order for a number of reasons - any order should not touch upon, or concern, allowances under the award.

PN310

I will then say something briefly, perhaps even more briefly, about the retrospectivity and constitutionality point than my learned friend did.

PN311

Can I turn, first of all, to Mr Coulton. We have, in the outline of closing argument document - paragraph 49, page 13 - collected eight instances of Mr Coulton being non-responsive, evasive or argumentative in evidence. Can I add to that a further reference, and that's paragraph number 729, where you had to warn Mr Coulton, for the second time, about ensuring that he answered the question appropriately.

PN312

In my respectful submission, the Commission, obviously, will need to make its own assessment in respect of the demeanour of Mr Coulton and Mr Pryor. Mr Pryor presented as a candid witness who was doing his best to tell the truth about events that occurred over a decade ago. Mr Coulton, contradistinctly, presented as someone who was there to parrot Qube's argument and position in this case and, in a number of respects, gave evidence that was entirely implausible.

PN313

Deputy President, one of the central matters, of course, concerns the 22 January meeting, and the contemporaneous note of that meeting is annexure KP13 to Mr Pryor's statement, which is at court book 725. The Commission will observe a number of things about this note. Top right-hand corner, it's dated, it's signed 22 January 2014 by Mr Pryor. Charting across, there are three initials, AB, MO, RP, Mr Barden, Mr Owens, Mr Pryor, RTBU national office the venue of the meeting, so I think the Commission can, contrary to the tangential submission that was made by our learned friends that this was just a note that was conveniently produced by Mr Pryor, accept, and should accept, that it is a note of a meeting between Mr Barden, Mr Owens and Mr Pryor on that date.

PN314

Now what it records, in the left side, is that there were - is something said by MO - the Commission would infer that that was Mr Owens - 'No rosters in place. Agreed to leave clause 4 Part A to cover shift penalties and weekends.' That is Mr Owens has agreed to leave clause 4 of what was to become, and what was, at that point, part of a draft document, Part A - or a draft list, I should say - to cover shift penalties and weekends - 'Make sure above award'. It provides significant support for the proposition that Mr Owens agreed precisely what is recorded in this contemporaneous note at the meeting on 22 January, which I think everyone is agreed did, in fact, occur.

PN315

An attack was made on the note by my learned friend in cross-examination on the basis that there was no list or document containing clause 4 of Part A as at 22 January and that the first time Mr Pryor had a copy of such a document was some time in early February. That ignores, in my submission, the evidence of Mr Pryor at paragraph 28 of his statement.

PN316

THE DEPUTY PRESIDENT: Paragraph which?

PN317

MR BONCARDO: 28. That's at court book 684:

PN318

The national office had undertook preparatory work for the first meeting and had produced a numbered list of clauses that would form the outline of Part A.

PN319

Now he no longer has a copy of the first draft, but he was sent that draft on 3 February by email, and that's why it's attached at KP10.

PN320

In my submission, the Commission ought accept the evidence that there was in existence a list of clauses that would form the outline of Part A and that it was brought by Mr Pryor to the meeting on 22 January, amongst other things, because of what is set out in the contemporaneous note. The note makes sense, and supports, the proposition that there was a Part A, and that Part A list, I should say, had, at clause 4, the relationship to award clause, and that is precisely what was brought by Mr Pryor to the meeting and discussed with Mr Owens.

PN321

There is some further elaboration. In answer to an open question from my learned friend, at PN1819 in the transcript, in respect to Mr Pryor's account of what occurred at the meeting, 1818 of - I think it's the first day of the hearing.

PN322

MR FOLLETT: The second.

PN323

MR BONCARDO: The second - I am indebted to my learned friend. Where, amongst other things, Mr Pryor - I'm sorry, I've got the wrong reference. That evidence is that Mr Pryor, in fact, had the list with him, and I will provide you the reference that I was looking for in a moment, Deputy President, and I will come back to that.

PN324

Mr Pryor's account, in my submission, is also supported by the circumstance that I referred to at the outset, and that is that, on 24 March, both Mr Coulton and Mr Owens were sent a Word document containing the draft of the agreement, and the Commission will find that as an attachment to Mr Pryor's statement commencing at court book 801, an email from Mr Barden to Mr Coulton - I'm

sorry, not to Mr Owens, although it's quite clear that Mr Owens had access to this document, or versions of this document, in the course of bargaining.

PN325

I took Mr Coulton to this email and the attachment, which commences at page 802, and the Commission will see, of course, at page 806, clause 4, 'Relationship to Parent Award and NES', and clauses 4.1 through to 4.4, and they are identical to the provisions that were ultimately in the agreement which the employees voted for. Of course, clause 4.1 had added to it the name of the award and, apart from that change, it was exactly as it appears here, exactly as it was when employees voted on it.

PN326

Mr Coulton was asked, at paragraph numbers 583 to 587, whether he had read the provisions of this document, and he agreed, and he agreed he had read them thoroughly and, no doubt, he read them attentively. He would, of course, have read and seen clauses 4.1 through to 4.4 and, in my respectful submission, had he seen them and read them and perceived them as an issue, he would have raised it.

PN327

That's exactly what someone in Mr Coulton's position would have done, and Mr Coulton - a lot of things might be said about Mr Coulton, but he appears to be someone who is not backwards in coming forwards. If the RTBU were trying to sneak in clauses 4.1 through to 4.4, they would have a hard time doing it by Mr Coulton, one would have thought.

PN328

Now there was a very important part of - another important part of - the objective record, which was that this document was a subject of various changes by Mr Pryor and also, we say, by Mr Owens. Mr Pryor's reply statement was to the effect that - it's at paragraph 64, court book 692 - Mr Owens had been making amendments to it. Mr Coulton, initially at least, didn't accept that proposition, and accepted that Mr Owens had at least been making comments on the document, and the Commission will find Mr Coulton's evidence in that regard in cross-examination, paragraph number 694 to 695 and 698 to 700 and 704 to 708.

PN329

But, in any event, it appears, at least from the evidence of Mr Pryor, that Mr Owens did make amendments to this document, and if the Commission looks at court book 851, the Commission will see a varied version of the document, and Mr Pryor says - and he's got a note to this effect that was sent via email on 20 June 2014 - there are a variety of amendments that have been made to it which are tracked - and it is clear that the document was undergoing review and recalibration by the parties in the course of bargaining.

PN330

It also appears to be accepted that it was Mr Owens who amended the definition of hourly rate in this document, and if the Commission goes to court book 1112, the Commission will find Mr Coulton's reply statement. At 1112, paragraph 16, he is replying to paragraph 69 of Mr Pryor's statement, and he says, amongst other things:

PN331

The definition of hourly rate inserted into the agreement by Mr Owens...

PN332

So it's quite clear - contrary to Mr Coulton's assertions in cross-examination that Mr Owens didn't amend this document - even on Mr Coulton's own evidence, Mr Owens was involved in amending it - that the hourly rate was amended by Qube. What was that amendment? That amendment was to make clear one thing, and one thing alone, that the hourly rate did not include annual leave loading. Qube did not amend it to provide - shift penalties, weekend penalties, et cetera, were not included.

PN333

In my submission, that is powerful objective evidence that what Mr Pryor said happened at the meeting on 22 January did happen, that there was an agreement that the award would be incorporated to ensure shift penalties, weekend penalties were included in the agreement; only as terms of the agreement via incorporation of the award, and Qube specifically turned its mind, through Mr Allen and Mr Coulton, to what was included and not included in the hourly rate. The only thing that was included was annual leave loading. The fact Mr Owens, on Mr Coulton's own evidence, made that amendment is particularly material.

PN334

A significant moment, in my respectful submission, happened in the case when Mr Coulton was cross-examined on the draft Word version of the agreement that was sent to him on 24 March 2014.

PN335

Can I take the Commission to Mr Coulton's evidence in this regard and – perhaps before I do, it's worth remembering when the Commission considers this evidence, and Mr Coulton's evidence more generally, that this gentleman was, and is, Qube's general manager for industrial relations.

PN336

He, in his evidence at 378 to 379 and 384 to 385, made key he was experienced in enterprise bargaining. He also, 386 to 388, and then from 402 to 413, made clear that he knew back in 2014, as anyone who was experienced in enterprise bargaining ought know, that enterprise agreements could incorporate terms from other instruments, including awards, and he also knew – the Commission will see this from parts of the cross-examination I've referred to – provisions of the Rail Industry Award included loadings and penalties for shift work, weekend work, meal allowances and for on call allowances amongst other things.

PN337

He knew that the current agreements, the four current agreements, all were stand-alone agreements and made express provision for the hourly rates they contained to be loaded rates. The Commission sees that in paragraphs numbered 420 to 424 and 429 to 450 of Mr Coulton's evidence. So that's his state of knowledge at the time he reads this document, and he reads it with some attention.

PN338

Paragraph number 589 – perhaps I should refer the Commission back to 586. The Commission will see there that – and perhaps even going back slightly further – 584:

PN339

You would've, after you received the document, looked at it carefully?---Yes.

PN340

Read every single clause?---I would've looked through it, yes.

PN341

You would've given consideration to every clause?---Yes.

PN342

You would've seen on page 806 that clause 4 was entitled, 'Relationship to the parent award in NES?---It is, yes.

PN343

Then I've taken him through clause 4.1. If the Commission scrolls down to 593:

PN344

And you would have understood at the time that this proposed clause was designed to incorporate by reference to the relevant reference award, which was the Rail Industry Award?---I understood the RTBU was claiming that, yes.

PN345

And that was a material difference from the four agreements that currently applied?---Yes.

PN346

That was a potentially significant matter. It was a claim.

PN347

Charting down to 597, there's some debate about incorporation of annual leave, sick leave and long service leave, and at 600 he denies that 4.1 – or he says he didn't know that 4.1 was designed to pick up and incorporate terms of the award into the agreement. I then get him to read clause 4.2, or then I ask him whether he read clause 4.2. He says, 'I have read it, yes.'

PN348

602:

PN349

That you read it at the time? I don't believe when you made your careful review of the proposed agreement?---4.2 I don't believe was included in a document, but I would've read it, yes.

PN350

It clearly was included in the document. That evidence was rubbish.

PN351

603:

PN352

You just, 4.2, you didn't believe was included in the document?'---No, not in that form. No, I don't. Is it? I don't think it is.

PN353

Mr Coulton, you're just making things up?

PN354

He denies that. He clearly, in my submission, had been caught out in that passage. I then refer him to clause 4.2 being attached to the document that was the Annexure 2, or the attachment I should say, to Mr Barton's email. Then at 605 he says – he was referring to the final document, and then there's an attempt by Mr Coulton to deflect, we say, at 606, 607.

PN355

At 608 you have warn him to answer the question. 609, I read clause 4.2 to him. The Commission will see 611 to 614. He agrees at 615 in respect to what the provision says. And then 616:

PN356

You knew that there was a potential for this clause to apply to loadings, penalties and allowances in the award, to rates of pay due under the agreement?---That was never my understanding. It was never discussed.

PN357

Then I suggest to him that that must've been his understanding when he read the clause – 'No.' And when I ask him, 'What did you understand the second sentence to mean', he says this, and this is very illustrative:

PN358

I don't think that ended up in the agreement, therefore, I must've taken issue with it.

PN359

That's just wrong. And I asked him to focus back on my question. This is another instance of Mr Coulton being evasive. I said:

PN360

What did you understand the clause to mean?

PN361

Mr Coulton admits he understands what it means, and I asked him to tell me –

PN362

Well it says you put penalties on the rate.

PN363

What rate was that?---The rates under the agreement.

PN364

And I said:

PN365

And your evidence is you don't think that part of the clause ended up in the agreement?---That's correct.

PN366

623, 'Would you be surprised to know that it did?' Then he asked me to take him to the relevant term of the agreement. He seems to have some difficulty accepting that proposition. That, in my respectful submission, was another instance of him being caught out.

PN367

627, he then - after being shown clause 4.2, and I think it was the 2015 Agreement, page 973 - he then says, 'That is identical. I was referring to the current agreement', presumably a reference to the 2019 Agreement, which we're all agreed was in exactly the same terms as the 2015 Agreement.

PN368

628:

PN369

So you think it might've dropped out of the current agreement, do you?---I don't think this is an identical form. I don't believe it is. I'm not sure.

PN370

Evasive and ridiculous. 629, I get him to check, take him to the 2019 Agreement. 633:

PN371

You'll see the second sentence is in exactly the same terms?---Yes, you're correct.

PN372

And I then at 634, 635 set out that he was the person who signed both the 2015 and the 2019 Agreement on behalf of Qube and must have understood that the loadings, penalties and allowances provided by the award were incorporated and were to apply to the rates of pay under the agreement. He denies that. That denial should be rejected. Mr Coulton knew what it meant. It meant what he said at 621 that he put penalties on the rate.

PN373

That evidence by Mr Coulton was telling, in our respectful submission. It made clear that he knew, and he must have known given his position and his experience, precisely what clause 4.2 meant, and his attempt to wheedle his way out of it in that cross-examination reflected very poorly on him.

PN374

Now, there's – it's a very brief point, but it needs to be made, that there's something made, at least by Mr Coulton, that Mr Owen's not having authority to agree to a claim in the 22 January meeting.

PN375

The point goes nowhere for two reasons. Firstly, what Mr Coulton might have subjectively perceived Mr Owens to have authority to do is neither here nor there. Mr Owens at that meeting was clearly acting with the apparent or actual authority of Qube, and by section 793 of the Act his conduct and his state of mind is attributed to Qube.

PN376

But in any event, our submission is, given what actually happened, particularly in light of Mr Coulton and Mr Owens having clause 4 in the terms that it was provided for a number of months, having reviewed the document over and over again for a number of months, Mr Coulton was clearly aware the claim had been agreed.

PN377

One of the matters that my learned friend – my learned friends I should say – rely upon to assert that Mr Pryor's evidence should not be accepted is an assertion that Mr Pryor didn't tell the delegates about what had been agreed at the meeting with Mr Owens, and of course they called Mr Rich and Mr Johnson to run that line.

PN378

Mr Rich's evidence, contrary to my learned friend's submissions in respect to what was said to him by Mr Pryor about the incorporation of the award and the RTBU removing or no longer pressing the penalty rates claim, was unambiguous and unequivocal.

PN379

Can I take the Commission to Mr Rich's cross-examination at paragraph number 290 in the first instance? This is after I've cross-examined him about his involvement with state-based negotiated clauses, which he accepted. He then was taken to 290, one of the newsflashes which had as point 4 on the common clause part of the document, 'Relationship to parent award or NES', and he accepted that he wasn't involved in negotiating that.

PN380

I then put to him: 'You understood the RTBU' – this is at 292 – 'had a claim for weekend penalties? Do you agree?' He seemed to be looking away from the document. Then I put it to him again directly:

PN381

Do you agree the RTBU had a claim for weekend penalties?---Yes.

PN382

And that claim wasn't pressed by the RTBU because you understood the Rail Industry Award was to be incorporated into the agreement?---Yes.

PN383

Helpfully in re-examination, PN329, Mr Ternovski asks about the source of Mr Rich's understanding and what discussions, if any, he had in respect to the issue of the award being incorporated. He says this:

PN384

It was only when we went to a meeting and Mr Pryor mentioned it at a - before we went into the EA meeting.

PN385

That is consistent with Mr Pryor's evidence - if the Commission goes back to Mr Pryor's evidence in respect to what happened with the document our learned friends place some reliance upon in respect to the penalty rates claim being not pressed or abandoned by the RTBU, at paragraphs 47 through to 48, court book 688, in respect to what occurred with the delegates, and that is that Mr Pryor received authority from them to not press that clause because of the incorporation of the award – and I've given you the wrong reference for that.

PN386

THE DEPUTY PRESIDENT: Yes.

PN387

MR BONCARDO: Please ignore those paragraphs. The relevant reference is – I apologise, my notes are wrong. Perhaps Mr Matthews – Mr Matthews might turn up for me the reference to the delegates giving Mr Pryor authority to withdraw the penalty rates claim.

PN388

But in any event, the submission – I'll give you the reference in a moment, Deputy President – is that Mr Rich's statement, both in cross-examination and in answer to that question in re-examination, supports the proposition that Mr Pryor did tell the delegates about this, and did make it clear that the claim was no longer needed, or needed to be pressed, because of the incorporation of the award.

PN389

In respect to Mr Johnson, we deal with his evidence in the outline of closing argument. I don't need to rehearse what is said at paragraphs 7 through to 10, but for the reasons there set out, the Commission would not place particularly much weight on his evidence.

PN390

Distinctly – and my learned friend made the submission, it's a fair submission, that well you cross-examine both these witnesses in a perhaps unsurprising way, and this all happened a long time ago, they weren't involved in Part A negotiations, they don't have any specific recollection of particular things happening during bargaining meetings, and they both in general terms agreed with that, but Mr Rich in the answers I've taken you to did have a specific recollection, and that's why the arguments my learned friend put to you ought not be accepted in respect to that aspect of Mr Rich's evidence. He was unequivocal about having that memory, which was helpfully clarified in re-examination.

PN391

Another matter that is, in our respectful submission, very significant in respect to Mr Coulton's evidence and his credibility more generally is his email to Mr Matthews on 1 March.

PN392

We've dealt with that, Deputy President, from paragraph 32 through to paragraph 45 of the outline, pages 8 through to 12, but it's perhaps worth spending some little time on it. The email – it's in the court book at page 1087 – and just before I take you to that, the reference in respect to Mr Pryor receiving approval from the delegates is court book 691, paragraph 62 of Mr Pryor's statement.

PN393

THE DEPUTY PRESIDENT: Sorry.

PN394

MR BONCARDO: Court book 691, paragraph 62 of Mr Pryor's statement.

PN395

THE DEPUTY PRESIDENT: Thank you.

PN396

MR BONCARDO: The email at 1087 sent to Mr Matthews, solicitor of the union, in respect to an application filed by the RTBU with this Commission – it's an email sent in the context of litigation – in our respectful submission makes abundantly clear what Qube's understanding of clauses 4.1 and 4.2 are, and, with respect, were.

PN397

The context is that Qube had unilaterally sought to delete clause 4.2. There was a series of emails and letters passing between Mr Matthews and Mr Allen and Mr Coulton in respect to that where Mr Matthews was threatening to instigate proceedings in this Commission for orders under section 229, and the email sought to allay the RTBU's concerns and convince it to drop the case that it had filed the night before.

PN398

At about point 5 of the agreement, there's reference to the current draft of the proposed agreement providing 'the agreement wholly incorporates the award' - this is the draft that deleted clause 4.2 –

PN399

Where there's inconsistency between the award and the agreement, the agreement shall prevail to the extent of the inconsistency.'

PN400

And then it says this:

PN401

As you would be aware, the award provisions with respect to loadings and penalties are incorporated into the proposed agreement, as they are under the current agreement, in circumstances where the enterprise agreement is silent on loadings and penalties.

PN402

That's our case, stated crisply by Mr Coulton in his email to Mr Matthews. He then goes on to say that:

PN403

Qube's only intention was to simplify existing arrangements, not to change the substantive meaning –

PN404

The substantive meaning being what was set out in the preceding sentence. If the Commission charts down the page right to the base, Mr Coulton asserts that, amongst other things, the matters he set out should allay the RTBU's concerns.

PN405

And then over the page, he, at the second paragraph, says amongst other things that Qube's going to put the agreement out to a vote, and then he invites Mr Matthews to urgently withdraw his application. So he's making representations in this email with a view to convincing the RTBU to not proceed with litigation that's on foot in this Commission.

PN406

Now, there could not be a more formal and serious context in which to make the kind of representations that are made in this email about the clause the subject of, or the principal subject of Mr Matthews' and the RTBU's section 229 application.

PN407

Mr Coulton sought to distance himself completely from this disastrous email by saying:

PN408

My solicitors drafted it -

PN409

we know they did; that's uncontroversial –

PN410

It was sent to me and I just copied and pasted it, sent it to Mr Matthews, and did not read a single word that was set out in it.

PN411

That evidence, in my respectful submission, is inherently improbable and must be rejected. The Commission will find Mr Coulton's assertion that he hadn't made any communications with his solicitors before the email was forwarded, or afterwards – PN870 through to 883.

PN412

Those assertions are made in circumstances where the Commission knows from exhibit RTBU2, which is a copy of the email sent by Mr – or Qube's I should say, not Mr Coulton's solicitors, and also 874 to 875 of the transcript, that Mr Coulton received the email from his solicitors at 10.48 am. So he had the email with him for, on my rather unreliable maths, about 48 minutes before he allegedly copied – or before he sent it on to Mr Matthews.

PN413

The point we make at paragraph 39 of the outline is that solicitors, as everyone knows, do not prepare materials and draft correspondence without instructions, and that's particularly in circumstances where the material, or the document is about litigation, and Mr Coulton himself, and to recognise that the litigious purpose of this document, which was self-evident in any event, at 890, paragraph number 890 of his evidence where I've asked him whether Mr Cochrane, his solicitor, was writing this off his own bat.

PN414

Then he says, 'No, Mr Cochrane was receiving correspondence from Steve', being Mr Allen, 'in view of the fact he was seeking to prevent the RTBU further delaying the process of the ballot.' 'It was about focusing on good faith bargaining order', as he viewed it, 'an 11th hour strategy to (indistinct) the delay' –

PN415

So what we were merely doing was looking to throw water on that application, or the issues raised within the application, and reinsert the clause.

PN416

In other words, he knew exactly what the purpose of this email was, and he's made it very clear in his answer to that question, to the extent that any clarification was needed.

PN417

His evidence on how this email came into being is not particularly easy to follow. He denied, at 884, that – I should perhaps usefully go back to 883 – he didn't give Mr Cochrane instructions in respect of the email. He then said at 884 that 'Mr Cochrane, however' – (indistinct) Mr Coulton didn't tell him anything – 'didn't write the email off his own bat.'

PN418

Then at 884 through 887, he speculates that 'maybe Mr Allen might have communicated with Mr Cochrane.' Then at 889, he says in relation to whether or not Mr Allen had given him instructions about responding to the email, he just doesn't know, and 'I don't believe there was any instruction given by Steve to Mr Cochrane.'

PN419

So the question remains how on earth did this email come to be written without instructions. The notion that Mr Coulton, or Mr Allen – it doesn't really matter who, with respect – gave instructions as to the nature and the content of the response, or did not give any instructions into the nature and content of the response, is inherently implausible and should not be believed.

PN420

Someone from Qube, and the most logical and rational person would've been Mr Coulton, must have spoken to Mr Cochrane and given instructions in respect to the matter, and that email, in our submission, is significant and makes it very clear what Qube's understanding of clause 4.2 was.

PN421

Mr Coulton, significantly, his evidence being now that he'd never seen this email and it was materially wrong, never took any steps to reply to Mr Matthews and telling him what he'd set out in the email was incorrect. It's at PN904 to 907.

PN422

Mr Matthews in his unchallenged statement, at paragraph 26, court book 889, deals with the good faith bargaining application, which was listed before you on 2 March, the day after Mr Coulton's email, and says that 'Qube committed to reinstating clause 4.2 in the form that it was', no doubt with the effect that Mr Coulton had set out, 'ahead of its next employee ballot, and the RTBU discontinued the matter.'

PN423

So the RTBU has relied upon what Qube have said about how clause 4.2 operates and that it's going to be reinserted into the agreement, and determined to discontinue their application, and Mr Coulton, who sent an email, which in effect sets up the context for the application being discontinued, doesn't disabuse Mr Matthews ever of what he said in that email being, on his evidence, incorrect.

PN424

We've also drawn attention to, Deputy President, the form F17 filed in respect to the 2019 Agreement, and the fact that it does not identify anywhere that shift penalties, allowances, weekend loadings, et cetera, were not included in, or were omitted from, I should say, the agreement. The Commission will see our submissions in respect of that at paragraphs 46 through to 47. The short point is that if Mr Coulton had, in fact, perceived the rates to be loaded rates, he would have made that clear in his F17 and he didn't.

PN425

We also rely as a matter adverse to Mr Coulton's credibility on the misleading memorandum that he issued to employees on 6 July in respect to the In Principle Agreement that was reached before Commissioner Crawford. We set out our submissions at paragraphs 50 through to 51 in that regard and we also note what Commissioner Crawford in section 424 of the case, paragraph 52 of the submissions, about the misleading nature of the document.

PN426

In short, the document represents - contains a number of representations which we have recorded at paragraph 51, that Qube were only served with a copy of the papers in the Federal Court matter after reaching the In Principle Agreement. Now, that's found, amongst other things, amongst other places, I should say, 1093 of the court book.

PN427

The memo starts at 1092 and 109 - and it's not controversial, I should say, Mr Matthews sets this out in his evidence that when the good - when proceedings came before Commissioner Crawford, he, that is, Mr Matthews, got up and explained that the RTBU had filed a case in a Federal Court, provided copies of the pleadings to Commissioner Crawford.

PN428

He then gave them to Mr Coulton and asked him to go away and have a look at them and make sure that they didn't present any issues in respect to reaching an In Principle Agreement and the uncontroversial evidence is that Mr Coulton said, 'I didn't present any issue.' Now, Mr Coulton in his memo to employees says under the heading or subheading:

PN429

Federal Court Proceedings. The day after reaching this in-principle deal, we were formally served with materials relating to the proceedings that the RTBU had commenced in the Federal Court.

PN430

And that might be literally true in the sense that formal service was effected on that day, but point 4 of Mr Coulton's list of disappointments on that page says this:

PN431

We were served with the court papers the day after reaching an In Principle Agreement. evidently so the RTBU could generate the same outcome under the proposed agreement without knowledge to Qube.

PN432

Now, that is materially misleading and deceptive as it conveys to the employees that the RTBU provided the court papers to Qube after reaching In Principle Agreement. That's just plainly wrong and untrue. Then over the page in the second paragraph explains why Qube could no longer adhere to the In Principle Agreement including because they carry - they might be carrying a risk of a substantial liability in a new agreement. The second paragraph:

PN433

We cannot commit to providing generous pay increases as well as run the risk of taking on this additional liability. This would have been known to the RTBU as well hence why they did not serve the court papers on us until the In Principle Agreement had been reached.

PN434

Now, that is again, just plainly false. The documents were provided to Mr Coulton before the In Principle Agreement was reached and confirmed before Commissioner Crawford and these misleading assertions that Mr Coulton makes, they're adverse on his credit and they indicate he's someone who will say whatever he thinks might be in Qube's interests.

PN435

Deputy President, in my submission, the Commission would not accept Mr Coulton's evidence unless it relates to a matter that is uncontroversial or is otherwise supported by the objective circumstances and would prefer his account of the critical meetings - I'm sorry, would reject his account of the critical meetings and prefer that of Mr Pryor.

PN436

In respect to Mr Pryor and the RTBUs case, the proposition documents that our learned friends have filed yesterday afternoon, which is styled as a roadmap of

propositions and subsidiary findings necessary to find that Qube agreed to pay award penalties and loadings creates, in our respectful submission, a straw man.

PN437

THE DEPUTY PRESIDENT: Sorry?

PN438

MR BONCARDO: A straw man.

PN439

THE DEPUTY PRESIDENT: Yes.

PN440

MR BONCARDO: The notion that each of these propositions and the subsidiary propositions and the subsidiary propositions need to be established before you can accept my client's case is, with respect, a nonsense and the Commission needs to weigh the evidence in totality and consider the matters that bear upon the credibility and the reliability of Mr Coulton and Mr Pryor's evidence without engaging in some artificial stepped process that this document seems to advocate.

PN441

Can I deal though with proposition number 1? Qube agreed to pay penalties on top of what were already loaded rates giving some workers a pay rise of 65 per cent. Now, it's accepted, proposition 1(c) that employees were getting a pay rise in excess of 45 per cent for some of them. So it's said to be absurd or incongruous that they could be getting 65 per cent, a 65 per cent increase.

PN442

Now, why it would necessarily be absurd or incongruous for employees to be getting such an increase or such an additional increase is not explained, but can I just note the references in footnote 5 because this notion that employees were getting a further pay rise of 20 per cent or more seems to be critical to Qube's case and where does it come from? Paragraph 110 of Mr Coulton's statement, page 46 of the court book. Can I take you to that, Deputy President?

PN443

THE DEPUTY PRESIDENT: What page?

PN444

MR BONCARDO: Page 46. So paragraph 110:

PN445

> *Based on a preliminary assessment conducted by Qube Logistics Rail, I am informed that the average estimated labour cost increase per employee of the RTBUs construction is anywhere between 20 and 30 per cent.*

PN446

We took objection to this paragraph for the patently obvious reason that it's hearsay. Mr Coulton was informed by persons unknown, unnamed, about estimated average labour cost increases. The evidence is objectionable and the

Commissioner - cannot be tested - could not be tested and the Commission should accord it no weight whatsoever. It is a bold assertion.

PN447

How - who derived the figures, how they were derived is not set out, and it is the high watermark of the notion that a pay rise of 20 per cent or more was on the cards, if our construction is correct. Now, there's also reference in footnote 5 to Mr Matthews' statement at paragraph 29, court book 890, which is said to support the proposition that Mr Matthews' model showed an increase of 500 to $700 per week, presumably per employee.

PN448

But let's just see what Mr Matthews actually says at paragraph 29, and it's useful to go back to paragraph 27, page 889. So March 2023 to determine whether there'd been a payment at all, he undertook modelling of two Qube roster periods. So he reviewed an employee's roster, reviewed their timesheets, et cetera. Paragraph 28 he found it an extremely difficult task. The significance of that I'll come back to in a moment. Then paragraph 29:

PN449

I had modelled two fortnightly pay periods using the record of two Qube employees.

PN450

So the 500 to $700 quotation is in respect to two Qube employees in 2023. Now, that doesn't establish a basis for the proposition that, on our construction, a pay rise of 20 per cent or more, in addition to the 45 per cent Qube were already offering in respect to some employees, was going to be made out.

PN451

So there is nothing, we would say, inherently improbable - the notion that employees are getting 45 per cent and they might be getting a further additional increase by reason of penalty rates, shift allowances, et cetera, being paid upon the ordinary hourly rates. Now, there was some cross-examination of Mr Pryor in respect to how much more employees might get each year and he accepted and it was put to him by my learned friend, that a wages bill - Qube's wages bill might increase not insignificantly if the amounts owed, the penalties were paid.

PN452

That is obviously correct so far as it goes, but it doesn't establish on our - in our respectful submission, any necessary absurdity or incongruity with this notion that Qube would have agreed to and did agree to the additional penalties and loadings as we're contending. The other matter that our learned friends draw attention to is that what, according to their case, Mr Pryor was being obfuscatory about, amongst other things, was in his evidence in respect to the PN Bulk Agreement.

PN453

That's at proposition number 10, amongst others, amongst other places. And the PN Bulk Agreement was the exemplar agreement and that on our learned friends' analysis, what we say had been agreed was in excess of what was provided by the PN Bulk Agreement. There's a number of difficulties with that

submission. Firstly, the PN Bulk Agreement is not in evidence. Secondly, Mr - well, actually, there are two pages of the PN Bulk Agreement.

PN454

That's - they're provided in the annexure to Mr Pryor's statement, annexure KP13 where he's made the note about rosters and - I'm sorry, about Mr Owens agreeing to leave clause 4 in to cover shift penalties. So pages 725, 726. Otherwise, the agreement is not in evidence. The rates under that agreement weren't put to Mr Pryor, but that is the rates under the PN Bulk Agreement, the specific rates were not put to Mr Pryor.

PN455

And the Commission will also note if it turns to page 725 of the court book, this is a matter that our learned friends don't seem to take into account in their analysis in relation to the PN Bulk Agreement. Clause 4.3:

PN456

An aggregate allowance will be paid in lieu of industry and award allowances in the rate of $5,677.88 which will be indexed by the wage increases in this agreement. It's to be paid fortnightly and applied to all levels.

PN457

So it's not just the hourly rates or the shift multipliers that employees get under the PN Bulk Agreement, it's an aggregate allowance and then there was some cross-examination by my learned friend of the relevant multiplier being 0.9. The Commission will see that page 726 under Part A, step 3, where the relevant step process for calculating amounts due to employees is set out.

PN458

It's obviously correct that the shift multiplier is 0.9, but then there's step 4 which doesn't seem to have been factored into the analysis, that for annual leave loading, you add another .019 for a shift worker and 0.13 for a day worker. So the analysis in respect to the PN Bulk Agreement (1) is flawed because PN Bulk Agreement's not in evidence and the rates that applied are not in evidence.

PN459

(2) Doesn't seem to take into account the aggregate allowance payable to employees fortnightly. And (3) doesn't take into account the annual leave loading which are multiplied on the penalties payable under that agreement. So to the extent that an attack is launched on Mr Pryor in respect to his views about the PN Bulk Agreement, it should not be accepted.

PN460

The Commission simply cannot be satisfied that Mr Pryor knew that if the award was incorporated, employees under the Qube Agreement would be doing better than the PN Bulk Agreement. Another matter that our learned friends rely upon is the fact that there were no complaints made to Mr Pryor about the non-payment of penalties after the 2015 Agreement was approved and indeed after the 2019 Agreement was approved.

PN461

Now, that's again uncontroversial until, we say, sometime towards the end of 2022, there were no complaints. We can't run away from that and we don't run away from that. The weight to be placed upon that in assessing what had been agreed in 2014 however, is marginal for these reasons. Firstly, it presumes that employees are able to discern from their payslips whether or not they are being paid in accordance with the agreement which incorporates the relevant provisions of the award and that also presumes a familiarity with the award provisions.

PN462

The payslips themselves are not a model of transparency and Mr Pryor was cross-examined about a couple of examples and the Commission will find an example, amongst other places, at 1287 of the court book, volume 2. I'm sorry, 1289 through to 1294. And if, by way of example, the Commission looks at the payslip at 1294, it's a payslip of Mr Bonrozic from Figtree, it's clear that he's received overtime.

PN463

It's not clear at all when that overtime was worked, on what days or what hours. It's clear he's received a component of salary. Again, not clear at all when he worked and Mr Matthews sets out in his statement paragraphs 27 to 29, the difficulties he had in actually working out, based upon those payslips, and time sheets, what had been paid to employees, what should have been paid on the RTBUs analysis, and at paragraph 28 sets out:

PN464

It's an extremely difficult task, took several hours to model one fortnightly pay cycle for one employee.

PN465

Now, this is a gentleman who is a solicitor and spends his time doing industrial law and it took him a significant period to work out what on earth these payslips entailed and meant and whether or not employees were being underpaid. It is not surprising in those circumstances, that train drivers who have skillsets that are very different to those of Mr Matthews, may not have picked up that they were potentially being underpaid.

PN466

That is why the lack of complaints, until we say there were some complaints raised to Mr Pryor sometime in late 2022, is not a matter of great moment and it's not a reason to find that Mr Pryor's evidence as to what was agreed back in 2014 should be rejected. There's also an attack made on Mr Pryor as a result of him, I think, to use my learned friend's colourful phrase, consuming his time investigating whether employees had or hadn't been paid barracks allowances and the like.

PN467

And there was, of course, evidence of one of the employees, Mr Parks, making a complaint about non-payment and Mr Follett cross-examined Mr Pryor about dealing with those issues and not picking up the issue of non-payment of penalty rates, et cetera. The answer to that point is, in my submission, a relatively simple

one and that is that Mr Pryor's evidence, PN166 and 176 to - I'm sorry, PN1266 and 1276 to 1277 was he dealt with the issue that he was asked to deal with.

PN468

And the issue about whether Mr Parks was or was not being paid shift penalties or loadings, was simply not one that was raised with him. That's at 1297, 1299, 1301. And in those circumstances, it's not perhaps surprising that a union official, no doubt, busy with a whole host of matters, wouldn't go looking for additional issues. Perhaps he should have, perhaps in hindsight that's what he would have done, but simply not what he did because it was not raised with him specifically as an issue he was dealing with, the issues that were raised with him expressly.

PN469

There's an attack made also on Mr Pryor for not - or in respect to his evidence that some employees raised the issue with him late last year. That evidence is raised in cross-examination. It is not inherently incredible and it was raised in circumstances where Mr Matthews' evidence was that he had raised the issue of potential underpayment with Mr Pryor sometime in - or about mid-2022.

PN470

So Mr Pryor - and my learned friends rely upon paragraph 14 of Mr Matthews's statement where Mr Pryor's asked if weekend penalties were currently being paid and he said he wasn't sure, he thought they weren't. Mr Pryor's alerted to the issue then and that he may have had some discussions with employees thereafter it's not inherently improbable. It's also put that it reflects adversely on Mr Pryor that he didn't tell Mr Coulton about this issue when he became aware of it either - well, sometime in late 2022.

PN471

The answer he gave in respect to that point is, in my respectful submission, a cogent one and a clear one. It's paragraph 6163 - PN1635 through to 1643 of the transcript. My learned friend criticised these answers but, in my respectful submission, they had not only a ring of truth to them, but they make complete sense.

PN472

He's asked at 1635 following a question at 1631 why he didn't tell Mr Coulton and he then says at 1634, 'Do you want a history lesson', and explains that the 2015 and 2019 Agreements took approximately five years. No pay increases or back pay. So far as he was concerned:

PN473

> *Qube would delay the process if I brought something major up. I didn't want that to happen to these employees.*

PN474

And he makes clear that that was what his view was at 1636 and then at 1638, he says that, to his knowledge, with the history there was no use bringing it up at that point in time and that is why the issue wasn't raised by him at that point. It's entirely understandable and not a matter that, in my respectful submission, bears adversely on his evidence. It was also suggested that:

PN475

Well, if you knew about this, you would have done something about it and you didn't do anything about it.

PN476

Well, the union was doing something about it. Mr Matthews was investigating it and Mr Matthews makes clear in his statement that what was, in fact, occurring from June 2023 - I'm sorry, from March 2023 onwards, was analysis and then ultimately, obtaining advice from counsel after getting approval from a divisional executive and then commencing the Federal Court proceedings.

PN477

Reliance is also placed upon the evidence that Mr Coulton gave before Commissioner Crawford and it's suggested that that evidence was dishonest or alternatively, his evidence before the Commission here was dishonest in respect to when he became aware of - well, my learned friend's question posed as, 'The argument about the award being incorporated.' Not too much, in our respectful submission, can or should be made of that. The transcript of that cross-examination commences at court book 645. I think it's the first volume, Deputy President.

PN478

THE DEPUTY PRESIDENT: Yes.

PN479

MR BONCARDO: And there's cross-examination on PN88 onwards by Mr Follett and then over the page, at PN98 he is asked about when the documents were filed and PN100:

PN480

The documents were settled by counsel.

PN481

How long did that progress go on?---For a couple of months.

PN482

102: A couple of months at least. So the union had the view about the constructional arguments that it runs in that proceeding for at least a couple of months, since Qube changed the first day of the draft?---Yes.

PN483

When it changed the clause 4.2, and that made you identify the argument you now seek to prosecute in the Federal Court?---Correct. And that's months ago.

PN484

105: Correct.

PN485

Now, he's asked about the argument that is being prosecuted in the Federal Court in a nonspecific sense in the sense that it is not put to him that he was not aware of the fact that amounts were payable. He's simply asked about the argument that

the union is running in the Federal Court and that's what his answers are directed to. They are not directed to him and should not be read as him conceding that he did not know about the agreement providing that penalties, shift loadings, et cetera, were payable.

PN486

The way the question was put, entirely understandable in the context of this particular proceeding, was not as clear or as precise as my learned friend who seemingly used it in this case, seeks to make it. The other matter that is relied upon is Mr Pryor's evidence in cross-examination about those answers and a number of things need to be pointed out about that.

PN487

At 1458 of the transcript, it's day 1, he's asked about his answers to Commissioner Crawford and 1459 which is something our learned friends rely upon, it's put to him that his evidence about becoming aware of the arguments, what is untrue. He says, 'No.' And then at 1460 he says, 'No, it wasn't the honest truth.' And then at 1461, Mr Follett suggests to him, 'So you knew a couple of months beforehand.' And he accepts that at 1462.

PN488

And then at 1466 he sets out in answer to Mr Follett's question at 1467, that he in fact, knew about the problem lacking in 2022. What he told Commissioner Crawford was that he learned about the problem a couple of months ago. He was wrong on timing. He was wrong on timing and that was all and it's not a matter that, in my respectful submission, goes particularly far and 1468 he makes clear his understanding that employees should have been paid the penalties, et cetera, all the time.

PN489

The other matter that is relied upon with some gusto by our learned friends is the Victorian Enterprise Agreement, and it's suggested, amongst other things, that the Commission would have inferred that it's absurd and ridiculous for a union to operate in a way where an official who's negotiating an agreement in New South Wales isn't intimately aware of the ins and outs of bargaining in another state. That proposition need only be stated to be rejected as far too prescriptive and detached from reality.

PN490

There is no evidence that Mr Pryor was intimately involved with or, in fact involved at all, with bargaining for the Victorian Agreement. His evidence was that, amongst other things, 1546, he had no involvement in negotiations in respect to the Victorian Agreement. Sorry, that's 1546:

PN491

What level of involvement did you have in the Victorian negotiations?---None.

PN492

And at 1607, he sets out that he wasn't up to date with the Victorian negotiations, but at 1603 he accepts that at a particular point in time he might have been aware of the status of those negotiations and he wasn't even sure when he was asked by

my learned friend at 1544, whether or not the Victorian deal was still open right at the end of the process in New South Wales.

PN493

Now, he's been quizzed on that, as it happened almost a decade ago, but in any event, it is clear that he did not have the kind of familiarity that my learned friend says he ought to have or you should assume that he had with the Victorian Agreement. And the Victorian Agreement is a curious thing for our learned friends to rely upon in cross-examination of Mr Pryor, in circumstances where Mr Coulton didn't refer to it at all in his witness statements.

PN494

And the Commission can see that if one person was intimately involved in negotiating the Victorian Agreement, it was Dan Coulton, and the Commission can see that, amongst other things, from exhibit A11 and exhibit A12, where Mr Coulton is sending emails to Mr Barden and Mr Marotta arranging meetings. He's sending emails, this is in exhibit A12, to someone called Susie attaching a copy of the agreement with changes that he's made and that he's highlighted.

PN495

So Mr Coulton was very familiar with the negotiation of the Victorian Agreement and presumably with its terms. And it's significant to go to those terms because they do not, on any analysis, assist Qube. In fact, they make our case even more cogent. And can I take the Commission to exhibit A13?

PN496

THE DEPUTY PRESIDENT: Yes.

PN497

MR BONCARDO: I think I said at the outset that Mr Coulton gave his autograph to this agreement. The Commission will have at page 3, their undertakings that Qube gave to Commissioner Harper-Greenwell. Who gave the undertakings on behalf of Qube? Dan Coulton. And then the signing page, signed for the purposes of the Regulations on behalf of Qube on the 26th day of February 2017, page 28:

PN498

Acting as the duly authorised representative of the company empowered to sign this agreement, Dan Coulton, National IR Manager.

PN499

So Mr Coulton, one would have thought, would have well-known the terms of this agreement, including because he negotiated it and including because he signed off on it. Can I take the Commission to page 4?

PN500

THE DEPUTY PRESIDENT: Yes.

PN501

MR BONCARDO: Previous agreements rescinded and/or varied, clause 4.1:

PN502

The agreement and attached schedules are intended to cover the field in relation to all matters relating to the terms and conditions of employment of all employees whose employment is subject to this agreement.

PN503

In other words, this is a standalone document. It does not incorporate the award, does not incorporate any other instrument. Mr Coulton would have, should have, we say, the Commission would be comfortably satisfied, did observe this clause and observe the distinction between it and clauses 4.1 and 4.2 of the New South Wales Agreement and must have appreciated why they were different.

PN504

Page 12 of the agreement contains clause 14.7 which makes clear that the rates of pay prescribed are inclusive of all payments, this is clause 14.7, Deputy President, including shift and weekend penalties, annual leave loading, public holiday payment and casual loadings where applicable and the rates take into account all responsibilities for each classification. A term one would see in a loaded rates agreement Mr Coulton including in this agreement, not in the New South Wales agreement.

PN505

If the Commission then turns to page 31 which is schedule 2 to the agreement, the number of definitions, definition of ordinary hours, definition of hourly base rate, the hourly rate applicable to the ordinary hours component of the remuneration. Distinctly from the New South Wales Agreement, nothing is said in this definition about annual leave loading because that work or the work of making clear that the hourly rate already included annual leave loading was done by clause 14.7.

PN506

In the New South Wales Agreement Mr Coulton and Qube made sure that the same result was achieved in respect to annual leave loading being included in the hourly rate by changing the definition of the relevant hourly rate. The other thing that is useful to note is that if one goes to schedule 4 and the wage rates, those wage rates are not the same as the wage rates prescribed by the 2015 Agreement.

PN507

They are different and no doubt they are different because, as Mr Coulton said in his 29 October email, 'There will necessarily be differences from state to state', and that, in my respectful submission, is precisely what happened and what was negotiated in the context here and there are particular classifications here with rates for driver only shunt operations which the Commission does not find an equivalent to in the pay levels under the 2015 Agreement in relation to the classifications on page 1012 of the agreement.

PN508

So the Victorian Agreement, in our respectful submission, does not assist Qube. In fact, in a number of ways, it makes its case much more difficult, in our respectful submission. There are some rates, of course, which are equivalent and identical, but there are others that are different and they are different because this

was a different agreement negotiated with a different branch of my client in respect to a different group of employees.

PN509

If the Commission will just pardon me a moment. In relation to some of the matters that are set out in our learned friend's aide memoire where Mr Pryor's alleged obfuscation and untruths are included, can I just very briefly make the following observations? In relation to Qube paying a penalty upon a penalty, that is, of course, premised on the notion that the rates were loaded rates which, if one accepts Mr Pryor's evidence, they were not.

PN510

In respect to whether or not Mr Pryor was organising for employees covered by the predecessor agreements, we don't, with respect, quite understand that point. He makes clear in his evidence at the commencement of his cross-examination what his responsibilities were and they related in that - in respect to Qube, primarily to bargaining for a new Enterprise Agreement.

PN511

The point is also raised in respect to Mr Pryor not notifying employees about the preparation of the award and we accept and have to accept, that there is no evidence of that and that it did not occur, save in respect to the delegates and Mr Rich's evidence is corroborative in that respect, but that does not, in our respectful submission, take things particularly far in circumstances where Mr Pryor's evidence is to the effect that the matter had been agreed early on and it had been ticked off.

PN512

There was no need to re-mention it or reagitate it and that needs to be seen in the context of the fact that clauses 4.1 through to 4.4 were with Qube from, we say, 14 March, but at least from 24 March and Qube had access to those clauses and did not raise any issue with them. In those circumstances, why would Mr Pryor want to draw attention to something that, so far as he was concerned, had been put away at the commencement of negotiations.

PN513

Deputy President, in our respectful submission, the Commission ought find that there was agreement by Qube as early as 22 January 2014, to incorporate the award into the agreement to ensure, amongst other things, that shift penalties and weekend penalties were paid on top of the rates provided by the agreement and insofar as Mr Coulton's evidence is concerned, that controverts Mr Pryor's evidence, that evidence ought be rejected.

PN514

Can I say something briefly about ambiguity and uncertainty and address some of the matters that my learned friend has raised, but can I firstly do this in respect to matters of context. A relevant matter of context is what the employees would have known about the terms of their current agreements when they voted on the 2015 Agreement. Now, Mr Coulton's evidence was, no doubt to comply with section 180(2) of the Act, this is at paragraph number 768 of his cross-examination, that:

PN515

Employees were provided with copies of the award, that is the Rail Industry Award, before they voted on the agreement during the access period.

PN516

Now, some point seems to be raised by our learned friends that, 'Well, employees must have known that they were just voting for the status quo.' That contention is made in a complete evidentiary vacuum. Qube had not put on any evidence about what employees were told in respect to this agreement and how it would operate. The documents that one might expect would be provided to employees under section 180(5) haven't been put into evidence.

PN517

Qube has been entirely silent on what it told employees the terms of the agreement were and how they operated, but one thing is very clear and that is the point I alluded to earlier, that the agreements the employees were covered by, and which applied to them at the time they voted for the agreement, were very clear that they were standalone agreements and that they provided hourly rates that were inclusive of allowances to expand to loadings, et cetera.

PN518

I note the time, so I'll try and do this relatively quickly and perhaps by reference to the outline document. At page 2 of that document we will see we have - and we've included this in the chronology as well, we've identified the relevant provisions of the four antecedent agreements which make clear what those agreements provided in terms of hourly rates being inclusive of loadings, et cetera, and none of those agreements incorporated the referenced award.

PN519

That is part of the objective context that employees would have been alive to when they voted on the agreement. To the extent that our learned friends' case insofar as it devolves into a contest between Mr Pryor and Mr Coulton, is premised upon their intention objectively ascertained being relevant, we say, and we've made this point in the submissions, that isn't quite what common intention means in the context of Enterprise Agreements that are approved by employees.

PN520

And the Commission must, in assessing both ambiguity and uncertainty and whether there's a common mutual intention between the employees and the employer and they say there plainly isn't (indistinct) certainly no evidence of that (indistinct) what the employees knew and would have known and when one compares the terms of the agreement employees have voted on to the terms of the agreements they were covered by, one cannot discern a common intention that employees would have appreciated and must have appreciated that clause 4.2 in the second sentence, didn't mean what it said.

PN521

Our primary contention which we've set out in the written submissions, is that clauses 1 - 4.1 to 4.4 are neither ambiguous nor uncertain, whether textually or having regard to wider contextual matters. Our learned friends in their written submissions and again today, drew attention to some clauses which they say entail

that the provisions must be ambiguous. The first one of those is clauses 29 which the Commission will find at page 1012 of the court book.

PN522

THE DEPUTY PRESIDENT: So clause 29 simply sets out the pay levels.

PN523

MR BONCARDO: It's difficult, with respect, to see how there is any ambiguity or uncertainty based upon the fact that pay levels are set out in clause 29 in circumstances where clause 4.2 makes clear that loadings, penalties and allowances apply to rates of pay due under the agreement other than award rates. Hourly rates are set out, the penalties, et cetera, apply to those rates. There is no ambiguity or uncertainty by reason of the shift allowances, weekend penalties, et cetera, not having allocated to them a rate in clause 29.

PN524

Clause 42 is also relied upon by our learned friends. The Commission will find that at page 1025. Deals with payment of wages. It reflects, in substance, what section 323 requires, that is the wages are to be paid fortnightly. It deals with payment time. There's no ambiguity or uncertainty arising from that clause and interestingly, doesn't deal with overtime.

PN525

THE DEPUTY PRESIDENT: What about any excess hours for the cycle?

PN526

MR BONCARDO: That doesn't give rise to any ambiguity or - well, actually, there would, Deputy President. It doesn't deal with overtime in terms, but, yes, I agree. That's right. That would capture overtime. But in any event, it deals with payment timing alone. Reliance was also placed today on a number of other provisions including 31.7(e) I've got a note of, which deals with - is it 1018, TBA shifts and particular reliance on 31.7(e) said that:

PN527

All TBA shifts shall be paid out in normal time until such time as the 76-hour guarantee has been accomplished or as provided within this agreement.

PN528

That is clearly dealing with when overtime is payable. It does not - it's entirely agnostic, in our respectful submission, as to when TBA shifts are to be worked and what rates are to be payable on them other than overtime. There's no ambiguity or uncertainty arising from that provision. In respect to RDOs in 32.4(b), it's - which requires employees to be paid at an overtime rate when they sign on during the dimensions of an RDO and all hours worked for the portion of the RDO will be paid at the overtime rate.

PN529

Again, and the remaining hours can be paid at the normal rate. Again, there's no ambiguity or uncertainty. In the event that those remaining hours, for example, occur at times when penalties or shift - the weekend penalties or shift penalties are payable, then those amounts are payable in respect to that time.

PN530

An entirely conventional way that an award incorporation term such as this would work, and the notion that employees will go or should go backwards, which I think was one of the examples used in relation to clause 7.4(iv) in respect to employees working outside of ordinary hours, in our respectful submission, goes nowhere. 7.4(iv) makes clear that overtime is payable when employees work outside of - or part-time employees work outside of their prescribed hours.

PN531

In the event that there was - or those hours may be worked at a time which is a time when a penalty or a shift - weekend penalty or a shift penalty is payable, then it will be obviously the case that the overtime, 1.6 of the normal rate, will be applicable and then be a question in relation to - and there'll be no question, in our respectful submission, in relation to whether or not the additional penalty would be payable in circumstances where there is (indistinct) an inconsistency for the purposes of clause 4.3.

PN532

Now, the section 109 cases that our learned friends rely upon are, in our respectful submission, not of any particular assistance or to the point. The direct collision proposition between a state law and a federal law does not have application in the context of a provision being clause 4.2 which incorporates terms of an award as terms of the agreement. So they're not terms - or clause 4.2 determines that clauses of the award are terms of the agreement, they're not terms, necessarily of a subsidiary or subordinate instrument.

PN533

They are made expressly terms of the agreement and where there is inconsistency between those terms as incorporated and the agreement, the terms of the agreement prevail. So the direct collision approach, the kind referred to by Barwick CJ is inapposite, in our respectful submission, and the tenor of the argument made today was to the effect that whenever an award term is incorporated, that would require an employer to pay more than what's prescribed by the agreement, then there's an inconsistency.

PN534

Now, that's ridiculous, with respect, and not how inconsistency clauses in Enterprise Agreements of this kind work. In our respectful submission, textually and contextually, the threshold point has not been reached in respect to an ambiguity or uncertainty and the application should be dismissed on that basis. Insofar as discretion is concerned, our learned friends say, I think, at the outset, that there was no necessary distinction between the 2015 and 2019 Agreement.

PN535

Paragraph 62 of our submissions sets out some additional factors, we say apply to the exercise of the discretion in relation to the 2015 Agreement which we rely upon. The other matter going to discretion obviously is common mutual intention and that common mutual intention is, in our respectful submission, that of the employees and the employer. To the extent that Mr Coulton - the contest between

Mr Coulton and Mr Pryor is germane, that context to that question of discretion, that contest should be resolved factually in favour of Mr Pryor.

PN536

In relation to Deputy President, the form of relief, can I take the Commission to our learned friends' application and the form of relief which is proposed in annexure 8 of that application is page 8 of the court book. These submissions are made in the event that we are wholly unsuccessful on the threshold point, the discretion point and then it comes to the further issue of discretion as to how, if at all, the Commission varies the relevant provisions.

PN537

Can I make these observations about what is proposed in respect to clause 4.2? Firstly, the Commission will see that the amendment is designed to determine that hourly and normal rates include an offset, both shift and weekend penalties or loadings and any allowances other payable under the award. It is clear in the case - appears to have been conducted on the basis that to the extent that it's our learned friend's case, there was agreement reached between the parties, it was that the all up - or that the rates were loaded rates that included shift and weekend penalties and loadings.

PN538

There's no evidence one way or another that makes clear that allowances under the award which could be many and varied, and could be changeable over time, were to be included in the all up rate and if the Commission is with our learned friends, then it would blue pencil, in our respectful submission, the words, 'Any other allowances in clause - the proposed amended clause 4.2.

PN539

We're not quite sure what the purpose of clause 5.2 is and what effect it has, but in relation to hourly or normal rates, for the reasons that I've identified, it's not appropriate, in our submission, to have, if our learned friends are correct about everything else, the words, 'Any allowances', there and they also be blue pencilled. One further matter that we wish to draw attention to and another reason why allowances should not be included, is clause 4.4 of the award - of the agreement, I should say.

PN540

Clause 4.4 which is found at page 973, deals with subsequent variations to the award that are more beneficial to employees and requires or provides that those superior variations are incorporated and prevail over the agreement to the extent of an inconsistency. So we've - and this argument only obviously applies in respect to the current agreement, prospectively, but in the event that there was a variation to the award which resulted in a more beneficial term, a provision being accorded to employees, the effect of our learned friends' proposed order would be to render clause 4.4 entirely otiose.

PN541

It's difficult to see what work, if any, clause 4.4 would do when clause 4.2 as amended, provides that the agreement includes or the hourly rates include an offset, penalties and loadings and allowances. And that's a further reason, in our

respectful submission, for allowances to be excised. In respect to retrospectivity, we rely upon the written submissions. We accept what my learned friend says about Full Benches having accepted that variations can be made retrospective, the only point we make is that the issue of retrospectivity wasn't a live one, specifically in those cases that our learned friend refers to.

PN542

Insofar as the constitutional point - and I also make this point in relation to retrospectivity and that is that Enterprise Agreements made under the Fair Work Act are different instruments in quality and in terms of how they are made, than awards made by the Commission which were the subject of the proceedings in the Tramways case that our learned friends place some reliance upon in their written submissions. The constitutional arguments we don't say anything further in relation to those matters.

PN543

We, otherwise, rely, Deputy President, on the written submissions.

PN544

THE DEPUTY PRESIDENT: Thank you.

PN545

MR FOLLETT: Deputy President, before I commence to reply, I need three minutes to take some instructions on one point and have a discussion with my learned friend about it.

PN546

THE DEPUTY PRESIDENT: Not a problem. So we'll return at 20 minutes to 4.

PN547

MR FOLLETT: If the Commission pleases.

SHORT ADJOURNMENT **[3.36 PM]**

RESUMED **[3.44 PM]**

PN548

MR BONCARDO: Deputy President, my learned friend has raised an issue with me which applies to what I might obliquely call professional difficulties for those who instruct him. Can I deal with the matter this way - and the matter relates to the evidence in respect to the 1 March 2023 email that Mr Coulton sent Mr Matthews. I invited you specifically to make a finding that Mr Coulton instructed my learned friend's solicitors to draft the email.

PN549

As I said, it doesn't matter too much whether or not that finding is made. I don't invite you to make a finding as to Mr Coulton giving those instructions. It seems on the evidence that it is likely that Mr Ellem may have given those instructions.

PN550

THE DEPUTY PRESIDENT: His submission was Mr Ellem or Mr Coulton.

PN551

MR BONCARDO: That's right, but I don't think there is a difficulty - and I haven't raised this with my learned friend - if I invite you to make a finding that Mr Coulton must have read before he sent, or otherwise looked at, that email. I don't invite you, as I did before, to make a finding that Mr Coulton gave instructions.

PN552

THE DEPUTY PRESIDENT: Okay.

PN553

MR BONCARDO: I just don't know whether that satisfies my learned friend - - -

PN554

MR FOLLETT: I have no problem with my learned friend making a submission that Mr Coulton must have read the email before he sent it. The difficulty is the suggestion that Mr Coulton gave instructions. I think he said that it was either Mr Ellem or Mr Coulton, and what I understood him to say was that he is not now asking you to make a finding that it was Mr Coulton.

PN555

THE DEPUTY PRESIDENT: Okay. Fine.

PN556

MR FOLLETT: If the Commission pleases.

PN557

THE DEPUTY PRESIDENT: I have got a 4 o'clock matter, so are we going to finish?

PN558

MR FOLLETT: Probably not, not in 15 minutes.

PN559

THE DEPUTY PRESIDENT: Okay. We will notify them.

PN560

MR FOLLETT: I will try to move as quickly as I can. My friend made some submissions about the chronology. For example, he talked about the log of claims for New South Wales being in existence in August 2013. It was never provided to Qube. He then also gave a later submission that it was finalised in December 2013. I don't know where that evidence comes from, but it can't correct because Mr Pryor accepted in cross-examination that he finalised the documents with the log of claims with the delegates the day before he presented it to Qube in late February 2014.

PN561

My friend also, I think, as part of that chronology said that he took the log of claims to the 22nd meeting with Mr Owens. There is no suggestion that Mr Pryor took the log of claims to that meeting. The suggestion is that he took a version of the list of common clauses to that meeting. My friend made a submission at the

outset and in conclusion about how we might have put this case to say that allowances weren't part of the loaded rates and it effected the relief. I don't know where that comes from, to be completely honest.

PN562

Each of the predecessor agreements have express clauses that cover allowances as within the loaded rate, and our case is that always has been that the rates carried from the highest of those instruments into the new agreement were loaded rates on the same terms. Of course, for shorthand, everyone has been talking about weekend penalties and shift penalties, but that's not to walk away from the proposition that our case has always been that allowances which were part of the loaded rate offset continue to be part of the loaded rate offset in the current agreement.

PN563

Some of the issues dealing with Mr Coulton, much was made of the fact that Mr Coulton surely read the draft clauses and clause 4.2, and no amendments were made. Reference was made to the evidence, I think at PN621, when asked what the clause did and Mr Coulton of course said, 'Well, you put the penalties on the rate.' There is no magic in any of that, Deputy President.

PN564

The real issue is it's one thing to see the clause in there and to have read it, it's another thing entirely to understand the implications. Repeatedly Mr Coulton said, 'I never understood that the argument they're putting based on clause 4.2 was what clause 4.2 was doing.' I will just give you the references quickly: PN600, 616 to 617, 635, 638 to 639, 705, 714, 760, 763.

PN565

Some submissions were made about Mr Owens amending a document, and there's a reference in my learned friend notes to Mr Coulton saying he didn't recall whether Mr Owens was making amendments to the document. Maybe he made amendments to the document. Where it goes is not apparent. He plainly made amendments to the document.

PN566

One of the amendments of course, which you might recall I took Mr Pryor to, was at court book 863, the amendment to the annual leave loading clause where Mr Owens takes the clause out on the basis that the annual leave loading is incorporated in the aggregate of wages. He wouldn't have needed to have said that if clause 4.4 was intended to have the effect referred to.

PN567

Can I deal now with PM11, the 1 March email as it were. The chronology here bears understanding. There was a legal review of the document commissioned by Qube in 2023, January. This is the draft proposed 2023 Agreement. Clause 4.2 was deleted as a tidy-up and Mr Coulton said he thought it was a boilerplate, which we know it is a boilerplate in the sense that it's a copy from other documents. Then we get in this exchange - which I don't want to take the Commission through. It's all in the material.

PN568

Mr Coulton gave evidence that was not directly challenged that he regarded the claim as a delaying tactic, hence why he was trying to pour cold water on it. He gave evidence as to why he thought that based on things he has heard subsequently which would corroborate and support the existence of that state of mind at the time. It's accepted by everyone that Qube's solicitors drafted the email and it's accepted by everyone that it was cut and paste in terms.

PN569

The only real issue is (a) whether Mr Coulton read it before sending it and (b) if he did read it before sending it, he understood what it was saying. It's pretty clear on its terms. Mr Coulton gave evidence, importantly, that wasn't challenged that at that point in time KHQ had received no instructions from Qube about the loaded rates issue. That is, the contention that the rates expressed in the agreement are themselves loaded rates, intended to compensate for all of these shift penalties and allowances.

PN570

No one had told, on Mr Coulton's evidence, KHQ that, so then when KHQ come to write the document they look at the clause and - we're not shying away from this - wrote what it says. That explains how the mistake, as it were, comes into that email. Mr Coulton gave you his account of where he was, what he was doing at the time he received it and when he sent it. He was a passenger in a car on his mobile phone. He did a cut and paste on his mobile phone, so it wasn't a forwarded email, and it's entirely unsurprising in those circumstances and not at all ridiculous that he would say, 'I didn't read it.' He was clear in his evidence to you, Deputy President, that he made a mistake and that he owns up to his mistake, and it was a bad mistake that he won't make again.

PN571

Much has been made of the 'Mr Owens meeting' in January. Our submissions as we have made, clearly you wouldn't make the finding that my learned friend has invited you to make about what occurred in that meeting, but in the counterfactual let's assume you made that finding. It doesn't really matter, because then you've got to grapple with what happened subsequently. It doesn't matter what was agreed on 22 January with Mr Owens. What matters is what was agreed between Mr Coulton and Mr Pryor - i.e., the company and the union - after that as to what the status of the agreement would be.

PN572

Mr Coulton's clear evidence was this was raised and rejected out of hand. Mr Pryor's evidence, of course, is it was raised and agreed, so in that sense it doesn't much matter. Let's assume for the sake of argument Mr Owens said, 'Yes, that sounds like a good idea', then a month later Mr Coulton gets hold of it and says, 'That's rubbish. We're not doing that', that's what you've got to grapple with.

PN573

My friend's potted history of the chronology ignored - you know, emphasised some contemporaneous objective documents, omitted all the rest of it. For

example, the log of claims; he didn't go anywhere near the log of claims. He didn't go near the rejection of it. He didn't go near the removal of it.

PN574

THE DEPUTY PRESIDENT: You just told me what matters is what the final agreement was, so where is the relevance either way?

PN575

MR FOLLETT: Because that's after 22 January, so it doesn't really matter what happened on 22 January because what happened in March countermands - - -

PN576

THE DEPUTY PRESIDENT: So the clock only starts when Mr Coulton gets involved?

PN577

MR FOLLETT: Well, if Mr Coulton rejects it and the union says, 'Okay, I'm removing it from the log of claims on that basis', what room is there left?

PN578

THE DEPUTY PRESIDENT: That's not what happened, but, anyway, I'll stop asking question.

PN579

MR FOLLETT: That is what happened, with respect. That's exactly what happened on the evidence; on Mr Coulton's evidence and on the documentary evidence. It's not Mr Pryor's recent invention. Some criticism was made of the way Mr Coulton filled out the F17. He gave you an explanation for why he filled that out. Let's assume for the sake of argument that you or someone else might take a different view about whether or not that was compliant or that was accurate. It's not a credit issue in the sense that there is a suggestion he is trying to be dishonest.

PN580

He said, 'Well, these items were not omitted because they were included within the loaded rates.' That's a perfectly logical explanation. You may not think, well, if I was filling out the statutory declaration and had to identify what clauses are omitted, that would be a legally accurate answer, but it doesn't go to the suggestion that he is intending to lie.

PN581

My learned friend, perhaps not surprisingly, with respect, didn't spend too much time on the propositions document other than making a high level assertion without any explanation at all that, well, you don't have to accept all those propositions for the case of the union team together. In our respectful submission you do, because they all interact and none of the individual findings make any sense without the other findings being made consistently with them.

PN582

When my friend, again perhaps not surprisingly, attempted to just deal with a couple of points - for example, much was made of where the 20 per cent and the

65 per cent came from. I understood the submission to be that the 45 per cent increase of some rates wasn't found in the evidence, and I also understood the submission to be that the 20 per cent on top of that wasn't to be found in the evidence either.

PN583

As to the 45 per cent increase, that's just math. You can do that from the documents, but there is evidence of it. You will find it in DC20 and DC22, court book 508 and 512. Correspondence to employees and then also correspondence to the union setting out and comparing the rates of pay in the proposed agreement, and the existing rates in the predecessor agreements at 508 and 512, and identifying what the delta between those rates were in each case. You will see, for example, pay to level 1, 42.68 per cent. Then, at 512, Mr Coulton sends the same table - actually it's a slight variation because there are different rates of pay by that point in time - to Mr Pryor. As to 20 to 25 per cent, Mr Pryor didn't dispute it.

PN584

There was a submission that the PN Bulk Agreement was not in evidence by reference to its hourly rates. If that's really a serious point, then I could always seek leave to tender it now. It's a document of the Commission. The rates are set out in our aide-memoire document on propositions at footnote 43, and the explanation and the calculations are there set out. I don't really know that much can be made of the point.

PN585

Mr Pryor didn't dispute that the expressed rates in the predecessor agreements were higher than the PN Bulk. His point was when you add the penalties on from the calculator in the PN Bulk agreement, they go higher. I think in answer to one of the questions I asked him cross-examination about the rates being higher, he said words to the effect, 'So what?'

PN586

My friend made some submissions about pay slips and how clear the pay slips were, and made some reference to Mr Matthews' modelling, how long it took. The pay slips, with great respect, are crystal clear. They set out salary and they set out overtime, and they have units. Salary is 76 hours, being the 76 hours for a fortnight, and then the overtime obviously varies by reference to the units. All of those 76 hours are paid at the same hourly rate.

PN587

It's not quite clear to us what the difficulty is in identifying from a pay slip whether someone got paid a shift loading or a weekend loading. The pay slip tells you in terms they were. So much so that of course when I took Mr Pryor to these particular pay slips, and I put to him that it was crystal clear that the amounts were not being paid, he agreed with that; that's PN1366. It's crystal clear on the face of the pay slips that these amounts were not being paid.

PN588

Some submissions were made about why this particular issue was not brought up by Mr Pryor. I understood it to be a broad submission about why it wasn't brought up at any point in time. The answer, as I understood it, was that, 'I didn't

want to upset the agreement and Mr Matthews was investigating.' Now, that can only be a justification or explanation for why he didn't bring it up from October 2022 through to February 2023. It's not an explanation for why it wasn't brought up for the six years prior.

PN589

My friend valiantly attempted to explain away Mr Pryor's evidence to Crawford C by asserting that the question wasn't clear or precise. Mr Pryor well understood the question because he conceded before you that it wasn't the honest truth. The question was clear and it was precise. It is when did this constructional argument come up, and he gives the time by reference to when clause 4.2 was to be removed. What is the connection between the removal of 4.2 other than the construction argument? That is, you incorporate these provisions, then they operate.

PN590

Mr Pryor well understood what the question was on any view of it and, as we have made the point in our submissions, it doesn't really help one way or another because whether or not he first found out in February 2023, as he said to Crawford C, or whether he first found out in October 2022, as he says to you, it doesn't explain his evidence that, 'I thought the whole way along they were paying the wages and there was always an agreement.'

PN591

Submissions were made about the Victorian enterprise agreement. Our point about involvement wasn't put as binary as my learned friend's submissions suggested of mine. We weren't making a submission that he had to be involved and you should find that he was intimately involved - this is Mr Pryor. Our point was he was aware of the status, and our principal point is it's all about outcomes. Mr Barden was involved in both. He was plainly aware of what was going on. It's the outcome that is relevant in Victoria and its inconsistency with the outcome said to have been reached in New South Wales.

PN592

You will see that the Victorian EA makes the union's argument more cogent basically by reference to the fact that it has an express loaded rates clause in it. If the New South Wales agreement had an express loaded rates clause in it, we wouldn't be here. Merely because it does, doesn't really advance the argument very far one way or another. The ultimate question is were the hourly rates of pay intended to be loaded rates that pick up penalties, loadings and allowances? That's the issue.

PN593

My friend made some submissions and placed emphasis on common mutual intention being that of employees. There is no decided case in this Commission involving section 217 that says that in terms. I think as a matter of principle it's wrong, but I don't really need to rehearse that argument now. Specialist people didn't confront the question that way.

PN594

There are of course observations about the differences in the statutory architecture now and who makes agreements, but there is no case that has said you can effectively jettison what might have been agreed between the principal industrial protagonists and focus solely your attention on what employees may or may not have thought. But, as we said in our (audio malfunction) even if you do, it's pretty clear.

PN595

My friend's argument is essentially, 'Well, they were given the award. Therefore, they knew that that was incorporated and it didn't have an express loaded rates clause in it so, therefore, they must have assumed and must have understood that they were going to get the penalties.' The far more likely analysis of what they might have thought or understood is that they were being paid loaded rates, they received endless communications about wage increases, they knew Qube had relented to increase all the rates to the South Spur instrument. They knew that they was then a wage increase on top of that and no one had told them a thing about penalties, loadings on top of that.

PN596

If it's really suggested that they might understood some significant difference, it does raise very real questions about the validity of the Commissioner's decision approving the agreement in a One Key sense, because this monumental change was not explained to anyone. I'm not quite sure the union really wants to press that point too hard. It will destroy their Federal Court claim.

PN597

Then my friend started to grapple with some of the other clauses in the agreement that he referred to and he appears to have misunderstood our argument somewhat. He repeatedly said, 'This clause is not ambiguous.' Some of those clauses may not on their face have been ambiguous. Our point was when you purport to read them with the contention that clause 4 is intended to bring in shift penalties and weekend penalties, then there is ambiguity or an uncertainty.

PN598

Each of those individual clauses on their face, they speak for themselves, except of course the penalty clause for part-timers and casuals. My learned dealt with the part-timer one. He said, 'Well, it's obviously the case you get the 1.6 loading for overtime', and then he said, perhaps (Indistinct) 'There is a question' - and then he corrected him to say, 'There's no question as to whether the applicable penalties are paid on top of that.'

PN599

That really just begs the question, with respect, what are they paid on top of? What is the 150 per cent loading for a Saturday paid on top of? Is it paid on the hourly rate, is it paid on the overtime rate, is it paid on some different rate? My friend said 42.1 deals only with timing. Well, one only reads the clause to see that it doesn't deal with timing, it deals with what you have to pay and it doesn't refer to paying any penalties other than overtime and RDOs.

PN600

He then said, by reference to some of the clauses - so the TBA clause, for instance - 'Well, I don't understand what the issue is. It says 1.6 for overtime and you get 1.6 for overtime. It doesn't say anything about what the payment rate is otherwise.' That's not right. The clause says for all the other hours you get paid normal time, and normal time is the hourly rates addressed in the agreement. There is no other available or reasonable construction. The clause say expressly in terms you get paid normal time. His case is, 'Well, no, you don't get paid normal time. You get paid normal time plus.' Plainly that raises inconsistency or, alternatively, it raises ambiguity.

PN601

My friend said then the constitutional cases are not relevant because they are dealing with different instruments. The point of referring to them is to identify what a direct collision is, because 4.3 does the work here that those constitutional cases do. It doesn't matter the source of the instrument. Clause 4.3 says once you incorporate a term of an award, if the operation of that term is inconsistent with the operation of another provision in the agreement then the operation of the award term doesn't operate in that way. That's 100 per cent on all-fours with the direct collision referred to in those cases.

PN602

My friend then mischaracterised our submission by saying, 'Well, of course it's not the case that if the thing is not mentioned in the agreement and you have an award incorporation clause, that you don't get it because it's not mentioned in the agreement.' That wasn't our submission at all. This submission we make is premised upon you accepting the proposition that the parties objectively intended the stated rates in the agreement to be loaded rates.

PN603

Once you have accepted that premise, then you have accepted that for that hour of work the parties have turned their mind to what you should be paid having regard to the fact it could be worked any time and expressed a rate for it. Once the award then comes in over the top and says, well, you get a different rate, that's where the direction collision is because the agreement says, 'For this hour of work you get paid X.' The award clause says, 'For this hour of work you get paid X plus.' That's direct inconsistency. I think that is all I have in reply.

PN604

THE DEPUTY PRESIDENT: Nothing arising?

PN605

MR BONCARDO: No, Deputy President, save for this - and just to make myself clear. Perhaps I wasn't clear enough - we're not putting in issue the 45 per cent or saying that there is no basis for embracing the 45 per cent increase, it was just the 20 per cent additional increase that the submissions were directed to.

PN606

THE DEPUTY PRESIDENT: I intend to reserve my decision. It will be published in due course.

PN607

MR BONCARDO: If the Commission pleases.

ADJOURNED INDEFINITELY [4.19 PM]